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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

LARRY D. KERNS,

Plaintiff,

v.

MATHEW J. WENNER, HUGH
GAYLORD, EDWARD TREACY,
THOMAS SARNECKI, GEORGE
TEDESCHI, CHARLES KAMEN, and
JOHN D. BACHLER,

Defendants.

CASE NO. 16cv2438-WQH-WVG

ORDER

HAYES, Judge:

The matters before the Court are Plaintiff's motion to rule on all matters (ECF No. 73), motion to reconsider the exclusion of ERISA rules and regulations (ECF No. 80), motion to reduce complaint (ECF No. 83), motion to forfeit his trial by jury (ECF No. 87), motion for entry of default judgment (ECF No. 89), motion for summary judgment (ECF No. 108), motion to reconsider that entry of default judgment be entered against Defendant Wenner (ECF No. 122), motion for forfeiture of case (ECF No. 124), two motions to strike documents from the record (ECF No. 126, 130), a supplemental motion to the pending motion for default judgment (ECF No. 132), and two motions to increase the damages alleged in the complaint (ECF Nos. 136, 140).

I. Background

On September 28, 2016, Plaintiff Larry D. Kerns initiated this action by filing the complaint against Defendants Mathew J. Wenner, Hugh Gaylord, Edward Treacy,

1 Thomas Sarnecki, George Tedeschi, Charles Kamen and John D. Bachler.¹ (ECF No.
2 1). Plaintiff brings causes of action for mail fraud and violation of the Americans with
3 Disabilities Act (“ADA”) and seeks \$3,000,000 in punitive damages. Plaintiff
4 allegations relate to Plaintiff’s benefits under the GCIU-Employment Retirement Fund.
5 *Id.*

6 **II. Motion to Rule on All Matters (ECF No. 73) and Motion to Forfeit Trial by**
7 **Jury (ECF No. 87)**

8 On June 8, 2017, Plaintiff filed a document titled “PLAINTIFF; KERNS;
9 HEREBY; OFFERS TO FORFEIT HIS RIGHT TO A JURY TRIAL; (IF HIS
10 MOTION FOR DEFAULT JUDGMENT IS NOT GRANTED); AND SUBMITS, THIS
11 MOTION: FOR HONORABLE JUDGE HAYS; TO RULE ON; ALL MATTERS;
12 REGARDING THIS CASE. (IF A FEW CONDITIONS; CAN BE APPROVED; BY
13 ALL PARTIES) (Plaintiff; requests a 1 hour hearing; for Judge Hays’ and defendant’s
14 questions).” (ECF No. 73). Plaintiff states that he will forfeit his right to a jury trial if
15 the Court “relies solely on plaintiff’s many filed documents” and any evidence
16 submitted by Defendant to make a ruling, the parties each pay their own legal expenses,
17 and Defendant waives all discovery. (ECF No. 73). On August 21, 2017, Plaintiff filed
18 a second motion which also asserts that Plaintiff will forfeit his right to a jury trial if the
19 following conditions are accepted by Defendant and the Court: (1) the parties waive
20 discovery and the Court rules on whether punitive awards are warranted; (2) each party
21 pays their own legal expenses; and (3) Defendant does not request and is not awarded
22 money from Plaintiff. *Id.* (ECF No. 87 at 4-5). Plaintiff also requests, “that Honorable
23 Judge William Q. Hayes; personally; is judge in this matter.” (ECF No. 102).

24 Plaintiff has not established any legal or factual basis that entitles him to the
25 ruling he seeks. Plaintiff’s motions are denied. (ECF Nos. 73, 87).

26 **III. Motion to Reconsider the Exclusion of ERISA Rules and Regulations (ECF**
27

28 ¹ Defendant Matthew Wenner is the only defendant remaining in this action. Defendants Gaylord, Treacy, Sarnecki, Tedeschi, Kamen, and Bachler were dismissed from this action with prejudice. (ECF No. 39).

1 **No. 80).**

2 On August 14, 2017, Plaintiff filed a motion for reconsideration of the Court's
3 prior Order denying his motion to exclude rules and regulations under the Employee
4 Retirement Income Security Act ("ERISA"). (ECF No. 80). Plaintiff contends that he
5 "previously, made an error; by considering the 'delay in receiving benefits'; statement
6 by defence; so ridiculous that he did not argue the matter and would like to argue that
7 matter; now." *Id.* at 3. Plaintiff contends ERISA is inapplicable to this matter because
8 the Complaint alleges "wanton and willful misconduct; that occurred; DURING a 13
9 year period of time" rather than a thirteen year delay in receiving benefits. *Id.* at 4.

10 In opposition, Defendant contends that Plaintiff fails to offer any new facts or law
11 relevant to the Court's previous ruling. (ECF No. 106). Further, Defendant contends
12 that there is no authority to support Plaintiff's position that his claims are exempted
13 from ERISA. *Id.*

14 Federal Rule of Civil Procedure 60(b) provides that a

15
16 court may relieve a party or its legal representative from a final judgment,
17 order, or proceeding for the following reasons: (1) mistake, inadvertence,
18 surprise, or excusable neglect; (2) newly discovered evidence that, with
19 reasonable diligence, could not have been discovered in time to move for
20 a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic
or extrinsic), misrepresentation, or misconduct by an opposing party; (4)
the judgment is void; (5) the judgment has been satisfied, released or
discharged; it is based on an earlier judgment that has been reversed or
vacated; or applying it prospectively is no longer equitable; or (6) any
other reason that justifies relief.

21 Fed. R. Civ. P. 60(b)(1-6). The burden of proof is on the party bringing the Rule 60(b)
22 motion. *See Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 383 (1992). Civil
23 Local Rule 7.1(i) provides that when a party moves the Court for reconsideration of a
24 prior order, the party must identify "what new or different facts and circumstances are
25 claimed to exist which did not exist, or were not shown, upon such prior application."
26 CivLR 7.1(i).

27 The Court's prior order stated, "The Court concludes that Plaintiff's allegations
28 relating to damages for delay in receiving benefits related to the administration of a plan

1 covered by ERISA. Plaintiff’s motion to exclude ERISA rules and regulations is
2 denied.” (ECF No. 76 at 2-3). In the current motion, Plaintiff fails to identify any new
3 or different facts and circumstances, or any other grounds demonstrating that relief from
4 the Court’s prior order is appropriate. Plaintiff’s contention that he did not adequately
5 argue a point in a previous motion does not support reconsideration. Further, the Court
6 properly determined that any exclusion of ERISA rules and regulations is inappropriate
7 at this stage in the proceedings. Although Plaintiff brings claims for mail fraud and
8 violation of the ADA, the allegations of the Complaint relate to the administration of
9 a plan covered by ERISA. *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 44 (1987)
10 (“ERISA comprehensively regulates, among other things, employee welfare benefit
11 plans that, “through the purchase of insurance or otherwise,” provide medical, surgical,
12 or hospital care, or benefits in the event of sickness, accident, disability, or death.”)
13 (citing 29 U.S.C. § 1002(1)). The motion for reconsideration is denied. (ECF No. 80).

14
15 **IV. Motion to Reduce Complaint Damages (ECF No. 83)**

16 On August 21, 2017, Plaintiff filed a motion to reduce the damages alleged in the
17 Complaint. (ECF No. 83). Plaintiff asserts, “Plaintiff believes complaint demand
18 amount; has to change; before a Judgement [sic] of Default; can be Granted; under
19 Federal Law; at this time. Therefore, plaintiff; is willing and happy to lower demand
20 Amount to 2.9 million dollars; in his efforts; for a Judgement of Default; by Judge
21 Hays.” *Id.*

22 The Court has previously denied multiple requests for entry of default judgment
23 by the Plaintiff because Defendant Wenner filed an answer and proof of service stating
24 that Plaintiff was served with the answer by mail on November 21, 2016. (ECF No.
25 37). Plaintiff provides no legal basis for the assertion that default judgment would be
26 appropriate if the damages alleged in the Complaint were reduced. *See Fed. R. Civ. P.*
27 55. Further, after a defendant has filed an answer, a plaintiff may amend a complaint
28 only with “leave of the court or by written consent of the adverse party.” *Fed. R. Civ.*

1 P. 15(a). Plaintiff has not sought leave to file an amended complaint reflecting the new
2 damages amount with the Court. To the extent Plaintiff seeks leave to amend in the
3 instant motion, Plaintiff has not complied with the requirements of Civil Local Rule
4 15.1(b). CivLR 15.1(b) (“Any motion to amend a pleading must be accompanied by:
5 (1) a copy of the proposed amended pleading, and (2) a version of the proposed
6 amended pleading that shows — through redlining, underlining, strikeouts, or other
7 similarly effective typographic methods — how the proposed amended pleading differs
8 from the operative pleading.”).

9 **V. Motion for Default Judgment (ECF No. 89), Motion to Reconsider that Entry**
10 **of Judgment by Default be Entered Against Defendant Wenner (ECF No. 122),**
11 **Supplemental Motion to Motion for Entry of Judgment (ECF No. 132)**

12 Plaintiff has filed a motion (ECF No. 89) and supplemental motion (ECF No.
13 132) requesting that entry of default judgment be entered against Defendant Wenner
14 pursuant to Federal Rule of Civil Procedure 55(b)(2). (ECF No. 89). Plaintiff contends
15 that he was not timely served with an answer (ECF No. 89) and that proof of service
16 “was not even mentioned” in the Answer filed by Defendant Wenner. (ECF No. 132).
17 Plaintiff has additionally filed a supplemental document requesting that the Clerk of
18 Court provide proof of service of the documents filed as docket numbers 78 and 76 in
19 this case and that these documents are removed from the docket. (ECF No. 118 at 7).
20 Plaintiff contends that proof of service associated with docket number 76 is deficient
21 because the wrong case number is listed on the service list page. *Id.*

22 In opposition, Defendant contends that the Court has previously denied Plaintiff’s
23 motions for default judgment and the latest motion for default judgment is not
24 supported by any new facts or law. (ECF No. 119).

25 Federal Rule of Civil Procedure 60(b) provides that a

26 court may relieve a party or its legal representative from a final judgment,
27 order, or proceeding for the following reasons: (1) mistake, inadvertence,
28 surprise, or excusable neglect; (2) newly discovered evidence that, with
reasonable diligence, could not have been discovered in time to move for
a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic
or extrinsic), misrepresentation, or misconduct by an opposing party; (4)

1 the judgment is void; (5) the judgment has been satisfied, released or
2 discharged; it is based on an earlier judgment that has been reversed or
3 vacated; or applying it prospectively is no longer equitable; or (6) any
4 other reason that justifies relief.

5 Fed. R. Civ. P. 60(b)(1-6). The burden of proof is on the party bringing the Rule 60(b)
6 motion. *See Rufo*, 502 U.S. at 383. Further Local Rule 7.1(i) provides that when a
7 party moves the Court for reconsideration of a prior order, the party must identify “what
8 new or different facts and circumstances are claimed to exist which did not exist, or
9 were not shown, upon such prior application.” CivLR 7.1(i).

10 Rule 55(a) of the Federal Rules of Civil Procedure requires that the Clerk of the
11 Court enter default “when a party against whom a judgment for affirmative relief is
12 sought has failed to plead or otherwise defend, and that failure is shown by affidavit or
13 otherwise.” Fed. R. Civ. P. 55(a). Rule 55(b)(2) of the Federal Rules of Civil
14 Procedure provides that the court may grant a default judgment after default has been
15 entered by the Clerk of the Court. Fed. R. Civ. P. 55(b)(2). Pursuant to Federal Rule
16 of Civil Procedure 12(a), a defendant must serve an answer within 21 days after being
17 served with the summons and complaint. Fed. R. Civ. P. 12(a).

18 This Court has previously denied Plaintiff’s requests for entry of default
19 judgment against Defendant Wenner. (ECF No. 37). The Court’s prior Order stated,

20 Plaintiff’s proof of service of the summons states that Defendant Wenner
21 was served by substituted service on October 31, 2016. (ECF No. 12 at 1).
22 Defendant Wenner filed an answer and proof of service stating that
23 Plaintiff was served with the answer by mail on November 21, 2016.
24 (ECF No. 11). The docket reflects that the Clerk of Court has not entered
25 default. Plaintiff’s motions for entry of default judgment are denied.

26 *Id.* Plaintiff’s recent motions fails to establish any grounds supporting reconsideration
27 of the Court’s prior order denying the motion for default judgment. The record reflects
28 that Defendant Wenner filed an answer and proof of service stating that Plaintiff was
served with the Answer by mail on November 21, 2016. (ECF No. 11).

Plaintiff also requests the Court remove the documents filed as docket number
76 and docket number 78 for improper service. (ECF No. 118). Docket number 76 is
an Order of the Court and the Court denies the request to remove this document from

1 the record. Docket number 78 is a “Notice of Order” filed by Defendant Wenner.
2 Attached to this notice, Defendant filed a Proof of Service stating that Plaintiff was
3 served with a true copy of the Notice on August 8, 2017. (ECF No. 78-2). The Court
4 notes that the case number listed on the service list included with the proof of service
5 for this document, the Answer, and other filings by Defendant is incorrect. However,
6 the Court concludes that the proof of service documents indicates that Plaintiff was
7 properly served with copies of the respective filings in this case. Plaintiff’s request to
8 strike the documents filed as docket numbers 76 and 78 is denied.² (ECF No. 118).

9 Plaintiff’s motion for default judgment, motion to reconsider that default
10 judgment be entered, and supplemental motion are denied. (ECF Nos. 89, 122, 132).

11 **VI. Motion for Summary Judgment (ECF No. 108)**

12 On September 11, 2017, Plaintiff filed a motion for summary judgment and
13 requested a hearing date. (ECF No. 108). Plaintiff’s motion states in its entirety,

14 There is not question; or argument; that Mail Fraud and ADA violations;
15 OCCURRED; Proved by the fact that; even though defendant; still denies;
16 plaintiff’s; allegations; His attorney has still; offered no [ZERO] evidence;
17 to prove his innocence. Plaintiff, Prays [the Court] will browse the
18 evidence plaintiff; provided the GCIU Employer Retirement fund;
19 Trustees; for the August 2016; appeal hearing; Letters of Appeal 1,2, and
20 3; plus the court; request; for green sheets; that was not filed in court; all
21 th previous; were evidence at the appeal hearing. Please also consider
22 considering Exhibits; A-1-A-2 (part 1)(part 2) and (part 3) and G-1 - G-3 -
23 G-4 - AND G-5. Please ENTER; this document on docket sheet;
24 01/04/2018 or earliest; applicable date.

20 *Id.* On September 22, 2017, Plaintiff filed a supplemental document to this motion
21 contending that he “cannot find any evidence of any kind; within pages 2 thru 10; that
22 he is not entitled to” summary judgment. (ECF No. 114 at 3). Plaintiff contends that
23 all of the documents he has filed at the clerk’s office are admissible evidence. (ECF

25 ² Plaintiff filed additional motions (ECF Nos. 126, 130) requesting that the Court
26 remove from the record Defendant Wenner’s opposition, evidentiary objections, and
27 declaration filed in response to Plaintiff’s motion for summary judgment (ECF No.
28 126); the answer filed by Defendant Wenner (ECF No. 11); the Notice of Order filed
by Defendant Wenner (ECF No. 78); and the response in opposition to the motion for
entry of default judgment by Defendant Wenner (ECF No. 119) due to the same issues
with the case number on the service list page. The motions are denied on the same
grounds. (ECF Nos. 126, 130).

1 No. 128).

2 In opposition, Defendant contends that the motion fails to establish the absence
3 of any genuine dispute of material fact, fails to address ERISA, fails to identify the
4 ground upon which summary judgment is sought, and was not accompanied by a
5 separate statement of undisputed fact or a memorandum of points and authorities.
6 (ECF No. 120). Defendant objects to the admissibility of the evidence cited by Plaintiff
7 on the following grounds: lack of foundation; lack of authentication; lack of personal
8 knowledge; hearsay; irrelevance; and ambiguous, confusing and misleading. (ECF No.
9 120-1).

10 “A party may move for summary judgment, identifying each claim or defense—or
11 the part of each claim or defense—on which summary judgment is sought. The court
12 shall grant summary judgment if the movant shows that there is no genuine dispute as
13 to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R.
14 Civ. P. 56(a). A material fact is one that is relevant to an element of a claim or defense
15 and whose existence might affect the outcome of the suit. *See Matsushita Elec. Indus.*
16 *Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). The materiality of a fact
17 is determined by the substantive law governing the claim or defense. *See Anderson v.*
18 *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317,
19 322-24 (1986). The moving party has the initial burden of demonstrating that summary
20 judgment is proper. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 153 (1970). The
21 burden then shifts to the opposing party to provide admissible evidence beyond the
22 pleadings to show that summary judgment is not appropriate. *See Anderson*, 477 U.S.
23 at 256; *Celotex*, 477 U.S. at 322, 324. The opposing party’s evidence is to be believed,
24 and all justifiable inferences are to be drawn in her favor. *See Anderson*, 477 U.S. at
25 255. To avoid summary judgment, the opposing party cannot rest solely on conclusory
26 allegations of fact or law. *See Berg v. Kincheloe*, 794 F.2d 457, 459 (9th Cir. 1986).
27 Instead, the nonmovant must designate which specific facts show that there is a genuine
28 issue for trial. *See Anderson*, 477 U.S. at 256.

1 Plaintiff brings a cause of action for mail fraud and a violation of the ADA and,
2 as the moving party, also bears the burden of demonstrating that summary judgment is
3 proper as to those claims. The Court concludes that Plaintiff has not satisfied his
4 burden to demonstrate that summary judgment is appropriate as to the mail fraud and
5 ADA claims. Plaintiff's motion for summary judgment is denied. (ECF No. 108).

6 **VII. Motion for Forfeiture of Case (ECF No. 124)**

7 On October 11, 2017, Plaintiff filed a document stating "PLAINTIFF, ENTERS;
8 A MOTION FOR FORFEITURE; OF CASE 16-CV-2438; BY DEFENDANT
9 RETROACTIVE TO SEPTEMBER 28, 2016; DUE TO NO ATTORNEY [ADDED]
10 AND DEFENDANT; NOT INDICATING; HE WAS REPRESENTING; HIMSELF.
11 **CivLR 5.2. - Missing Proof of Service CIVIL LOCAL RULE 7.1(I) [NEW**
12 **EVIDENCE].**" (ECF No. 124). Plaintiff contends that proof of service is "not even
13 mentioned" in Defendant's answer filed on November 21, 2016. *Id.*

14 Plaintiff does not clearly identify the relief he is requesting from the Court.
15 Further, as previously determined by the Court, Defendant Wenner attached proof of
16 service to his Answer stating that service was completed by mail on November 21,
17 2016. (ECF No. 11 at 10). The motion is denied. (ECF No. 124).

18 **VIII. Motion to Increase Demand Amount (ECF Nos. 136, 140)**

19 Plaintiff filed two motions to increase the demand amount to five million dollars
20 "due to questions regarding; whom pays an unknown amount of; defense legal fees."
21 (ECF Nos. 136, 140). After a defendant has filed an answer, a plaintiff may amend a
22 complaint only with "leave of the court or by written consent of the adverse party."
23 Fed. R. Civ. P. 15(a). Plaintiff has not sought leave to file an amended complaint
24 reflecting the new damages amount with the Court. To the extent Plaintiff seeks leave
25 to amend in the instant motion, Plaintiff has not complied with the requirements of Civil
26 Local Rule 15.1(b). CivLR 15.1(b). The motions are denied. (ECF Nos. 136, 140).

27 **IX. CONCLUSION**

28 IT IS HEREBY ORDERED that the motions filed by Plaintiff are DENIED.

1 (ECF Nos. 73, 80, 83, 87, 89, 108, 122, 124, 126, 130, 132, 136, 140).

2 DATED: November 20, 2017

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4 **WILLIAM Q. HAYES**
5 United States District Judge

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