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**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

BRITNEY GOOCH, THOMAS  
IMPASTATO,

Plaintiffs,

v.

LAS VEGAS BISTRO, LLC,

Defendant.

Case No. 2:14-cv-02189-APG-PAL

**ORDER SETTING ASIDE DEFAULT AND  
DENYING MOTION FOR DEFAULT  
JUDGMENT**

(Dkt. ##9, 13)

Plaintiffs' complaint alleges federal and state law claims arising from their former employment with defendant. Plaintiffs served the complaint and summons upon defendant's registered agent, but defendant did not file an answer or other response. On February 6, 2015, the clerk entered default against defendant.<sup>1</sup> Plaintiffs now move for default judgment,<sup>2</sup> and defendant moves to set aside the default.<sup>3</sup>

Good cause exists to set aside the default. There is no apparent prejudice to plaintiffs, the defendant is not culpable in the default and the defendant has raised potential meritorious defenses to plaintiffs' claims. But I condition the set aside of the default on the defendant's payment to plaintiffs of the reasonable attorney's fees and costs incurred in connection with obtaining the default and opposing the motion to set aside.

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<sup>1</sup> (Dkt. #8.)

<sup>2</sup> (Dkt. #9.)

<sup>3</sup> (Dkt. #13).

1           **I.       DISCUSSION**

2           I may “set aside an entry of default for good cause.”<sup>4</sup> To determine “good cause,” I  
3           “consider three factors: (1) whether the party seeking to set aside the default engaged in culpable  
4           conduct that led to the default; (2) whether [he] had no meritorious defense; or (3) whether  
5           reopening the default judgment would prejudice the other party.”<sup>5</sup> This standard is disjunctive—  
6           a finding that any these factors is true is sufficient for me to refuse to set aside the default.<sup>6</sup>

7           “Crucially . . . judgment by default is a drastic step appropriate only in extreme  
8           circumstances; a case should, whenever possible, be decided on the merits.”<sup>7</sup> “Where timely  
9           relief is sought from a default . . . and the movant has a meritorious defense, doubt, if any, should  
10          be resolved in favor of the motion to set aside.”<sup>8</sup>

11                           **A.       Culpable conduct**

12           “[A] defendant’s conduct is culpable if he has received actual or constructive notice of the  
13           filing of the action and intentionally failed to answer.”<sup>9</sup> “Intentionally,” in this context, means the  
14           defendant acted in bad faith to take “advantage of the opposing party, interfere with judicial  
15           decision-making, or otherwise manipulate the legal process.”<sup>10</sup>

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21                           <sup>4</sup> Fed. R. Civ. P. 55(c).

22                           <sup>5</sup> *United States v. Signed Pers. Check No. 730 of Yubran S. Mesle*, 615 F.3d 1085, 1091  
23                           (9th Cir. 2010) (quotations omitted).

24                           <sup>6</sup> *Id.*

25                           <sup>7</sup> *Id.* at 1091.

26                           <sup>8</sup> *Id.* (citations omitted).

27                           <sup>9</sup> *Ashford*, 657 F.2d at 1055.

28                           <sup>10</sup> *Id.*

1 Plaintiffs properly served defendant's resident agent with the summons and complaint.  
2 But apparently the resident agent sent the documents to the wrong client.<sup>11</sup> The defendant has  
3 provided multiple declarations attesting to the system normally employed to track lawsuits, and  
4 the breakdown that occurred in this case. There is no indication the defendant benefited, or hoped  
5 to benefit, from waiting to engage counsel and proceed with its defense. Indeed, defendant  
6 actively participated in the EEOC investigation and proceedings that preceded this lawsuit. Its  
7 negligent failure to respond is not culpable conduct for purposes of Rules 55 and 60.<sup>12</sup>  
8

9 **B. Meritorious defenses**

10 To satisfy the meritorious defense requirement, a defendant must allege sufficient facts  
11 that, if true, would constitute a meritorious defense.<sup>13</sup> I need not determine whether those factual  
12 allegations are true at this stage.<sup>14</sup> “[W]here timely relief is sought from a default judgment and  
13 the movant has a meritorious defense, doubt, if any, should be resolved in favor of the motion to  
14 set aside the judgment so that cases may be decided on their merits.”<sup>15</sup>  
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16 The defendant appears to have meritorious defenses to plaintiffs' claims. Defendant  
17 contends that plaintiff Gooch had a long history of work-related problems, including leaving her  
18 job post without permission to chase two customers outside the building, and that she failed to  
19 return to work after that incident.<sup>16</sup> Defendant contends that plaintiff Impastato was fired for poor  
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23 <sup>11</sup> (Dkt. # 3:16-7:9.)

24 <sup>12</sup> *Signed Pers. Check No. 730 of Yubran S. Mesle*, 615 F.3d at 1091.

25 <sup>13</sup> *Id.*

26 <sup>14</sup> *Id.*

27 <sup>15</sup> *Schwab v. Bullock's Inc.*, 508 F.2d 353, 355 (9th Cir. 1974).

28 <sup>16</sup> (Dkt. #13 at 2:26-3:4.)

1 job performance and that his allegations in the complaint are rebutted by the facts.<sup>17</sup> Thus,  
2 resolving doubts in favor of the defendant, there appear to be potentially meritorious defenses to  
3 plaintiffs' claims.

4 **C. Prejudice to plaintiffs**

5 "To be prejudicial, the setting aside [of the default] . . . must result in greater harm than  
6 simply delaying resolution of the case."<sup>18</sup> Rather, the question is whether plaintiffs will be  
7 hindered in their ability to pursue their claim.<sup>19</sup> Plaintiffs contend that since entry of default their  
8 attorneys have been "working diligently to gather information, provide evidentiary bases for  
9 asserted damages, and prepare Plaintiffs' Application for Entry of Default Judgment."<sup>20</sup> But most  
10 of that work would be necessary regardless of the default because plaintiffs must prove their  
11 allegations and present evidentiary bases for their damages if they hope to prevail at trial.  
12 Plaintiffs fail to provide any authority or analysis suggesting that they have been prejudiced aside  
13 from being delayed. And delay is not enough. Most importantly, plaintiffs fail to identify how  
14 they will be hindered in pursuing their claims if I set aside the default.<sup>21</sup>

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17 **D. Conclusion**

18 All three factors weigh in favor of setting aside the default. There is no evidence the  
19 defendant acted in bad faith, it has raised potentially meritorious defenses, and I see no prejudice  
20 to plaintiffs. Given that default is a drastic and disfavored measure, I set it aside.

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24 <sup>17</sup> (*Id.* at 4:5-13.)

25 <sup>18</sup> *TCI Grp. Life Ins. Plan v. Knoebber*, 244 F.3d 691, 701 (9th Cir. 2001), as amended on  
26 denial of reh'g and reh'g en banc (May 9, 2001).

27 <sup>19</sup> *Falk v. Allen*, 739 F.2d 461, 463 (9th Cir. 1984).

28 <sup>20</sup> (Dkt. #15 at 10:16-18 and 11:23-26.)

<sup>21</sup> *TCI Grp. Life Ins. Plan*, 244 F.3d at 701.

1           However, I have wide discretion to condition the setting aside of a default upon the  
2 defendant's payment of the plaintiffs' attorneys' fees and costs.<sup>22</sup> It is unfair to force plaintiffs to  
3 bear the expense of litigating the default and the motion to set aside. Thus, I am conditioning the  
4 set aside upon the defendant's payment of plaintiffs' reasonable attorney's fees and costs incurred  
5 in obtaining the default and opposing the motion to set aside. In their opposition, plaintiffs seek  
6 to recover all of the fees and costs incurred in connection with this lawsuit.<sup>23</sup> Plaintiffs overreach.  
7 They would have incurred most of the requested costs and fees even if defendant timely answered  
8 the complaint. Thus, plaintiffs shall submit an affidavit and appropriate documentation  
9 supporting the fees and costs incurred in connection with obtaining the default and opposing the  
10 motion to set aside the default.

12       **II.     CONCLUSION**

13           IT IS THEREFORE ORDERED that defendant's motion to set aside default (**Dkt. #13**) is  
14 **GRANTED.**

15           IT IS FURTHER ORDERED that the plaintiffs' motion for entry of default judgment  
16 (**Dkt. #9**) is **DENIED AS MOOT.**

17           IT IS FURTHER ORDERED that the clerk's entry of default (**Dkt. #8**) is **VACATED.**  
18 However, this relief is conditioned upon defendant reimbursing plaintiffs for attorneys' fees and  
19 costs in an amount I will determine. Within 14 days of entry of this Order, plaintiffs shall submit  
20 an affidavit and appropriate documentation supporting a request for attorneys' fees and costs  
21 incurred in connection with obtaining the default and opposing the motion to set aside default.  
22 Defendant will have 14 days thereafter to file any opposition to the requested amount.  
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26           <sup>22</sup> *Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. Louisiana Hydrolec*, 854 F.2d  
27 1538, 1546 (9th Cir. 1988).

28           <sup>23</sup> (Dkt. #15 at 11:17-20; Dkt. ##10, 11.)

1 IT IS FURTHER ORDERED that defendant shall file an answer or other response to the  
2 complaint no later than 14 days after the entry of this Order. However, if defendant does not pay  
3 plaintiffs' fees I subsequently award, I may strike its answer and reinstate default.

4 DATED this 14<sup>th</sup> day of September, 2015.

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7 ANDREW P. GORDON  
8 UNITED STATES DISTRICT JUDGE  
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