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4 UNITED STATES DISTRICT COURT  
5 WESTERN DISTRICT OF WASHINGTON  
6 AT TACOMA

7 PHILLIP BURTON HAUSKEN,  
8  
9 Plaintiff,

10 v.

11 D. LEWIS, et al.,  
12 Defendants.

CASE NO. C12-5882 BHS-JRC

ORDER DENYING MOTION  
FOR RECONSIDERATION

13 This matter comes before the Court on the Defendants' Motion for  
14 Reconsideration of this Court's ruling affirming in part and denying in part the Report  
15 and Recommendation ("R&R") of the Honorable J. Richard Creatura, United States  
16 Magistrate Judge (Dkt. 60).

17 **I. PROCEDURAL & FACTUAL BACKGROUND**

18 On October 16, 2012, Phillip Burton Hausken ("Hausken"), an inmate in the Special  
19 Offender Unit at Monroe Correctional Complex, filed a 42 U.S.C. § 1983 civil rights  
20 action against Daniel Lewis ("Lewis"), Dawn Thompson ("Thompson"), and Joyce  
21 Marciel ("Marciel"). Dkt. 5.

22 Hausken alleges that in violation of the Constitution, each month, fifty cents is  
taken from his inmate trust account and forwarded to the inmate betterment fund to pay

1 for cable television that his unit does not have access to and other privileges he does not  
2 use. Dkt. 5 at 6. Lewis, the inmate trust account manager, is allegedly the individual  
3 who takes the fifty cents from Hausken's account. *Id.* The funds are sent to the inmate  
4 betterment fund administered by Marciel. *Id.* Hausken seeks money damages and  
5 injunctive relief to prevent the monthly taking of his fifty cents.

6 On December 17, 2012, Defendants filed a motion to dismiss Hausken's  
7 complaint. Dkt. 11. On February 2, 2013, in an R&R on Defendants' motion, Judge  
8 Creatura recommended granting Defendants qualified immunity from damages, but  
9 allowing the case to proceed on the issue of injunctive relief. Dkt. 21.

10 On September 12, 2013, the Court granted Lewis and Marciel qualified immunity  
11 from damages, but held that Hausken could proceed with a claim for injunctive relief  
12 against them in their official capacities. *Id.* at 7 and 10. Thompson, who merely denied  
13 Hausken's tort claim, was dismissed based on lack of personal participation. *Id.* at 8.  
14 Construing Hausken's pro se complaint liberally, the Court found he sufficiently pled a  
15 Fifth Amendment takings claim (*id.* at 12), and re-referred the matter to Judge Creatura  
16 for further proceedings.

17 On November 5, 2013, Judge Creatura entered an order to show cause directing  
18 Hausken to take some action because Defendants had failed to file a timely answer after  
19 their motion to dismiss had been denied in part. Dkt. 41.

20 On December 20, 2013, Hausken filed a motion for default. Dkt. 42. Defendants  
21 responded by filing a motion to strike Hausken's motion. Dkt. 43.

1 On March 4, 2013, Judge Creatura denied Defendants' motion to strike, reasoning  
2 in part that after the Court entered the order granting in part and denying in part their  
3 motion to dismiss, "Defendants needed to file an answer, or another motion that would  
4 prevent the entry of default within 14 days of entry of the Court's order." Dkt. 46 at 2  
5 (*citing* Fed. R. Civ. P. 12 (a)(4)(A)). Judge Creatura further reasoned that by the end of  
6 September 2013, Defendants had defaulted, and, even after entry of the show cause order  
7 (Dkt. 41) informing Defendants they were in default, they still failed to file an answer,  
8 thus allowing the action to languish for five months. Dkt. 46 at 2.

9 On March 4, 2014, Judge Creatura also issued an R&R recommending that the  
10 Court grant Hausken's motion for default and enter an order of default and default  
11 judgment against Defendants. Dkt. 47. Judge Creatura based his recommendation on the  
12 fact that Defendants had improperly delayed the action from September 2013 until  
13 February 2014. *Id.* at 3 (*citing Swaim v. Moltan Co.*, 73 F.3d 711, 716 (7th Cir. 1996)).  
14 Thus, Judge Creatura recommended that the Court grant injunctive relief preventing  
15 Defendants or their agents from taking funds for cable television from Hausken while he  
16 is housed in a unit that does not have in-cell access to cable television. *Id.* at 4. He also  
17 recommended granting Hausken costs, including his filing fee in this action. *Id.*

18 On the same day Judge Creatura issued the order denying Defendants' motion to  
19 strike and the R&R, Defendants filed an answer to Hausken's complaint. Dkt. 48. On  
20 March 18, 2014, Defendants filed objections to the R&R. Dkt. 50. On April 30, 2014,  
21 Hausken filed objections. Dkt. 58.  
22

1 On May 12, 2014, the Court issued an order affirming in part and denying in part  
2 Judge Creatura's R&R. Dkt. 58. On May 27, 2014, Defendants filed the instant motion  
3 for partial reconsideration of the Court's order on the R&R, seeking reconsideration of  
4 the Court's determination that entry of default is proper and sanctions are appropriate.  
5 Dkt. 63.

## 6 II. DISCUSSION

### 7 A. Standard of Review

8 Motions for reconsideration are disfavored. The court will ordinarily  
9 deny such motions in the absence of a showing of manifest error in the  
10 prior ruling or a showing of new facts or legal authority which could not  
11 have been brought to its attention earlier with reasonable diligence.

12 W.D. Local Civil Rule 7(h)(1).

### 13 B. Entry of Default

14 Fed. R. Civ. P. 55(a) provides: "When a party against whom a judgment for  
15 affirmative relief is sought has failed to plead or otherwise defend, and that failure is  
16 shown by affidavit or otherwise, the clerk must enter the party's default." After the clerk  
17 enters default, a party must seek entry of default judgment under Rule 55(b). Put another  
18 way, "an entry of default is a prerequisite to a default judgment under Rule 55(b)." *Lee v.*  
19 *Bhd. of Maint. of Way Employees*, 139 F.R.D. 376, 380 (D. Minn. 1991).

20 Defendants are correct that in the Court's prior order it determined that Defendants  
21 did not object to Judge Creatura's recommendation that entry of default pursuant to Fed.  
22 R. Civ. P. 55(a) be entered against them. Dkt. 63 at 3 (*citing* Dkt. 50 at 5-6). Finding  
instead that "the entirety of their brief focuses its objections on Judge Creatura's

1 recommendation that Hausken's entry of default judgment be entered against  
2 Defendants." *Id.*

3       Upon review of the Defendants' objections, which could have been more explicit  
4 in its challenge to entry of default specifically, the Court determines that Defendants'  
5 brief does include an objection to the R&R's recommended entry of default. Nonetheless,  
6 the Court also finds that Judge Creatura's reasons regarding Defendants' improper delay  
7 as set forth in his R&R and as summarized above provide sufficient bases to enter  
8 default. *See supra.*

9       Defendants also supply new facts to support their contention that the Court should  
10 not have adopted Judge Creatura's recommendation to enter default. Defendants state  
11 that "it was recently learned that Hausken does have access to cable television" and has  
12 had access in his room since October 24, 2013," with the exception of a two-week period.  
13 Dkt. 63 at 2 (*citing* Dkt. 63-1 at 3-4 (Declaration of Daniel S. Cowles ("Cowles"),  
14 Classification Counselor 3 in Special Offenders Unit at Monroe Correctional Complex)).  
15 They indicate that Hausken's "own actions are the only reason why he would not [have]  
16 received full cable television privilege." *Id.* at 4. Cowles's declaration also explains the  
17 policy and program by which offenders in Hausken's unit gain privileges, including  
18 access to cable television. *Id.* at 3. Defendants argue the aforementioned facts are "fatal"  
19 to Hausken's case and "clear evidence" that the Court erred in determining that  
20 Hausken's case "appears to have merit" which resulted in the manifest injustice of entry  
21 of default. *See* Dkt. 63 at 2-3.  
22

1 While Defendants supply additional information that may indeed be relevant to  
2 determining whether Hausken's case has merit, these "recently learned" facts were not  
3 before the Court when it made its decision to adopt Judge Creatura's recommendation to  
4 enter default. Therefore, for the purposes of a motion for reconsideration (W.D. LCR  
5 7(h)(1)), the Court does not have to consider new facts which could have been learned  
6 much earlier, say in October of 2013, e.g. through counsel's discussion with his clients  
7 and relevant witnesses and the preparation and submission of declarations or an answer.  
8 Had Defendants timely filed an answer after the case was initially referred back to Judge  
9 Creatura post the Court's ruling on his initial R&R, and then filed a motion for summary  
10 judgment including the foregoing information, the trajectory of this case would have been  
11 quite different.

12 Defendants also maintain that the Court "should have considered Fed. R. Civ. P.  
13 55(c) and its provision allowing a district Court to set an entry of default for good cause,"  
14 and effectively asserting that the Court should have considered the factors for  
15 determining if good cause exists to set aside the entry of default. Dkt. 63 at 3 (*citing*  
16 *Franchise Holding II, LLL. V. Huntington Rests. Group, Inc.*, 375 F.3d 922, 925-26 (9th  
17 Cir. 2004)).

18 When the Court was reviewing the objections to Judge Creatura's R&R, it was  
19 determining whether his recommendation that entry of default was appropriate given  
20 Defendants' objections. The Court was not ruling on a motion to set aside entry of  
21 default under Fed. R. Civ. P. 55(c). Moreover, Defendants did not make an argument  
22 specifically citing to Fed. R. Civ. P. 55(c) in their objections. If Defendants thought

1 argument and case law directly related to the standards set forth in Fed. R. Civ. P. 55(c)  
2 was relevant to their objection to entry of default, they could have with reasonable  
3 diligence brought those particular legal authorities to the Court in their objections. *See*  
4 W.D. LCR 7(h)(1). They did not. Defendants' motion for reconsideration of entry of  
5 default is denied.

6 The Defendants can make a motion to set aside entry of default pursuant to Fed. R.  
7 Civ. P. 55(c). They can include the new arguments they now make in that motion to the  
8 Magistrate Judge.

#### 9 **4. Sanctions**

10 Defendants also argue that the Court's issuance of sanctions in the amount of  
11 \$66.00 is "manifestly unreasonable" and "under 55(a) or (b) is not legally supportable."  
12 Dkt. 63 at 1-2. Defendants support their arguments through a number of means, including  
13 through the submission of a declaration they argue would have been submitted had they  
14 been allowed to contest the amounts sought in Hausken's bill of costs, which the Court  
15 used to determine a portion of Defendants' sanctions. *See* Dkt. 63 at 5-7.

16 Additionally, Defendants now state that Hausken's fifty-cent monthly fee is not  
17 being deducted from his inmate trust account and has not been deducted since September  
18 of 2013, with the exception of two times; rather, the fees are accumulating as debt due to  
19 his indigency status. *See* Dkt. 63 at 6 (*citing* Dkt. 63-1 at 17-18 (Declaration of Daniel  
20 Lewis, Department of Corrections Trust Account Manager)).

21 Interestingly, Defendants' prior objections explicitly state: "It is uncontested \$0.50  
22 per month is deducted from Mr. Hausken's account for cable television access at the

1 prison.” Dkt. 50 at 6. Based on this information, the Court made its determination  
2 regarding the \$3.00 portion of the sanction. Had Defendants made the correct  
3 representation to the Court, it may have ruled differently on regarding that part of the  
4 sanction.

5 Defendants implicitly, or perhaps not so implicitly, question the Court’s power to  
6 sanction them for what it has determined to be improper delay. *See* Dkt. 63 at 4. In its  
7 inherent power to manage its own docket, the Court has the authority to issue sanctions  
8 for improper delay. In exercising its broad discretion, the Court could have reasonably  
9 sanctioned Defendants several hundred dollars for their unnecessary delay. Although the  
10 Defendants did not have the opportunity to object to the amounts specified in Hausken’s  
11 bill of costs, the \$66.00 sanction is not an amount that would warrant additional briefing  
12 and litigation, as that would result in the further unnecessary expenditure of resources.  
13 Here, Defendants have acknowledged they caused delay, although they take the position  
14 the delay was not improper. *See* Dkt. 50 at 7-8. In the Court’s opinion, Defendants have  
15 improperly delayed Plaintiff’s case and in doing so unnecessarily added work to the  
16 Court’s docket. The Court’s sanction of a total of \$66.00 stands. Defendants’ motion for  
17 reconsideration on this issue is denied.

### 18 **III. ORDER**

19 Therefore, it is hereby ordered

20 (1) Defendants’ motion for reconsideration (Dkt. 63) is **DENIED**; and  
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22



1 (2) This action is **referred back** to Magistrate Judge Creatura for further  
2 proceedings.

3 Dated this 30th day of May, 2014.

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6 BENJAMIN H. SETTLE  
7 United States District Judge  
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