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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 DALLAS BUYERS CLUB,
12 Plaintiff,
13 v.
14 MICHAEL AHMARI,
15 Defendant.
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No. 3:15-cv-01614-BAS-DHB

MEMORANDUM OF AUTHORITIES IN
SUPPORT MOTION TO SET ASIDE
DEFAULT UNDER FRCP 55(c)

NO ORAL ARGUMENT UNLESS
REQUESTED BY THE COURT

Hearing Date: June 20, 2016
Hearing Time:
Judge: Hon. Cynthia Bashant
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20 MEMORANDUM OF POINTS AND AUTHORITIES
21

22 I. INTRODUCTION
23

24 The Court should set aside entry of default against Defendant pursuant
25 to Fed. R. Civ. P. 55(c) because there is good cause for Defendant's delay in
26 appearing in this action.

27 II. STATEMENT OF FACTS AND PROCEDURAL HISTORY
28

Plaintiff filed this lawsuit against plaintiff on or about March 5, 2016.

1 Defendant was apparently served on or about April 6, 2016. On or about April 20,
2 2016 defendant's counsel contacted plaintiff's counsel, James Davis to inquire as to
3 why plaintiff named defendant. Mr. Davis could provide no basis other than the
4 fact that defendant was a subscriber to an ip address that he believed was connected
5 to copyright infringement. On April 21, 2016 plaintiff's counsel sent his first of an
6 ongoing series of demands for settlement. In this first salvo from plaintiff's
7 counsel, her requested \$10,800.00 to settle the case. This was flatly denied as
8 defendant has never been involved in any activity as alleged in the complaint.
9 Defendant requested an additional 14 days to respond to the complaint, however
10 plaintiff's counsel stated he would allow defendant an additional 7 days. The
11 plaintiff then began a series of demands to defendant more fully described below.
12 After a series of actions constituting bad faith tactics, plaintiff entered a default
13 against defendant on May 5, 2016. Prior to the Courts Entry of Default, Defendant
14 notified plaintiff of its intent to appear in the action, requested Plaintiff's stipulation
15 to set aside the default and thereafter filed an objection to the entry of default and
16 notice of intent to appear in the case on May 6, 2016.

17 III. STANDARD OF REVIEW - THE COURT MAY SET ASIDE A 18 ENTRY OF DEFAULT FOR GOOD CAUSE

19 Defendant previously objected to entry of default in this matter as it contends
20 that plaintiff was operating in bad faith to attempt defendant to pay him for what
21 defendant contends amounts to extortion by plaintiff's counsel. Trial court has the
22 authority to set aside the entry of default "for good cause" under rule FRCP 55(c).
23 Most courts hold that the "good cause" required for relief from entry of default
24 under Rule 55(c) is a more lenient standard. [Johnson v. Dayton Elec. Mfg. Co. (8th
25 Cir. 1998) 140 F3d 781, 783.]

26 In determining whether "good cause" exists, the most important factors
27 usually are:

28 - whether the defendant's culpable conduct led to the default was; whether

1 the defendant has a meritorious defense, and whether setting the default aside
2 would prejudice the plaintiff. *Franchise Holding II, LLC v. Huntington Rests.*
3 *Group, Inc.* 375 F.3d 922, 925 (9th Cir. 2004).

4 Other Factors, however may also be relevant, including:

- 5 – the nature of defendant’s explanation for the default;
- 6 – the amount of money involved; and
- 7 – the promptness of defendant’s motion to set aside entry of default.

8 *Indigo America, Inc. v. Big Impressions, LLC* 597 F3d 1, 3, (1st Cir. 2010)

9 In addition, “the law does not favor defaults,” and “therefore, any doubts as
10 to whether a party is in default should be decided in favor of the defaulting party.”
11 *Bonita Packing Co. v. O’Sullivan*, 165 F.R.D. 610, 614 (C.D. Cal. 1995).

12 II. BAD FAITH OF PLAINTIFF’S COUNSEL

13 Plaintiff’s counsel has repeatedly demanded that plaintiff pay him in lieu of
14 responding to his complaint. When asked for a shred of evidence to substantiate
15 the fact that defendant was somehow liable for infringement none was forthcoming.
16 Plaintiff’s counsel stated that he had done extensive investigation and spent
17 upwards of \$15,000 to investigate. When asked how he could have possibly spent
18 such money to investigate, plaintiff’s counsel stated he sent out a couple of letters to
19 the former address of defendant and that he had spoken to defendant’s father, who
20 denied his son's involvement and did not help with plaintiff’s investigation.
21 Defendant is a recently graduated college student who does not have the money to
22 spend thousands of dollars on a lawsuit wherein the plaintiff has no information
23 other than an ip address.

24 Plaintiff’s counsel then presented defendant with a spreadsheet showing that
25 the ip address of defendant was allegedly used to infringe the copyright of his
26 client. It is uncontroverted that the sole basis of plaintiff’s lawsuit was that
27 defendant was a subscriber to the ip address of which a movie was supposedly
28 downloaded.

1 III. GOOD CAUSE - PLAINTIFF'S COUNSEL HAS ACTED IN BAD
2 FAITH IN DEMANDING A POLYGRAPH AND THEN WITHDRAWING
3 SUCH OFFER WHEN IT BECAME APPARENT DEFENDANT WOULD
4 AGREE

5 Plaintiff **demanded that defendant take a polygraph** examination in
6 exchange for a dismissal of the case. Plaintiff's counsel disingenuously stated that
7 he would bear all the costs for such a polygraph test. When plaintiff's counsel then
8 agreed to take such a test with the proviso that defense costs and attorney fees be
9 covered, plaintiff then refused to pay costs and revoked his offer to conduct a
10 polygraph.

11 IV. PLAINTIFF OFFERED TO DISMISS IF DEFENDANT WOULD
12 ASSIST HIS DISCOVERY EFFORTS AND THEN CHANGED HIS MIND
13 AFTER RECEIVING A DECLARATION FROM DEFENDANT UNDER
14 PENALTY OF PERJURY

15 Plaintiff's counsel, James Davis, advised defendant's counsel, Clay Renick,
16 that he would not file a default in this matter if defendant would provide him with a
17 declaration that he was not involved and indicating another person that may have
18 been the actual infringing party. In response to such offer, defendant made a
19 declaration that he was not involved and indicated that a new roommate may have
20 been responsible based on the supposed timing asserted by plaintiff's counsel. (See
21 declaration of Defendant Michael Ahmari). Defendant was one of many parties
22 that lived in the apartment residence at San Diego State University that had access
23 to the web through the ip address.

24 District court's across the nation have dismissed these cases:

25 Southern District of California **Judge Barry Moskowitz** has found that an IP
26 address, alone, is insufficient to support a complaint for copyright infringement.

27 Washington District **Judge Robert Lasnik** stated in his dismissal of a
28 similar action that, "Simply identifying the account holder associated with an IP

1 address tells us very little about who actually downloaded ‘Elf-Man’ using that IP
2 address,” and “While it is possible that the subscriber is the one who participated...
3 it is also possible that a family member, guest, or freeloader engaged in the
4 infringing conduct.”

5 District Court **Judge Ursula Ungaro**, in the Southern District of Florida,
6 stated, ““There is nothing that links the IP address location to the identity of the
7 person actually downloading and viewing Plaintiff’s videos, and establishing
8 whether that person lives in this district,” and ““Even if this IP address is located
9 within a residence, the geolocation software cannot identify who has access to that
10 residence’s computer and who would actually be using it to infringe Plaintiff’s
11 copyright,”

12 Plaintiff’s counsel has demanded that defendant pay him \$10,000, agree that
13 he committed copyright infringement, and stipulate to an injunction against further
14 infringement. It appears that plaintiff’s counsel named Defendant without proof
15 because he was, rightly so, being pressured by the court to either name a party or
16 dismiss. Defendant’s counsel requested that Mr. Davis inform him of even on
17 thing, other than the fact that defendant was a subscriber, that indicated that
18 Defendant was involved in the alleged infringement.

19 Plaintiff’s counsel is aware that many individuals had access to this ip
20 address. Plaintiff’s counsel has supposedly spoken to other roommates of
21 defendant about these allegations to no avail. Defendant should not be forced to
22 spend thousands of dollars to satisfy the fishing expedition of plaintiff’s counsel.
23 This amounts to willful extortion of innocent individuals.

24 Defendant has categorically denied that he was in any way associated with
25 these alleged infringing activities. Defendant has provided Mr. Davis with a
26 declaration stating that he was not involved with these activities and directing
27 plaintiff’s counsel to a possible person that may be involved on the basis of when
28 these alleged acts occurred.

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2 V. GOOD CAUSE - DEFENDANT ACTED IMMEDIATELY TO INSURE
3 NO ACTUAL DEFAULT JUDGMENT WOULD BE ENTERED

4 When it became apparent that plaintiff's counsel had gone ahead with his
5 threat to file a default rather than to dismiss, defendant acted immediately to ensure
6 that a swift default judgment would not be entered. Prejudice is determined by
7 whether a party will be hindered in pursuing its claim. See Knoebber, 244 F.3d at
8 701. The fact that a party may be denied a quick victory is not sufficient to deny
9 relief from default judgment. Bateman v. United States Postal Service, 231 F.3d
10 1220, 1225 (9th Cir. 2000). "The delay must result in tangible harm such as loss of
11 evidence, increased difficulties of discovery, or greater opportunity for fraud or
12 collusion." Audio Toys, 2007 U.S. Dist. LEXIS at *9.

13 Defense counsel immediately contacted plaintiff's counsel and requested
14 plaintiff's counsel's stipulation to set aside the default prior to moving forward with
15 any default judgment. Plaintiff's counsel responded in what has already become
16 typical by demanding yet more money from defendant.

17 Defendant promptly filed an objection to entry of default to put the court on
18 notice that defendant would be filing a motion to set aside the default if plaintiff
19 would not sign a stipulation.

20 "Any other response indicating an intent to defend prevents entry of default."
21 [See deAntonio v. Solomon (D MA 1967) 42 FRD 320, 322]. Defendant plans to
22 immediately file a rule 12(b) motion for more definite statement, based on the
23 grounds that defendant has been named in this lawsuit solely in the basis of his
24 being that subscriber to an ip address. Attached hereto is the declaration of Clay
25 Renick, Esq., confirming the actions of Mr. Davis that led to this entry of default
26 and the declaration of defendant, Michael Ahmari.

27 VI. GOOD CAUSE EXISTS AS PLAINTIFF'S COUNSEL ACTIONS
28 WERE CONTRADICTORY AND UNFAIR TO DEFENDANT

1 It is primarily the reasons of the apparent bad faith of plaintiff's
2 counsel, as more fully explained below, that defendant chose not to file an
3 immediate responsive pleading. (See Declaration of Defendant's Counsel, Clay
4 Renick)

5 However, plaintiff will undoubtedly argue that it was defendant's culpable for
6 its decision not to respond. Defendant's counsel requested that plaintiff confer with
7 his client prior to filing any motion for default and stated that he was not filing
8 because of plaintiff counsel's verbal promise to dismiss the action upon receiving a
9 declaration from defendant. It was solely the perceived bad faith by plaintiff's
10 counsel and the immediate ongoings in the prior days in offering and retracting a
11 polygraph and then offering and refusing to file a dismissal after receiving a
12 declaration, that led to the refusal to file an immediate response by defense counsel.
13 The Court in TCI Group Life Ins. Plan v. Knoebbler (9th Cir. 2001) 244 F3d 691,
14 697, has stated that "even a conscious decision not to respond may be excusable if
15 supported by credible reasons."

16 Although defendants felt the immediate filing of default was unfair given the
17 circumstances, defendant acted swiftly to remedy the situation and to remove any
18 possibility of any perceived prejudice by its contacting defendant and agreeing to
19 go ahead and file a responsive pleading without delay.

20 Notwithstanding the recalcitrance of plaintiff's counsel, it has been defense
21 counsel's prior experience that it is a common courtesy that counsel will always
22 stipulate to set aside a default if little time has past. This perhaps unspoken rule is
23 more succinctly reference in the The Rutter Group, Federal Civil Procedure Before
24 Trial, [6:207] PRACTICE POINTER ... "If you represent plaintiff, do not oppose
25 defendant's motion for relief unless the matter is truly important and there are valid
26 reasons for your opposition. Absent such reasons, your opposition makes you seem
27 petty." Schwarzer, Tashim & Wagstaffe, RUTTER GROUP PRAC. GUIDE
28 FEDERAL CIV. PRO. BEFORE TRIAL (The Rutter Group 2016)

1 In light of plaintiff's counsel demanding a settlement during every phone
2 conversation, it appears that his protestations are more about recovering a
3 settlement for his client regardless of the validity of his case than any actual
4 reasonable basis for his failure to stipulate to set aside the default. Indeed on the
5 day before this motion was filed, plaintiff's counsel sent a further demand for
6 settlement of "\$11,500.00 and an agreement to an injunction." (See Declaration of
7 Clay Renick, Esq.)

8 "The court has considerable flexibility and may set aside the default entry for
9 good cause. [FRCP 55(c); see JMB Mfg., Inc. v. Child Craft, LLC (7th Cir. 2015)
10 799 F3d 780, 792 – "good cause" for relief is more lenient and "does not
11 necessarily require a good excuse for the defendant's lapse"; FOC Fin'l Ltd.
12 Partnership v. National City Comm'l Capital Corp. (D AZ 2009) 612 F.Supp.2d
13 1080, 1083. [6:204-6:207]

14 VII. MERITS OF DEFENDANT'S PROPOSED DEFENSE

15 A defense is considered meritorious if "there is some possibility that the
16 outcome of the suit after a full trial will be contrary to the result achieved by the
17 default." Hawaii Carpenters' Trust Funds v. Stone, 794 F.2d 508, 513 (9th Cir.
18 1986). All that is required is an assertion of "a factual or legal basis that is
19 sufficient to raise a particular defense; the question of whether a particular factual
20 allegation is true is resolved at a later stage." Audio Toys, Inc. v. Smart AV Pty
21 Ltd., 2007 U.S. Dist. LEXIS 44078, *8 (N.D. Cal. June 6, 2007). Defendant has
22 offered to make himself available for a polygraph test, made a written declaration
23 as to his lack of knowledge of any infringing activity and offered to turn over his
24 personal computer. Defendant absolutely denies engaging in any infringing activity
25 whatsoever. (See attached declaration of Michael Ahmari, Exhibit 1)

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27 ///

VII. CONCLUSION

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2 Defendant finds himself involuntary dragged into the fishing expedition of
3 plaintiff's counsel and forced to pay for plaintiff's discovery with his own money. It
4 is the very costly process of defending this litigation that has led defendant to do
5 everything possible to limit the costs of proceeding, including providing a
6 declaration to plaintiff's counsel upon his false promise to dismiss.

7 Defendant therefore requests that the mere entry of default be set aside by
8 order of the court and that defendant be permitted to file a rule 12(b) motion for a
9 more definite statement, based on the following good cause reasons:

10 1. Defendant acted promptly to notify the court and defendant of its
11 objection to defendant's action in filing an entry of default,

12 2. There is absolutely no prejudice to defendant as there was no delay in
13 moving for relief from default,

14 3. Plaintiff was provided with exculpatory evidence prior to his filing of a
15 default,

16 4. Plaintiff's counsel misrepresented his intent to file a dismissal if defendant
17 would aid him in identifying the possible infringer;

18 5. Defendant presents the absolute defense to this action that he was not the
19 person who participated in the alleged infringing activity, and;

20 6. Defendant acted in good faith, given the statements by plaintiff's counsel,
21 offering to dismiss defendant based upon agreement to a polygraph test and
22 providing a declaration of his innocence.

23 7. Defendant was of the opinion that plaintiff's counsel was unfair in that he
24 told plaintiff's counsel that he would not have to respond if he could get a
25 declaration from defendant stating his innocence under penalty of perjury and
26 directing him to a possible infringer, and therefore felt tricked upon receiving a
27 demand to file an answer.

28 8. The day prior to filing this motion, plaintiff's counsel again tried to extort

1 money out of defendant, even though defendant had provided a declaration of his
2 innocence. “Mr. Davis stated he would accept \$11,500.00 and an agreement to an
3 injunction to resolve this matter.”

4 Based on the above reasons, the Court should grant Defendant’s motion.

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6 Dated this day of May 16, 2016

/s/ Clay Renick
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California bar number 179531
clayrenick@gmail.com
Attorney for Defendant
Michael Ahmari

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