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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

DALLAS BUYERS CLUB, LLC, Plaintiff, v. **CALEB SCOTT,** a/k/a Kaleb Scott**,** Defendant.	Case No.: 3:15-cv-00730-AC PLAINTIFF'S OPPOSITION TO MOTION TO SET ASIDE DEFAULT; Declaration of Counsel; Declaration of Rhonda Rowell; Exhibits 1 - 8

PLAINTIFF'S OPPOSITION TO MOTION TO SET ASIDE DEFAULT

Plaintiff Dallas Buyers Club, LLC ("Dallas") herein opposes Defendant Kaleb Scott's motion to set aside the default and default judgment entered against him. This opposition is supported by the filed Declaration of Counsel, Declaration of Rhonda Rowell (process server) and Exhibits 1-8.

The initial complaint in this action was filed in April of 2015. After investigation it appeared the likely proper defendant was Caleb Scott, a/k/a Kaleb Scott ("Scott"). Letters were dispatched to Mr. Scott on September 17, 2015 and September 24, 2015 without response. Exhibits 1, 2. A First Amended Complaint was filed naming "Caleb Scott" on October 7, 2015.

Caleb Scott was then personally served on October 13, 2015. Ecf. 20, 51. In the service on Caleb Scott he informed the agent for service, "Defendant confirmed his name is spelled with a "K" and not a "C". Exhibit 3, Oct. 15, 2015 Invoice; Field Notes, Exhibits 4, 5.

Subsequent to personal service, Scott was then served with multiple additional documents, including, but not limited to:

December 2, 2015;	Ecf. 21/22:	Notice of Default
January 6, 2016;	Ecf. 23-25:	Motion to Enter Default (With Cover, Exhibit 6)
January 20, 2016;	Ecf. 26-27:	Order of Default (With Cover, Exhibit 7)
February 23, 2016;	Ecf. 28-30:	Motion for Default Judgment
April 19, 2016:	Ecf. 38-39:	Orders of the Court
April 22, 2016;	Ecf. 40-42:	Order and Judgment (Mailed by the court)

Presumably during this time frame Scott also received notices regarding the first appointment of *pro bono* counsel (Ecf. 31) from the court and various letters from his appointed counsel before their withdrawal.

More than a month after entry of the judgment against Scott, Scott has finally appeared and moved for relief of the judgment against him claiming 1) lack of service, 2) lack of notice, and 3) a meritorious defense.

For the reasons below, Scott's motion is properly denied.

ARGUMENT

I. The Context of this Action is Relevant.

The nature of this case and the context of this action are relevant in the examination of this motion. This Court and this District are well aware that there is a pattern and practice of parties simply refusing to respond and appear in BitTorrent cases with the large number of defaults on record. This is not happenstance. There is the active promotion and advice, even by

counsel, for parties to ignore BitTorrent litigation. *See generally, Killer Joe v. Doe*, 6:15-cv-00494-ST, Ecf. 27 (Sanctions Order, Oct. 5, 2015) ("Mr. Eilers explained that he did not respond in reliance on advice provided by various Internet web pages that oppose plaintiff's actions or copyright enforcement. However, any advice to ignore court Orders or a subpoena, whether served in person or by mail, is incorrect and provides no legal excuse.") *See also, Dallas Buyers Club v. Doe*, 6:15-cv-00221-AC, Ecf. 45 (Sanctions Order, Oct. 13, 2015) ("Baldino also admitted she intentionally ignored the mail from Dallas with the hope the problem would go away. Dallas should not be punished for, and Baldino should not prosper from, her deliberate decision to thwart Dallas's attempts to serve her....")

This advice to ignore these proceedings is not limited to anonymous anti-enforcement a/k/a "copyleft" advocate web pages, but is also often the advice of counsel. One prominent BitTorrent defense counsel openly affirms, "In every one of my calls, I discuss what I call the 'ignore' option which in many people's scenario is a viable option. In many cases, I even push a client towards the 'ignore' side of things."[1] With a common award of statutory minimum damages ($750), the result is many parties consciously choose to elect default, even when offered *pro bono* counsel. *See eg., Glacier Films v. Tenorio,* 3:15-cv-01729-SB.

What sets this case apart is that the Scott, likely anticipating statutory damages of $750, is instead faced with a damages award of $5,000.00. Willfully electing to ignore a matter and accept a default hoping for minimum damages is not a basis to set aside a judgment.

[1] Public Blog of Cashman Law Firm, last ref. July 7, 2016: https://torrentlawyer.wordpress.com/2016/01/27/beware-of-high-volume-based-settlement-factory-attorney-copyright-trolls/

II. Defendant Scott seeks relief under FRCP 55(c) and FRCP 60(b).

a. FRCP 55(c)

FRCP 55(c) permits the court to set aside entry of default for good cause. To determine whether a defendant has shown good cause a court considers: (1) whether the defendant engaged in culpable conduct that led to the default; (2) whether the defendant had a meritorious defense; and (3) whether reopening the default would prejudice plaintiff. *Franchise Holding II, LLC v. Huntington Rests. Group., Inc*., 375 F.3d 922, 925 (9th Cir. 2004)). This standard is disjunctive; and the court may deny the request to vacate default if any of the three factors is true. *See id.*

b. FRCP 60(b)

The factors considered in setting aside a default judgment under FRCP 60(b) mirror those of FRCP 55(c). *Brandt v. Am. Bankers Ins. Co. of Fla*., 653 F.3d 1108, 1111 (9th Cir. 2011), *citing Falk v. Allen*, 739 F.2d 461, 463 (9th Cir. 1984). There is an additional factor to be considered under FRCP 60(b) and that is, "a compelling interest in the finality of judgments which should not lightly be disregarded." *Rodgers v. Watt*, 722 F.2d 456. 459 (9th Cir., 1983).

c. Elements: Culpable Conduct; Meritorious Defense; Prejudice

i. Culpable Conduct

Culpable conduct is shown if a defendant received actual or constructive notice of the action and intentionally failed to answer. *Alan Neuman Productions, Inc. v. Albright*, 862 F.2d 1388, 1392 (9th. Cir., 1989). Issues of personal service aside, there is no doubt that Scott was aware of this action. In his filed declaration he claims he was absent from the address of service from sometime in January 2016 through April 2016, a fact Dallas disputes. But this does not address the letters and communications, including the Notice of Default sent December 2, 2015 (Ecf. 21, 22), which he confirms he received, and earlier letters. Exhibits 1, 2, 5, 7. Scott

specifically admits he was aware of this action at least as early as October 14, 2015 when he called plaintiff's counsel the day after being served.[2]

With respect to the claim that he moved and did not keep plaintiff apprised of a new address, such is not excusable neglect and also properly considered culpable conduct of Scott.[3] *Employee Painters' v. Ethan Enterprises*, 480 F.3d 993 (9th Cir., 2007); *See also Pena v. Seguros La Comercial, S.A.,* 770 F.2d 811, 815 (9th Cir.1985).

1. Service

Scott in his declaration claims he was not served with the complaint. If the court finds Scott was served then his conduct is clearly culpable and his motion should be denied. There can be no excusable neglect and setting aside the default would be a clear and unjust prejudice to plaintiffs. Declaration aside, the evidence supports a finding that Scott was personally served.

In this action there was an initial affidavit of service that included a reference to Scott being female "Sex: F" and the time of service being 2:45 pm. Ecf. 20, p. 2. When the company used for service of process was contacted about the apparent designation of "F" an amended affidavit of service was returned correcting the designation to "M" and without any explanation the time of service was adjusted to "6:45 pm." Ecf. 51. As of the filing of the Amended Affidavit of Service the issue of time of service had not been raised by the defendant. But apparently this was an unrevealed critical point in the anticipated motion due to Scott holding back an "ace up his sleeve" - that he was at work at 2:45 pm. In effect, Scott initially intended to move against his default solely based on a pair of typos on the filed affidavit of service.

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[2] Plaintiff's counsel has no record of this call. Scott verifies the call took place on October 14, and has the cell phone records to confirm he placed the call, but it is not uncommon for parties to call and refuse to provide a name or identify a case. Decl. Counsel, ¶¶ 3-6.

[3] As argued below, Dallas maintains the claim of having moved as argued is factually implausible.

While much may be made of the two Affidavits of Service, the explanation is very simple. The first affidavit was prepared off of a fax transmission of the process server's "Field Sheet" (Exhibit 5) and on the second affidavit of service this was corrected with a review of the original document (Exhibit 4). Comparing the two documents it became clear that the proper time of service was 6:45, and it is further verified with the Field Sheet notation that earlier in the day at 4:20 pm there was an unsuccessful attempt at service making the 2:45 pm time clearly in error. See generally Declaration of Rhonda Rowell.

Service at 6:45 PM is also consistent with Scott's schedule, as at 4:20 PM he would have been at the gym, returning home about 6:00 PM. Exhibit 8, Scott Deposition Transcript, p. 21. ("Trans"). Further facts that support actual service include:

a) The proper house was served as the Field Sheet (Exhibit 4) notes "Dodge Truck 991 DAS" and this happens to have been Scott's truck. Trans. p. 22.

b) The indicia of service on the affidavit of service, height of 5'11" and weight of 200 pounds, brown hair, and no glasses, match Scott exactly. Trans. 37 - 38.

c) There was no one else at the house that might have been served other than Scott. Trans. p. 22.

d) On service, when Scott accepted the documents Scott told the agent his name was spelled with a "K." Exhibits 3, Oct. 15, 2015 Invoice with comment: "Defendant confirmed his name is spelled with a "K" and not a "C"; Exhibit 4; Declaration of Rhonda Rowell.

e) Scott's declaration makes the vague claim of speaking to plaintiff's counsel by cell phone. Plaintiff's counsel has no record of this call, which is not uncommon as many parties call plaintiff's counsel and refuse to identify themselves.[4] However, on

[4] In the deposition of the subscriber in this matter the subscriber affirmed he did not know Scott's phone number. Ecf. 56-1, p. 10. Prior to the deposition of Scott on July 1, 2016, plaintiff's counsel cannot find and evidence of this call or record of having Scott's phone number. Decl. Counsel, ¶¶ 3-6.

investigation the evidence is that Scott called plaintiff's counsel the morning of October 14, *the day after being served*. Trans. p. 33-34. As plaintiff's counsel did not have Scott's phone number and as Scott denied reading any of the letters sent by mail, the only plausible explanation is Scott called plaintiff's counsel on being served.

f) Scott claims he did not see a copy of the complaint in this action until "April when I gathered my mail." Trans. p. 24. As the only time plaintiff sent Scott a full copy of the complaint was with personal service, this is a clear indication Scott was served and like other correspondence simply ignored the service. Decl. Counsel, ¶ 16.

Scott's declaration aside, all of the actual evidence in this action supports a finding that Scott was personally served.

2. Technical Service Not Required

So long as a party receives sufficient notice of the complaint, Rule 4 is to be "liberally construed" to uphold service. *Chan v. Soc'y Expeditions, Inc*., 39 F.3d 1398, 1404 (9th Cir.1994). Rule 4 is a flexible rule that should be liberally construed so long as a party receives notice of the complaint. *United Food & Commercial Workers Union v. Alpha Beta Co*., 736 F.2d 1371, 1382 (9th Cir. 1984). Rule 4(e)(1) provides service compliant with state law is sufficient. Rule 7D(1) of the Oregon Rules of Civil Procedure ("ORCP") provides that summons shall be served:

> ... in any manner reasonably calculated, under all the circumstances, to apprise the defendant of the existence and pendency of the action and to afford a reasonable opportunity to appear and defend.

Moreover, ORCP 7G provides in part that:

> If service is made in any manner complying with subsection D(1) of this rule, the court ... shall disregard any error in the service of summons that does not violate the due process rights of the party against whom the summons was issued.

The Oregon Supreme Court interprets service rules liberally. *See, e.g., Lake Oswego Review, Inc. v. Steinkamp*, 298 Or. 607, 695 P.2d 565, 568 (1985) ("[W]hen a defendant actually

does get notice, defects in form of summons or method of service of summons do not invalidate service. A defendant who received actual notice can hardly assert that summons was not served by a manner calculated to give notice.")

Scott admits he had sufficient notice of this action to call plaintiff's counsel the day after being served. Trans. p. 34 ("Q So you knew about it at least on October 14th, correct? A Correct.") Further Scott admits to receiving a letter, "dated in December" (Trans p. 25) which could have only been plaintiff's Notice of Default. Ecf. 21/22, as well as multiple letters in January. That he may decline to read document mailed to him or served on him, even documents from appointed *pro bono* counsel, does not negate notice.

Simply denying service and notice, despite the clear evidence to the contrary is not sufficient.

3. Scott's arguments as to notice are implausible.

Service issues aside, Scott received full and fair notice of this action. Scott's defense he did not receive notice is based on a claim that "from approximately January 2016 through April 2016, I resided at another location and had not visited the address in Salem until April 23, 2016."

A large number of letters were mailed and notices sent to Scott prior the January date. Decl Counsel, Exhibits 1,2,6,7. The fact that Scott, even accepting that he did not receive any of the correspondence or notices in January, February, March or April, had already received actual notice, multiple letters and a specific Notice of Default (Dec. 2, 2015) sent prior to his claimed absence makes it clear that Scott, with enough knowledge of this action to call plaintiff's counsel the day after being served, willfully refused to act allowing a default to be entered against him.

There are no issues of missing letters or mail theft. Trans. p. 25. Scott's deposition testimony confirms that a number of letters were in fact received, including the Notice of

Default, but Scott simply did not read them. Trans. p. 25-26. ("Q: So you know you received at least three letters but you did not review any of them? A: No.").

Also worth noting is Scott's claim of being away from the 421 Kingwood Avenue address from January through April is implausible. On investigation the facts are Scott paid rent for 421 Kingwood Avenue for the months of January through May. Trans. p. 9. This was the address Scott used as a regular matter of course and the address on his driver's license even as he sat for his deposition on July 1, 2016. Trans. p. 37. And while his declaration may make it sound as if he was far away, he was not. Scott was not out of the state or even out of the city of Salem as he claims to have been at 4401 12th Street Cutoff, Salem, Oregon, about 5 miles away. Trans. p. 7. It is factually implausible for Scott to have paid rent for four months on his primary residence and never returned despite being 5 miles and minutes away.[5]

4. The facts indicate the default in this matter was intentional

When taken as a whole, the facts of this case indicate that Scott was properly served, had notice, and allowed a default to be entered against him. This was likely under the impression damages would be limited to $750. This level of culpable conduct, with the knowing strategy of having a default entered against him, is not a basis to set aside a default judgment.

The judgment in this action is properly final.

ii. Meritorious defense

A defendant seeking to set aside an entry of default must present specific facts that would constitute a meritorious defense. *United States v. Signed Personal Check No. 730 of Yubran S.*

[5] Scott's normal routine is to go to his Gym, "Snap Fitness" (Trans. p. 21) after work, which is located at 1124 Wallace Rd NW, Salem, Oregon. This gym is only 1 mile from his residence, meaning nearly daily he was a mile from 421 Kingwood Avenue, yet claims he never went home for almost four months.

Mesle, 615 F.3d 1085, 1094 (9th Cir. 2010). A mere general denial without facts to support it is insufficient to justify vacating an entry of default. *Franchise Holding II v. Huntington Rest*., 375 F.3d 922, 926 (9th Cir., 2004).

Scott's only defense to this action is a denial. Trans. p. 35. This is not a meritorious defense.

iii. Prejudice to plaintiff

It has been ten (10) months since the first letter in this matter was sent to Scott, and nine (9) months since Scott was served and contacted plaintiff's counsel by phone in October of 2015. Delay is prejudicial if is there is a loss of evidence. *TCI Group Life Ins. Plan v. Kneobbler*, 244 F.3d 691, 701 (9th Cir. 2001), *quoting Thompson v. American Home Assur.* Co., 95 F.3d 429, 433-34 (6th Cir. 1996).

One critical piece of evidence in this action would be Scott's laptop computer used to infringe plaintiff's rights. Scott now he claims he threw his computer away in the trash, despite the fact that it was working and was not replaced. Trans. p. 12. It is implausible that a party would simply throw away their only working computer, and too much of a coincidence that this critical piece of evidence is no longer available.[6] Plaintiff submits a more likely scenario is the laptop is still in Scott's possession and in use, but with incriminating evidence it will not be produced.

Whether a working computer / laptop was thrown in the trash for no reason, or is simply being withheld, the delays in this case clearly prejudice plaintiff.

[6] Scott, without any evidence or record claims he put the laptop in the trash in June which would have been after notice of this action as the subpoena response from Comcast was received June 9, making notice to the subscriber in early May, making even the implausible disposal in June of 2015 after notice.

III. Implied Accusations

In the defendant's motion and declaration of counsel there is the implicit claim that somehow plaintiff failed to provide a phone number or impeded appointment of *pro bono* counsel. As per the declaration of Scott's counsel and exhibits, both the Tigard (subpoena response) and current address of the defendant were provided. Plaintiff simply did not have a phone number for Scott. (Ref. Ecf. 56-1, deposition transcript, p. 10, "Q: Do you have a phone number for Caleb Scott? A: I do not. Q: Do you have an e-mail address for Caleb Scott? A: I don't.")

That Scott called plaintiff's counsel on October 14, the day after being served, is if anything evidence of his own culpability.

IV. Just Terms dictate that plaintiff should be awarded costs and fees.

Should the Court wish to grant Scott any relief, plaintiff, with multiple notices, letters and service on the defendant, and good faith efforts to twice accommodate the appointment of *pro bon*o counsel should be granted the FRCP 60(b) "just terms" relief of costs and fees to date. As this Court has already noted, "Dallas should not be punished for, and [the defendant] should not prosper from, [his] deliberate decision to thwart…" Dallas's efforts to enforce its rights. *Dallas Buyers Club v. Doe*, 6:15-cv-00221-AC, Ecf. 45 (Sanctions Order of Oct. 13, 2015).

V. Conclusion

Scott's arguments and explanations denying he was served and denying notice are contrary to the facts and implausible. He openly admits he never read the documents he received, including the December 2, 2015 Notice of Default. He willfully ignored this matter up to the point that he was provided with a $5,000 judgment.

With a growing culture, and even the advice of some counsel to ignore these proceedings if not the law, the Court should not lightly set aside a judgment against a defendant who has elected to have a default entered against them. To reopen this case after 10 months of delay would be a disregard of the standards by which a judgment should be maintained and a clear prejudice to plaintiff and would further the culture of ignoring these proceedings.

Absent any colorable evidence that Scott was not served and did not have notice the judgment in this matter should stand. Setting aside this judgment will only lead to a growing cascade of defaults and petitions to set aside the already deep catalog of defaults, many of them obtained after parties were appointed pro bono counsel.

The default and judgment in this matter were after proper service, with full notice, and likely well considered by Scott with an anticipated entry of statutory minimum damages. They should not be set aside.

Respectfully submitted this 8th day of July, 2016.

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