UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

GLOBAL DIRECT SALES, LLC, PENOBSCOT INDIAN NATION, CHRISTOPHER RUSSELL and RYAN HILL,

Plaintiffs

v.

AARON KROWNE, individually and d/b/a THE MORTGAGE LENDER IMPLOD-O-METER and ML-IMPLODE.COM, KROWNE CONCEPTS, INC., IMPLODE-EXPLODE HEAVY INDUSTRIES, INC., JUSTIN OWINGS, KRISTA RAILEY, STREAMLINE MARKETING, INC. and LORENA LEGGETT,

Defendants.

Case No. 8:08-cv-02468

Hon. Deborah K. Chasanow

DEFENDANTS' REPLY

REPLY BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO VACATE DEFAULT

Defendants Implode-Explode Heavy Industries, Inc. ("IEHI") and Krowne Concepts, Inc. ("KCI") (collectively "Defendants") respond as follows to Plaintiffs' Memorandum in Opposition to Defendants'' Motion to Vacate Default.

First, Defendants note, respectfully, that Plaintiffs' opposition memorandum fails to address several arguments raised in the memorandum in support of Defendants' pending motion ("Defs.' Mot." or "Mot."), most notably (1) that the Penobscot Indian Nation, *qua* government entity, may not bring a claim for defamation. Mot. at 8. Plaintiffs similarly fail to address Defendants' argument that (2) Plaintiffs have suffered no prejudice as a consequence of the default (with the possible exception of attorneys fees) or delay, Mot. at 15, and (3) "Krista Railey

was a blogger not acting as an agent of either Defendant in publishing the article, such that Defendants disseminated the article innocently," Mot. at 7-8. As such, this honorable Court's may consider those points conceded, and should do so rather than allow Plaintiffs to duck those arguments. See Bristow v. Daily Press, Inc., 770 F.2d 1251, 1256 (4th Cir. 1985); Alba v. Merrell Lynch, 198 F. App'x 288, 295 (4th Cir. 2006); Bailey v. ManorCare Health Servs., Inc., 203 F.3d 819, 2000 WL 135105, at *1 (4th Cir. Feb. 7, 2000). See also Kutik Photography v. Cochran, 975 F. Supp. 812, 814 (E.D. Va. 1997) (failure to respond to argument in motion to dismiss required court to grant motion); Ciphertrust, Inc. v. Trusecure Corp., No. 04-cv-1232, 2005 U.S. Dist. LEXIS 46322, at *1 (E.D. Va. Nov. 28, 2005) (ruling plaintiff conceded defendant's argument by failing to respond to it); Adidas-America, Inc. v. Payless Shoesource, Inc., 546 F. Supp. 2d 1029, 1076 (D. Or. 2008) (failing to respond to opponent's argument constitutes conceding argument); Canatella v. Stovitz, 365 F. Supp. 2d 1064, 1083-84 (N.D. Cal. 2005) (same); Southern Nevada Shell Dealers Ass'n v. Shell Oil Co., 725 F. Supp. 1104, 1109 (D. Nev. 1989) (same).

Defendants herein address Plaintiffs' responses:

A. **Defendants Did Not Default Intentionally**

1. Defendants Made Serious Efforts to Continue Litigating This Case, Defaulting Only Due to Inability to Pay and Inability to Participate Without Counsel

Referring to a letter submitted in response to the Court's Order to Show Cause (Docket No. 105), Plaintiffs repeatedly contend that Aaron Krowne "submitted papers suggesting that [IEHI and KCI] intended not to secure counsel and default." Pls.' Opp'n at 2, 4, 5, 8. Presumably, this refers to page one of the letter, which provides, in pertinent part: "Defendants have dutifully defended this matter so far, but it is a case of well-funded corporate entities out-suing small, independent journalists. Defendant IEHI, Inc. acknowledges that it can no longer afford counsel, and anticipates a default will be entered." Krowne Letter (June 13, 2011) at 1

(the remainder of the letter sets forth a legal defense and requests relief despite the absence of an attorney). This hardly amounts to an "intentional" default, particularly in light of the fact Mr. Krowne informed the Court that he was seeking *pro bono* counsel when Defendants' retained attorneys withdrew. Decl. of Aaron Krowne accompanying Withdrawal Mots. (Docket No. 98-1) ¶9 ("As I strongly believe my side will prevail on the merits of the case, I will continue to seek pro bono counsel to the best of my ability to continue footing a defense, but it is impossible for me to give a timetable or guarantee of success in this pursuit."). Mr. Krowne thereafter made numerous forthright attempts to participate in the litigation of this case. See Defs.' Mot. at 6 (citing Docket Nos. 105, 108, 110). And he continued seeking *pro bono* representation for Defendants. Krowne Reply Decl. (attached hereto) ¶¶4-5.

2. Default Resulted, In Part, From Advice of Counsel

The Fourth Circuit has "repeatedly expressed a strong preference that, as a general matter, defaults be avoided and that claims and defenses be disposed of on their merits. This imperative arises in myriad procedural contexts, but its primacy is never doubted." Colleton Preparatory Acad., Inc. v. Hoover Universal, Inc., 616 F.3d 413, 417 (4th Cir. 2010) (citations omitted). Moreover, "the personal responsibility of the party is a consideration to be taken into account in deciding whether or not to set aside a default, for 'justice demands that a blameless party not be disadvantaged by the errors or neglect of his attorney. . . .' Senn v. Harrison Trans. Co., 826 F.2d 1060, 1061 (4th Cir. 1987) (unpub.) (quoting United States v. Moradi, 673 F.2d 725, 728 (4th Cir. 1982)). All doubts regarding default are resolved in favor of the defaulting party. Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp., 843 F.2d 808, 809 (4th Cir. 1988).

While Mr. Krowne wishes he had been more savvy about Defendants' legal expenses and litigation strategy here, the litigation decisions he made on behalf of Defendants were based on the advice of counsel. In this Circuit, the Court may consider that in determining whether blame for the current procedural posture fairly lies with Defendants alone. Defendants spent some $90,000 defending this law suit through discovery and via an anti-SLAPP motion to dismiss. IEHI essentially prevailed, after trial and appeals, before the New Hampshire Supreme Court in a concurrently litigated action alleging, *inter alia*, libel (albeit against a third-party) at total start-to-finish cost of approximately $35,000 by late 2009 or early 2010. Krowne Decl. in Support of Defs.' Mot. (Docket No. 117-1) ¶¶13-17. Thus, he was surprised that the litigation costs in defending this case were much higher—with pretrial efforts alone totaling some $90,000. Id. ¶6. Nonetheless, he realized by late 2009 that Defendants' litigation costs were unsustainable, id. ¶7 and informed counsel, Krowne Reply Decl. (attached hereto) ¶6. Despite this knowledge, counsel decided to proceed with an Anti-SLAPP Motion to Dismiss almost one year after filing a Rule 12(b) Motion to Dismiss, and more than one year after the lawsuit was filed. Krowne Reply Decl. ¶7. (Counsel did inform Mr. Krowne that they would attempt to mitigate costs by delegating much of the work on the Anti-SLAPP motion to a less expensive associate or intern. Id.) This decision ultimately consumed the resources Defendants needed to continue moving forward, and ultimately resulted in default. To the extent that that these litigation decisions were based on advice of counsel, Defendants respectfully suggest that, under this Circuit's precedent, they essentially constitute excusable neglect that should not obviate the good cause argument *sub judice*. See, e.g., Moradi, 673 F.2d at 728.

B. Defendants IEHI and Krowne Concepts Have A Meritorious Defense, Regardless of Ms. Railey's 2009 Declaration

Plaintiffs repeatedly contend, without citing any authority, that Ms. Railey's December 2009 declaration somehow deprives Defendants of a meritorious defense. Pls.' Opp'n Br. at 3 ("Since the author admits that the article is false, misleading and defamatory, Defendants IEHI and KCI cannot have a meritorious defense.") Plaintiffs are mistaken. First, Ms. Railey is simply not in a position to speak (i.e., make admissions) on behalf of each defendant. Additionally, Plaintiffs blatantly mischaracterize Ms. Railey's statement as an admission of defamation.[1] As to the article's veracity, she said (1) "there are significant problems with the final published article," Railey Decl. (Dec. 4, 2009) ¶6, (2) "the article contains and implies false statements of fact and is misleading in a material manner," id., and (3) she "advised IEHI and [KCI] that the article was not factual [*sic*] accurate and should be removed from the website or substantially corrected," id. at ¶8). While she suggests that something (we are left to guess what) in the article was false or misleading, this hardly amounts to an admission of liability for defamation. Lacking a crystal ball, or a trial, we cannot know what Ms. Railey's vague statements refer to.

Most importantly, Ms. Railey's earlier sworn statements call the veracity of her most recent declaration into question. Compare id. ¶¶6-8 with Railey Aff. (Oct.7, 2008) [Docket No. 18-2] ¶35 ("I stand behind all of the statements I have made in my article about the Plaintiffs,

[1] Plaintiffs also make several references to Ms. Railey's statements concerning "IEHI and KCI's disparate treatment of advertisers and non-advertisers." Opp'n at 3, 4. Defendants dispute the implication that Ms. Railey was encouraged to write a negative story about an advertiser's competitor as retaliation, and point out that the record indicates that it was a representative of the Grant America Program who reached out to IEHI to advertise, not the other way around. See Ex. H to Decl. of Robin Medecke in Support of Defs.' Anti-SLAPP Mot. to Dismiss (Docket No. 62) ¶¶4-6 (noting that IEHI's policy was "to not advertise firms with suspicious lending practices") and Ex. B at 8 (email thread including Aug. 6, 2008 email from Lorenna Leggett stating that "this company"—evidently Global Direct Sales—"wants to advertise on mli.").

and I believe each and every one of them to be based in truth and supported by my research."); see also Defs.' Mot. at 13 n.4 ("Ms. Railey does not elaborate; her declaration fails to specify any inaccuracies, state when she learned of them, or explain why her statement is at odds with her October 2008 sworn affirmations of the article's veracity."). The fact that Ms. Railey changed her tune for reasons unknown, yet has not settled with Plaintiffs, only provides more reason to permit Defendants' their day in court. At most, her inconsistent testimony renders this case inappropriate for summary judgment.

C. Defendants Acted With Reasonable Promptness Under the Circumstances

Plaintiffs point out that Rule 60 has no bearing on this motion. Opp'n at 5-6 ("since no judgment by default has been entered . . . the provisions of Rule 60(b)(1) do not apply to the pending motion."). Defendants agree.[2] Yet Plaintiffs nonetheless suggest that the Court should apply the one year bar applicable to default judgments under Rule 60(c). Opp'n at 5. The cases Plaintiffs rely upon involve motions for relief from a final judgment under Rule 60, not merely an entry of default under Rule 55.[3] For example, Plaintiffs describe Consolidated Masonry &

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[2] See 10A Charles Alan Wright et al., Federal Practice and Procedure § 2692 (3d ed. 2008) ("The entry [of default] simply is an official recognition of the fact that one party is in default . . . . The entry is an interlocutory step that is taken under Rule 55(a) in anticipation of a final judgment by default under Rule 55(b)."). Id. at § 2698 ("A motion to set aside an entry of default is not governed by Rule 60(b) . . . or by any express time limits."); Hutton v. Fisher, 35 F.R.D. 167, 168 (E.D.Pa. 1964) ("The [time limitation] of [the federal equivalent of Rule 60(c)] . . . applies only to a judgment by default and not to an entry of default."), vacated on other grounds, Hutton v. Fisher, 359 F.2d 913 (3rd Cir. 1966); see also 29 A.L.R. Fed. 7 (1976) ("While the specific grounds for relief from a default or other final judgment which are listed in Rule 60(b) (for example, 'mistake, inadvertence, surprise, or excusable neglect') have frequently been regarded as included within the concept of good cause for purposes of Rule 55(c), it is generally recognized that good cause is a broader and more liberal standard requiring less justification for relief than would be necessary under Rule 60(b).").

[3] Indeed, a few do not even involve a default. See, e.g., Goldfine v. United States, 326 F.2d 456 (1st Cir.1964) (Rule 60(b) challenge to a stipulated settlement permitting the sale of property); Pagan v. American Airlines, Inc., 534 F.2d 990, 993 (1st Cir.1976) (challenge by plaintiff to a judgment approving a stipulation for settlement).

Fireproofing, Inc., 383 F.2d 249, 251 (4th Cir. 1967) as affirming the denial of a motion to vacate because, "by waiting 2 ½ months between the date of entry of default and the motion, movant 'did not act promptly.'" Opp'n at 6. In fact, a default judgment was entered months before the motion, not merely the entry of default. Consolidated Masonry, 383 F.2d at 250-51. Furthermore, in that case the district court found that the defendant (a) failed to check the record even after learning he had had not answered the complaint in time, and (b) "did no more than allege in conclusory fashion that it had a meritorious defense." Id. (further noting that the defendant "presented no statement of underlying facts to support this conclusion to enable the court to appraise the merits of the claimed defense."). Here, by contrast, Mr. Krowne has been diligently attempting to participate in this case, and Defendants have set forth a substantiated defense. See also Seanor v. Bair Transp. Co. of Del., 54 F.R.D. 35, 36 (E.D. Pa. 1971) (denying a motion filed thirteen months after entry of default judgment). So, while it is true that Defendants have not identified a case vacating default after a delay of over one year,[4] neither have Plaintiffs identified a case where such a motion was denied. Regardless, this case is more like Lolatchy v. Arthur Murray, Inc., 816 F.2d 951, 953-4 (4th Cir. 1987)) (reversing denial of relief from default despite delay of over ten months after finding that delay "was caused in significant part by defendants' second attorney," no witnesses was made unavailable by the delay, the presentation of none of the plaintiff's evidence was prevented by the delay, and "the

[4] Undersigned counsel found orders granting relief from default after more than a year, but they involve jurisdictional infirmities or otherwise void judgments. See, e.g., Marquette Corp. v. Priester, 234 F. Supp. 799, 802–03 (D.S.C. 1964) (granting a motion filed after fifteen months on the grounds that the judgment was void). Due to the *pro bono* nature of this representation, comprehensive but expensive resources such as Lexis or Westlaw were not used to research this question, so Defendants cannot say with certainty whether such authorities exist. Nonetheless, Plaintiffs provide no reason to think that a Rule 55 motion otherwise grounded in good cause may not be brought and granted right up until the time of judgment.

defendants had responded to all discovery requests made by plaintiff, and, as far as the record shows, the case was ready for trial." So too here.

D. Vacating Default is in the Public Interest

The core difference between this Rule 55 motion and most others is the significant public interest involved in condemning, or at least preventing a chilling effect upon legitimate reporting and criticism of shady, dubious financial practices. Numerous magazine articles and blog postings have reported on seller-funded down payment assistance programs because they affect the integrity of a huge federal housing insurance program, which is in turn demonstrably important to the financial health of Americans more generally. See Mot. at 7-8 (citing several published articles on the subject in general, and discussing Plaintiffs in particular). Accordingly, the truth or falsity of Ms. Railey's accusations are a matter of public importance.

Although GAP ceased accepting or soliciting new accounts as of October 2008, there is reason to believe that Plaintiffs continue to have a less-than-laudable motive for pursuing a default judgment here. First, Forbes reported that Christopher Russell was planning a new seller-financed down payment assistance program in anticipation of the end of GAP:

> Russell's new game plan: He will soon start working with at least one other entity, perhaps even a church. . . . One group in the 'alliance' will give the money to a home buyer. The other will collect repayment from the seller. For the next transaction, they will switch roles so that they take turns collecting money. That way the down-payment donors can say with a straight face that they aren't being reimbursed out of the transaction they are funding. 'We're going forward,' Russell says. 'We believe in the program because it gets people into homes, it's economically viable—and it will be profitable for us.')

Ex. H to Railey Aff. in Opp'n to Pls.' TRO Mot. (Docket No. 18-11) (August 7, 2008 Forbes article entitled "Going Tribal" noting, *inter alia*, "Russell got rich off this racket once before.").

Second, Mr. Russell cited a prior legal victory in his threat to Defendants. In his public comment posted in response to the article, Mr. Russell stated, *inter alia*:

> Real and credible news organizations like, the Washington Post, Wall Street Journal, Forbes and others have all investigated this to the nth degree and they never reported the bullshit you are reporting because they found most of it to be gossip and innuendo which was completely untrue. . . . Fortunately, our judicial system offers a way for me to seek recompense for the harmed caused by a fraud, such as you. **Spend the money for a good lawyer because I use the best and I am coming after you hard.**

Ex. I to Railey Aff. in Opp'n to Pls.' TRO Mot. (Docket No. 18-13) (September 10, 2008 Comment by Mr. Russell submitted to whistleblower.ml-implode.com website) (emphasis added). Mr. Russell later followed-up with a more ominous threat, citing a settlement he reached in another case: "For your information, I will seek damages, as I have now collected nearly a quarter million from Mr. Brandon so far. (We allow him to make monthly payments. I won't be so generous with your "scam" blog.)." Krowne Decl. Ex. B (Docket No. 117-1) at 11 (June 2011 email concerning rebuttal copying September 2008 email from Christopher Russell).

Thus, Defendants suspect Plaintiffs want a judgment here because they wish to be able to direct future skeptics of their conduct to a post-Housing and Economic Reform Act judgment in their favor. Given the public importance of down payment assistance programs such as those masterminded by Mr. Russell, this honorable Court should not grant Plaintiffs the ability to wield the imprimatur of this Court as a cudgel against reporters or skeptics of their latest program(s) absent a trial on the merits. Defendants regret the delay that has resulted here, and have great respect for the time and effort spent by the Court in its analysis of Plaintiffs' First Motion for Default and Summary Judgment, resulting in its April 2012 opinion and order.

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Nonetheless, due to (1) Mr. Krowne's repeated efforts to participate, (2) the absence of a final judgment, (3) Plaintiffs' failure to identify any prejudice resulting from the delay, even with respect to discovery, despite their own failure to respond to interrogatories, Krowne Reply Decl. ¶8, and (4) the public importance of this case, Defendants respectfully reiterate their request that the Court vacate the entry of default and calendar this case for trial.

Dated: August 6, 2012

By: /s/
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a copy of the foregoing Reply Brief in Support of Defendants' Motion to Vacate Default (along with the supporting declaration of Aaron Krone) was sent electronically on August 7, 2012 to counsel for Plaintiffs, Michael L. Braunstein and Gary E. Mason, and to defendant Krista Railey.

By: /s/

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