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 Assigned: Hon. Deborah K. Chasanow

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PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION
TO DEFENDANTS' MOTION TO VACATE DEFAULT

I. INTRODUCTION and PRELIMINARY STATEMENT

More than one year ago, this Court entered a default against Defendants Krowne Concepts, Inc. (ñKCIò) and Implode-Explode Heavy Industries, Inc. (ñIEHIò). The default was entered after IEHI and KCIôs counsel moved to withdraw their appearances, the Court directed Defendants to show cause why a default should not be entered and IEHI and KCI sole principal, Aaron Krowne, submitted papers suggesting that the corporations intended to not secure counsel and default. Defendantsô moving papers confirm that more than one year ago, they intentionally defaulted. Accordingly, Defendantsô motion to set aside the default should be denied.

II. STATEMENT OF FACTS

A. Defendants' Intentional Default and Extensive Delay

In April and May 2011, Defendantsô IEHI and KCIôs counsel moved to withdraw their appearances in this action. (ECF No. 98 and 101.) This motion was supported by the declaration of Aaron Krowne, IEHI and KCIôs sole corporate member. On May 31, 2011, the Court granted the motions to withdraw as counsel and withdrew their appearances. (ECF No. 104.) The Courtôs May 31, 2011 Order directed Defendants IEHI and KCI to ñshow cause no later than June 14, 2011, why a default should not be entered against them.ò (Id.) Aaron Krowne, the principal of Defendants IEHI and KCI submitted papers suggesting that the corporations did not intend to secure counsel. (ECF No. 105.) On June 17, 2011, no counsel had entered an appearance on behalf of the corporate Defendants and this Court Ordered that:

> Default is entered against the Defendants Implode-Explode Heavy Industries, Incorporated and Krowne Concepts, Inc. (ECF No. 107.)

Defendants waited until July 6, 2012, more than one year after the default, to make the instant motion to set aside the default (Dkt. 117.)

B. Defendant Railey's Admissions Establish That IEHI and KCI Do not have a meritorious Defense

Defendant Krista Railey wrote the September 2008 article. (Railey Dec., p. 1, ¶ 3.) Defendants IEHI and KCI published the article and Mr. Krowne and Randall Marquis of IEHI and KCI were the articleôs editors. (Id. at ¶ 4.) Railey admits that ñthere are significant problems with the final published articleò and the ñarticle contains and implies false statements of fact and is misleading in a material manner.ò (Id. at p. 2, ¶ 6.)

Railey requested that Defendantsô IEHI and KCI provide Russell ña fair opportunity to rebut the articleò (Id. at ¶ 7) and admits that she ñadvised IEHI and Krowne [KCI] that the article was not factual accurate and should be removed from the website or substantially correctedò (Id. at ¶ 8), but that ñdefendants IEHI and Krowne [KCI] dissuaded me from making corrections to the article or publishing a corrected article on the website.ò (Id. at ¶ 9.)

Defendant Railey confirms Defendants IEHI and KCIôs disparate treatment of advertisers and non-advertises (Id. at ¶ 10), including, concealing and removing ñposts regarding the illegal activities of an advertiserò (Id. at ¶ 11), ñencouraged [her] to write a negative story a GCS [advertiserôs] competitorò (Id. at ¶ 13) and that she as ñserious questions regarding whether the article was published and/or not corrected/removed from the website because the plaintiffs refused to advertise.ò (Id. at p.3, ¶ 17.)

Railey describes researching an article regarding another DPA provider, American Family Funds (ñAFFò) administers of the Dove Foundation (collectively ñAFF/Doveò) (Id. at ¶ 18), that a principal of AFF/Dove began advertising on the website (Id. at ¶ 19) and that she was not encouraged to write the article by ML Implode and no AFF/Dove article was published on the website. (Id. at ¶ 20.)

Railey declares that defendants IEHI and KCI did not allow her to correct the article (Id.

at ¶ 23), continued to publish it after she advised it contained false statements (Id. at p. 1, ¶ 23) and are using the article and lawsuit to raise funds and generate publicity. (Id. at p. 3, ¶ 23.)

Defendants IEHI and KCI principals Aaron Krowne and Justin Owings admit that Railey knew more about the veracity of the article then they did and they had done no independent investigation. Since the author admits that the article is false, misleading and defamatory, Defendants IEHI and KCI cannot have a meritorious defense

III. LEGAL ARGUMENT

This Court entered a default against Defendants KCI and IEHI after their principal, Aaron Krowne, submitted papers suggesting that KCI and IEHI failure to secure counsel and default was intentional. Then KCI and IEHI waited more than one year to move to set the default aside. Defendantsô motion to set aside their year old intentional default should be denied.

Rule 55(c) of the Federal Rules of Civil Procedure states that a court ñmay set aside entry of default for good cause.ò In assessing a motion to set aside an entry of default, a district court is to consider whether the moving party acted with reasonable promptness and has a meritorious defense to the action. Additionally, a district court considers (1) who bore responsibility for the default; (2) any unfair prejudice to the non-moving party; (3) whether there is a history of dilatory action; and (4) the availability of sanctions less drastic. See Colleton Preparatory Acad., Inc. v. Hoover Universal, Inc., 616 F.3d 413, 417 (4th Cir. 2010); Payne ex rel. Estate of Calzada v. Brake, 439 F.3d 198, 204ï 05 (4th Cir. 2006).

In this case, the Clerk has entered an Order of Default pursuant to Rule 55(a), but neither the Clerk nor the Court has entered a ñjudgment by defaultò pursuant to Rule 55(b). Since no ñjudgment by default has been enteredò pursuant to Rule 55(c), the provisions of Rule 60(b)(1) do not apply to the pending motion. See Wainwright's Vacations, LLC v. Pan American Airways

Corp., 130 F.Supp.2d 712, 717 (D.Md. 2001);see also Carbon Fuel Co. v. USX Corp., 1998 WL 480809, at *2 (4th Cir. 1998).

Defendants must establish that they acted with reasonable promptness and have a meritorious defense. See Consolidated Masonry & Fireproofing, Inc. v. Wagman Const. Corp., 383 F.2d 249, 251 (4th Cir. 1967). Defendants, having delayed for over one-year after intentionally defaulting, cannot meet this standard.

A. Reasonable Promptness

More than one year ago, this Court entered a default against Defendants KCI andIEHI. The default was entered after IEHI and KCIôs counsel moved to withdraw their appearances, the Court directed Defendants to show cause why a default should not be entered and Defendants IEHI and KCI sole principal, Aaron Krowne, submitted papers suggesting that the corporations intended to not secure counsel and default.

Rule 55(c) does not provide a specific time limit for the filing of a motion to set aside an entry of default. Rather, ñwhether a party has taken órreasonably promptô action ... must be gauged in light of the facts and circumstances of each occasion....ò Kim v. Nyce, WL 2367383, 2 -3 (D.Md. 2010) citing Moradi, 673 F.2d at 727. Courts in this Circuit when ñmeasuring the reasonableness of the delayò use the same considerations for both Rule 55(c) and Rule 60(b). See Jones v. City of Richmond,106 F.R.D. 485, 488 -489 (D.C.Va.,1985) A motion to set aside a default judgment pursuant to Rule 60(b) must be made within a reasonable time, and in the case of motions that rely on subsections (1) to(3), not more than one year after judgment has been entered. Fed. R. Civ. P. 60(b). Here, more than one year has elapsed since the default.

In determining timeliness of a defendant's motion to set aside default judgment, a court may consider not only the length of time between the entry of judgment and the defendant's

response, but also may consider the delay between the time the defendant first learns of the judgment and his response thereto. See Park, 812 F.2d at 896. The promptness of a defendant's response to the entry of default or to a default judgment is necessarily fact-dependent. United States v. Moradi, 673 F.2d 725, 728 (4th Cir.1982). Courts commonly find a delay of a few days or weeks to be acceptable. Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp., 843 F.2d 808, 812 (4th Cir.1988) (two weeks); Park, 812 F.2d at 896 (fifteen days); Bank United, 286 B.R. at 843 (nineteen days); Rasmussen v. Am. Nat'l Red Cross, 155 F.R.D. 549 (S.D.W.Va.1994) (three days). Here, Defendants have known about the default since it was entered for more than one year.

Tellingly, Defendants fail to cite a single case excusing a delay of this length. In Consolidated Masonry, the Fourth Circuit denied the motion to set aside, determining that by waiting 2 ½ months between the date of entry of default and the motion, movant ñdid not act promptly.ò Consolidated Masonry & Fireproofing, Inc., 383 F.2d 249, 251 (4th Cir. 1967). See also Nelson v. The Coleman Co., 41 F.R.D. 7 (D. S.C. 1966) (Simons, J) (even short delay not excused where circumstances showed lack of intent to act promptly); accord Jack Gray Transport, Inc. v. Shaw, 105 F.R.D. 485, 488-89 (N.D. Ill. 1984) (determining under Rule 60(b) relief from judgment standard that, while failure to answer might be excusable neglect, failure of a party to act for several months after notified of default proceedings is inexcusable). See also Pagan v. American Airlines, Inc., 534 F.2d 990, 993 (1st Cir.1976) (a delay of either four months and eleven days or two months and nine days in moving to set aside judgment approving settlement of an action unreasonable. Court held that ñ[a]ny loss of rights stems solely from the cumulative effect of appellant's own neglect and that of his newly retained attorneyò); Goldfine v. United States, 326 F.2d 456 (1st Cir.1964) (ñparties' delay of two months and five days not

reasonable even after court found excusable neglect for rule 60(b) purposes); Schmidt v. Schubert, 79 F.R.D. 128, 129 (E.D.Wis.1978) (where law changed two months prior to final judgment, a Fed.R.Civ.P. 60(b)(6) motion was not timely when party waited one month and fifteen days after entry of final judgment to file the motion). . Seanor v. Bair Transport Co. of Del., 54 F.R.D. 35 (E.D.Pa. 1971) (Delay of 13 months in seeking to set aside entry of default required denial of motion to set aside default.)

The ñoutside limit of one year . . . is not a license to stand by and let the clock run.ò Jack Gray Transport, 105 F.R.D. at 489. Movantsô motion, made more than a year after the default is a glaring example of their cavalier disregard of ñan already overburdened judicial process,ò Colleton Prep, 223 F.R.D. at 407, as well as the legitimate interests of Plaintiffs. Defendants knew of their intentional default and failed to act for more than one year. Defendants have not acted with reasonable promptness and their motion to set aside the default should be denied.

B. Meritorious Defense

Defendants do not have a meritorious defense to this action because the articleôs author admits that the article was false and the false statements are defamatory *per se*. Further, Defendants admit publishing the article and knowing less about the articleôs facts than Railey.

In the context of a defendant's motion to set aside the entry of default or default judgment, a meritorious defense will be established if the defendant proffers evidence that, ñif believed, would permit the court to find for the prevailing party.ò Augusta Fiberglass, 843 F.2d at 812. Bare allegation of a meritorious defense is insufficient. Consol. Masonry & Fireproofing, Inc. v. Wagman Constr. Corp., 383 F.2d at 251.

Because the articleôs author admits that the article is false and defamatory, Defendants do not have a meritorious defense.

C. Additional Factors

In addition to determining whether Defendants acted with reasonable promptness and have a meritorious defense, courts consider: 1) personal responsibility; 2) prejudice to Plaintiffs; 3) history of dilatory action; and 4) the availability of less drastic sanctions. U.S. v. Moradi, 673 F.2d 725, 728 (4th Cir. 1982).

1. Personal Responsibility & History of Dilatory Action

Defendantsô publishing and refusal to remove an article whose author admits it is false, misleading and defamatory in retaliation for Plaintiffsô declining Defendantsô request to advertise is dilatory action. Further, Defendants are clearly responsible for this intentional default. Accordingly, Defendants should be permitted to set aside their intentional default.

In April and May 2011, Defendantsô IEHI and KCIôs counsel moved to withdraw their appearances in this action. (ECF No. 98 and 101.) On May 31, 2011, the Court granted the motions to withdraw as counsel and withdrew their appearances. (ECF No. 104.) The Courtôs May 31, 2011 Order directed Defendants IEHI and KCI to ñshow cause no later than June 14, 2011, why a default should not be entered against them.ò (Id.) Aaron Krowne, the principal of Defendants IEHI and KCI submitted papers suggesting that the corporations did not intend to secure counsel. (ECF No. 105.) On June 17, 2011, no counsel had entered an appearance on behalf of the corporate Defendants and this Court Ordered that:

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ñ[C]ourts have placed the greatest emphasis on this factor.ò Where, as here, the moving party caused the delay, courts are not hesitant in relying on this important factor to decline to set aside a default. E.g., Colleton Prep, 223 F.R.D. at 406-07 (citing Park Corp. v. Lexington Ins.

Co., 812 F.2d 894, 897 (4th Cir. 1987)). ñWhen the party is at fault ... the party must adequately defend its conduct in order to show excusable neglect.ò Augusta Fiberglass, 843 F.2d at 811.

Defendantsô motion should be denied because they intentionally defaulted.

2. Prejudice to Plaintiffs & Availability of Less Drastic Sanctions

Because of the delay and the associated attorney's fees, a lesser sanction should not be permitted. To grant the remedy sought merely rewards Movants and punishes the sole party that has abided by the deadlines and sought to pursue this case diligently. In the alternative, Defendants should be required to pay all of Plaintiffsô attorneysô fees and costs arising out of the default proceedings. See Adams v. Object Innovation, Inc., WL 7042224, 9 -10 (E.D.Va. 2011)

IV. CONCLUSION

Based on the foregoing, Defendantsô motion should be denied in its entirety.

Dated: July 23, 2012

KANTROWITZ, GOLDHAMER & GRAIFMAN, P.C.

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