UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

ERNEST TAYLOR

CIVIL ACTION

VERSUS

NO. 13-579-BAJ-RLB

THE CITY OF BATON ROUGE, ET AL

FRCP RULE 55(C) MOTION TO SET ASIDE DEFAULT

NOW INTO COURT, through undersigned counsel, come defendants, the City of Baton Rouge, Mary Roper, Carl Dabadie, Jr., Lisa Freeman, Patrick Wennemann, James Thomas, and Jane Doe (collectively "Defendants") who respectfully move this court to set aside the Default entered on August 25, 2014, for the reasons set forth below:

1.

Defendants have been named herein in a suit stemming from the arrest of Ernest Taylor.

2.

On October 22, 2013, James L. Hilburn of the East Baton Rouge Parish Attorney's Office waived service on behalf of defendants. After participating with opposing counsel in moving the case forward, Mr. Hilburn then abruptly retired from said position without first filing an answer.

3.

On April 16, 2014, plaintiff filed a motion for Preliminary Default, based on the premise that the defendants had failed to file an answer in the suit. Defendants immediately

filed an answer on April 17, 2014; however, that answer was stricken.

4.

Plaintiff then filed a Motion for Default Judgment. Defendants opposed the motion. On August 25, 2014, the Court issued a Ruling and Order granting the Motion for Default Judgment. It set the matter for hearing on September 23, 2014, to determine damages. It indicated that a final judgment would issue by separate order. That order has not yet issued.

5.

Defendants move this Honorable Court, pursuant to FRCP Rule 55 (c), for an order setting aside the Default. The basis for this request is that defendants took prompt action to correct the default; there exists a meritorious defense; the absence of prejudice to the plaintiff; the entry of default would produce a harsh or unfair result; and other reasons establishing good cause therefor.

WHEREFORE, defendants, the City of Baton Rouge, Mary Roper, Carl Dabadie, Jr., Lisa Freeman, Patrick Wennemann, James Thomas, and Jane Doe, pray that the premises considered, this FRCP Rule 55(c) Motion to Set Aside Default be granted, the default be set aside and vacated and, after due proceedings are had, plaintiff's suit be dismissed at plaintiff's cost. It is further prayed that the hearing scheduled to determine the amount of monetary damages be cancelled, and that defendants be granted leave to file an answer.

BY ATTORNEYS:

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UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

ERNEST TAYLOR **CIVIL ACTION**

VERSUS

NO. 13-579-BAJ-RLB

THE CITY OF BATON ROUGE, ET AL

CERTIFICATE

I hereby certify that a copy of the foregoing **Motion to Set Aside Default Under Rule 55(C)** has been served on all counsel record through a Notice of Electronic Filing generated by the Court's CM/ECF system, including those listed below on this 11th day of September, 2014.

Terrence J. Donahue, Jr.
Christopher D. Glisson
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340 Florida Street
Baton Rouge, Louisiana 70801

/s/ Gwendolyn K. Brown
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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

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CIVIL ACTION

VERSUS

NO. 13-579-BAJ-RLB

THE CITY OF BATON ROUGE, ET AL

MEMORANDUM IN SUPPORT OF
MOTION TO SET ASIDE DEFAULT UNDER RULE 55(C)

This Honorable Court recently rendered a Ruling and Order in response to the Plaintiff's Motion for Default Judgment against Defendants the City of Baton Rouge/Parish of East Baton Rouge ("City/Parish"), Carl Dabadie, Jr. ("Dabadie"), Mary Roper ("Roper"), Lisa Freeman ("Freeman"), Patrick Wenneman ("Wenneman"), James Thomas ("Thomas"), and Jane Doe ("Doe") (collectively "Defendants"). Plaintiff further sought from the Court an order (1) seeking to permanently enjoin the City/Parish from enforcing City of Baton Rouge, Louisiana and East Baton Rouge Parish, Louisiana Code of Ordinances §13:95.3 ("§13:95.3"); (2) directing the City/Parish to return Plaintiff's firearms; and (3) scheduling a hearing for the purposes of determining monetary damages to be awarded to Plaintiff. This Honorable Court has rendered a Ruling and Order granting Plaintiff's request for default judgment. (Doc.# 69). However, no final judgment has yet been entered. This

Motion is now filed, pursuant to Rule 55(C)[1] to request that this Honorable Court vacate the default.

Fed.R.Civ.P. 55(c) provides that an entry of default may be set aside if the party seeking relief shows good cause. In determining whether to set aside an entry of default, the district court should consider (1) whether the default was willful, (2) whether setting it aside would prejudice the adversary, and (3) whether a meritorious defense is presented. *CJC Holdings, Inc. v. Wright & Lato Inc.*, 979 F.2d 60, 64 (5th Cir.1992) (citing *United States v. One Parcel of Real Property*, 763 F.2d 181, 183 (5th Cir.1985)). These factors are not "talismanic." *Id*. Courts have been careful to avoid treating them as though they were exclusive, relying on such other factors as whether: (1) the public interest was implicated, (2) there was a significant financial loss to the defendant, and (3) the defendant acted expeditiously to correct the default. *Dierschke v. O'Cheskey (In re Dierschke)*, 975 F.2d 181, 184 (5th Cir.1992). More specifically, the Fifth Circuit has joined those circuits that have

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[1]Because no final judgment has yet been entered, this motion is brought pursuant to Rule 55(c) which is consistent with the well-established rule that Rule 60(b) applies only to final, appealable judgments. See 12 James Wm. Moore et al., *Moore's Federal Practice* §§ 60.22(3)(b), 60.23 (3d ed.2000); cf. *Berthelsen v. Kane*, 907 F.2d 617, 620 (6th Cir.1990) (noting that "a default judgment may be vacated only by satisfying the stricter standards applied to final, appealable orders under Fed.R.Civ.P. 60(b)"). An order granting default judgment without any judgment entry on the issue of damages is no more than an interlocutory order to which Rule 60(b) does not yet apply. See *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1364 n. 27 (11th Cir.1997) ("When the amount of damages is in dispute ... only the court may enter judgment, and then only after determining the amount of damages. There can be no 'judgment' without a determination of relief. Thus, the document entitled 'default judgment' in this case is more properly termed simply a 'default.' *Dassault Systemes, SA v. Childress*, 663 F.3d 832, 840 (6th Cir. 2011).

treated the tripartite test in *One Parcel of Real Property* as disjunctive. *Id*. at 183–84. Nevertheless, the ultimate inquiry remains whether the defendant shows "good cause" to set aside the default. *CJC Holdings, Inc*., 979 F.2d at 64.3 "Good cause" that will support grant of relief from default is not susceptible of precise definition; no fixed, rigid standard can anticipate all of the situations that may occasion failure of a party to timely answer a complaint. *In re Dierschke*, 975 F.2d at 183. Whatever factors are employed in determining whether to set aside entry of default, the imperative is that they be regarded simply as a means of identifying circumstances which warrant the finding of "good cause" to set aside a default. *Id*. at 184.

That decision necessarily is informed by equitable principles. *Id*. Default judgments are "generally disfavored in the law" and "should not be granted on the claim, without more, that the defendant ha[s] failed to meet a procedural time requirement." *Lacy v. Sitel Corp*., 227 F.3d at 292 (quoting *Mason & Hanger–Silas Mason Co. v. Metal Trades Council*, 726 F.2d 166, 168 (5th Cir.1984)). The Fifth Circuit has adopted a policy in favor of resolving cases on the merits and against the use of default judgments. *See Rogers v. Hartford Life & Accident Ins. Co*., 167 F.3d 933, 936 (5th Cir.1999); see also *Sun Bank of Ocala v. Pelican Homestead & Sav*. Ass'n, 874 F.2d 274, 276 (5th Cir.1989) ("Default judgments are a drastic remedy, not favored by the Federal Rules and resorted to by the courts in extreme situations [and] are available only when the adversary process has been halted because of an essentially unresponsive party.") Although Rule 55(c) issues are committed to the district court's

discretion, "when the grant of a default judgment precludes consideration of the merits of a case, even a slight abuse of discretion may justify reversal." *Shepard Claims Serv., Inc. v. William Darrah & Assocs*., 796 F.2d 190, 193 (6th Cir.1986), quoting *Williams v. New Orleans Pub. Serv., Inc*., 728 F.2d 730, 733-34 (5th Cir.1984).

While counsel for the defendants understand and deeply regret the actions and inactions which have given rise to the Court's frustration with its handling of the litigation thus far, it is respectfully submitted, nevertheless, that "good cause" exists to set aside the entry of default. First, the default was not "willful" as that term has been defined in the jurisprudence.[2] There is no indication that the defendants deliberately intended to violate court rules. And while James Hilburn did fail to timely file an answer, the record is clear that the adversary process was not halted by that fact. Indeed, Mr. Hilburn was responsive to plaintiff's counsel and took actions which made clear his intent to defend the suit. Mr. Hilburn and plaintiff's counsel engaged in numerous telephone calls regarding the case. Mr. Hilburn and plaintiff's counsel submitted a status report which resulted in a scheduling order being issued by the Court. As Mr. Hilburn explained at a hearing held on this matter, he did not immediately file an answer because he was waiting to see how the Attorney General's

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[2]The "willfulness" factor requires the court to consider whether the party intended to violate court rules and procedures and not merely whether the party failed to answer. 21A Fed. Proc., L. Ed. § 51:66, citing *Widmer-Baum v. Chandler-Halford*, 162 F.R.D. 545 (N.D. Iowa 1995) Good faith or the inadvertent failure to answer must be contrasted with a situation where a party absconds from the jurisdiction or tries to avoid liability by physically avoiding the proceedings. 21A Fed. Proc., L. Ed. § 51:66, citing *Commercial Bank of Kuwait v. Rafidain Bank*, 15 F.3d 238, 27 Fed. R. Serv. 3d 1353 (2d Cir. 1994) (evasion of service and refusal to respond to complaint).

Office intended to handle the criminal matter in order to determine whether it was more appropriate to file a stay.[3] Given his ongoing interactions with plaintiff's counsel, he did not expect that his opposing counsel would seek default. However, once Mr. Hilburn retired but before the case had been re-assigned to new counsel, plaintiff's counsel, on April 16, 2014, filed a Motion for Preliminary Default. As soon as the defendants' new counsel, Tedrick Knightshead, learned of the default, he promptly--indeed the very next day-- filed an Answer with the Court.[4] These actions demonstrate that the defendants are not refusing to comply with the orders of the Court such that the adversary process has been halted or are such that the defendants can be properly categorized as an "unresponsive party;" rather, the defendants actions demonstrate that they stand ready to defend this suit.

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[3]The courts can exercise discretion to manage civil litigation so as to avoid interference with companion criminal case. *Degen v. United States*, 517 U.S. 820, 827, 116 S. Ct. 1777, 1782, 135 L. Ed. 2d 102 (1996).

[4]The Court, in its Ruling and Order, correctly noted that the out-of-time Answer was filed without the requisite request for leave of court for its filing. The Court perceived the failure as "insult[ing]". (Doc.# 69). With the greatest respect to the Court, the defendants submit that Mr. Knightshead's action in filing the answer without first obtaining leave of court to do so was not intended to be disrespectful to the Court's rules and procedures. It is acknowledged that, as an attorney practicing before this Court, Mr. Knightshead is expected to know the rules applicable to the practice, and Mr. Knightshead does not take this responsibility lightly. Still, Mr. Knightshead does not typically practice in federal court. While Mr. Knightshead agreed to handle the federal caseload left by Mr. Hilburn's abrupt retirement, in the haste with which Mr. Knightshead sought to respond to the crisis he perceived when learning of the default in this matter, he failed to recall that leave of court is required when filing a late answer. Thus, it is submitted that the failure to seek leave to file the out-of-time answer was merely a result of the stressful situation in which Mr. Knightshead found himself and was, in no way, intended to be disrespectful to the Court.

Second, given the early stage of the litigation and the fact that defendants have attempted to cure the default by Mr. Knightshead's filing an Answer (which the plaintiff then moved to strike), it is clear that the denial of the plaintiff's request for default would not prejudice the plaintiff's case. As was set forth above, Mr. Hilburn's reliance on the negotiations he was undertaking with plaintiff's counsel, while ill-advised, was not effectively halting the adversary process, *i.e.* telephone calls were ongoing, a scheduling order was issued. The law is clear that there is no prejudice to the plaintiff where "the setting aside of the default has done no harm to plaintiff except to require it to prove its case. It has decided nothing against it except that it cannot continue to hold the sweeping [relief] it obtained ... without a trial and by default. All that ... has [been] done is to give the defendants their day in court."[5] Thus, mere delay does not alone constitute prejudice. Rather, "the plaintiff must show that the delay will result in the loss of evidence, increased difficulties in discovery, or greater opportunities for fraud and collusion."[6] Plaintiff has made no such showing; nor does any potential for unfair prejudice appear in the record.

Third, with regard to the issue of whether the defendants have presented a meritorious defense, it is clear simply from the Answer which the defendants previously attempted to file, that the defendant police officers and public officials have a potential defense of qualified immunity. At issue in this case is the defendant officers' enforcement of an

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[5] *Gen. Tel. Corp. v. Gen. Tel. Answering Serv.*, 277 F.2d 919, 921 (5th Cir.1960); *See also United States v. One Parcel of Real Property*, 763 F.2d 181, 183 (5th Cir.1985)

[6] *Berthelsen v. Kane*, 907 F.2d 617, 621 (6th Cir.1990).

ordinance which prohibits the possession of firearms in locations where alcoholic beverages are sold. While the plaintiffs have raised a claim that the ordinance is unconstitutional, and this Court has now so found, the defendant officers and public officials may have qualified immunity for their enforcement of an ordinance which they reasonably believed to be valid.

Indeed, Ernest Taylor was arrested for violation of City-Parish Ordinance 13:95.3 on October 13, 2012. The Louisiana Constitution was amended two months after his arrest to make the right to keep and bear arms in Louisiana a "fundamental" right and any restriction upon this right subject to strict scrutiny.[7] At the time of Mr. Taylor's arrest, no case had ever held that §13:95.3 was unconstitutional on its face or that the constitutionality of the ordinance was subject to a standard of strict scrutiny. Accordingly, at the time that Mr. Taylor was arrested, the provisions of the ordinance were presumed to be constitutional.

Qualified immunity is a defense that protects government officials from suit when they exercise the discretionary functions of their office. *See Harlow v. Fitzgerald*, 457 U.S. 800, 815, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). In order to overcome a defense of qualified immunity, a plaintiff must establish that: "(1) the official violated a statutory or constitutional right, and (2) the right was 'clearly established at the time of the challenged conduct." *Morgan v. Swanson*, 659 F.3d 359, 371 (5th Cir. 2011) (citing *Ashcroft v. al-Kidd*, —— U.S. ——, ——, 131 S.Ct. 2074, 2080, 179 L.Ed.2d 1149 (2011)). The court may

[7]The current provision within Art. I, § 11 of the Louisiana Constitution which provides: "The right of each citizen to keep and bear arms is fundamental and shall not be infringed. Any restriction on this right shall be subject to strict scrutiny" became effective on December 10, 2012.

examine these factors in any order. *Pearson v. Callahan*, 555 U.S. 223, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009) (overruling in part *Saucier v. Katz*, 553 U.S. 194 (2001)). It is the Plaintiff's burden to present evidence that a defendant is not entitled to qualified immunity when the defense is raised. *See Bazan ex rel. Bazan v. Hidalgo County*, 246 F.3d 481, 489 (5th Cir.2001).Claims of qualified immunity are not judged on twenty-twenty hindsight, or in light of knowledge ascertained after an event, but by looking through the eyes of the public official, considering what that official knew about the situation at the relevant time. *Arebalo v. Swisher Cnty., Tex*., 2:13-CV-082-J, 2013 WL 4475606 (N.D. Tex. Aug. 21, 2013*, citing Graham v. Connor*, 490 U.S. 386, 396–97, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989); *Poole v. City of Shreveport*, 691 F.3d 624, 630 (5th Cir.2012).

When a plaintiff files a complaint against a public official alleging a claim that requires proof of wrongful motive, the trial court must exercise its discretion in a way that protects the substance of the qualified immunity defense. It must exercise its discretion so that officials are not subjected to unnecessary and burdensome discovery or trial proceedings. The district judge has two primary options prior to permitting any discovery at all. First, the court may order a reply to the defendant's or a third party's answer under Federal Rule of Civil Procedure 7(a), or grant the defendant's motion for a more definite statement under Rule 12(e). Thus, the court may insist that the plaintiff "put forward specific, nonconclusory factual allegations" that establish improper motive causing cognizable injury in order to survive a prediscovery motion for dismissal or summary

judgment. *Siegert v. Gilley*, 500 U.S. 226, 236, 111 S.Ct. 1789, 1795, 114 L.Ed.2d 277 (1991) (KENNEDY, J., concurring in judgment). This option exists even if the official chooses not to plead the affirmative defense of qualified immunity. Second, if the defendant does plead the immunity defense, the district court should resolve that threshold question before permitting discovery. *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982).To do so, the court must determine whether, assuming the truth of the plaintiff's allegations, the official's conduct violated clearly established law. *Crawford-El v. Britton*, 523 U.S. 574, 597-98, 118 S. Ct. 1584, 1596-97, 140 L. Ed. 2d 759 (1998)

Because the officers and public officials in this matter had no reason to suspect that their enforcement, on October 13, 2012, of a presumptively valid statute, was unlawful, they should be deemed entitled to qualified immunity for the actions. It is appropriate for this Court to permit this matter to move forward to afford the defendants the opportunity to present this defense in whatever procedural manner may be available following the court's actions on this Motion to Vacate Default.

Similarly, defendants Parish Attorney Mary Roper, City Prosecutor Lisa Freeman, and Police Chief Carl Dabadie, have a defense to the claim that they made policy by directing the enforcement of an unconstitutional ordinance because, in fact, neither Roper, Freeman, nor Chief Dabadie are "policy makers."[8] These defenses are tangible and significant and, if

[8]*See e.g. Krueger v. Reimer*, 66 F.3d 75, 77 (5th Cir. 1995)*; Johnson v. Moore*, 958 F.2d 92, 94 (5th Cir.1992); *Carbalan v. Vaughn*, 760 F.2d 662, 665 (5th Cir.) *cert.*

established, may serve to completely absolve the defendants of any liability for the claims pled. Indeed, the defense of qualified immunity stands as a bar even to the prosecution of the suit.

Further, although this Court has analyzed the constitutionality of City-Parish Ordinance 13:95.3 and has deemed it unconstitutional, it has done so without benefit of all of the evidence which may be developed at trial. For example, in footnote 20 of its Ruling and Order, the Court took issue with the fact that the defendants "unequivocally state that there was probable cause for Thomas to stop Taylor's vehicle...[while there had yet] been no finding by this Court that Thomas had probable cause when he stopped Taylor the night of the arrest." *See Ruling and Order*, p. 13. (Doc.# 69). If this matter is permitted to go to trial, such facts can be fully developed. Further, the Court notes that "although Defendant's assert that §13:95.3 is 'narrowly tailored' to achieve a compelling government interest, they fail to establish such... [and, instead]... merely argue...[the defendants' compelling governmental interests]...without citation to any evidence in the record... *See Ruling and Order*, p. 13. (Doc.# 69). If this matter is permitted to go to trial, the defendants can develop evidence in support of its arguments. For example, an expert could be called or statistical evidence introduced to show that there are more arrests for assault and/or battery in establishments where alcohol is served than in other types of public establishments. It is a

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denied, 474 U.S. 1007, 106 S.Ct. 529, 88 L.Ed.2d 461 (1985); *Turner v. Upton County*, 915 F.2d 133, 137–38 (5th Cir.1990), *cert. denied*, 498 U.S. 1069, 111 S.Ct. 788, 112 L.Ed.2d 850 (1991); *Krueger v. Reimer*, 66 F.3d 75, 77 (5th Cir. 1995).

basic tenet of American jurisprudence "that courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Camreta v. Greene*, —— U.S. ——, 131 S.Ct. 2020, 2031, 179 L.Ed.2d 1118 (2011) (quoting *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988)). It is respectfully submitted that it is not yet necessary to reach the constitutional question presented here and, further, that this Court should reconsider its decision to reach a constitutional question via default judgment when, by its own wording, the facts and evidence have not yet been fully developed. Perhaps after the evidence is fully developed, the defendants may present a memorandum with an analysis of the constitutional issues which this Court deems more thorough and compelling than it found the analysis offered in its previous filings to be. *(See Ruling and Order*, p. 13, wherein this Court took issue with the post-hearing memorandum previously filed.) (Doc.# 69).

Finally, justice requires that the default not be confirmed. First, the petition contains allegations which are simply untrue. For example, as was set forth above, neither Parish Attorney Mary Roper, nor City Prosecutor Lisa Freeman, nor Police Chief Dabadie, is, as a matter of fact, a policy maker, and none of these defendants did, in fact, as alleged, set the policy of enforcing an ordinance which they knew to be unconstitutional. If permitted to go to trial, a defense to this allegation will be proven. If the default is confirmed, then there will a judgment setting forth as true these factually inaccurate allegations. Second, the factors addressed in *Dierschke v. O'Cheskey, supra,* weight in favor of vacating the default.

Specifically, the public interest is implicated by this ruling both in that the public has a right to know the accuracy of the allegations against its public officials, and by virtue of the fact that any judgment against the defendants will be paid from the public fisc; the citizens deserve their day in court. Finally, the defendants have acted expeditiously to correct the default. *See Dierschke v. O'Cheskey*, 975 F.2d at 184.

For the foregoing reasons, it is respectfully requested that the default previously entered be set aside, and that the defendants be granted leave to file an answer.

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CERTIFICATE

I hereby certify that a copy of the foregoing **Memorandum in Support of Motion to Set Aside Default Under Rule 55(C)** has been served on all counsel record through a Notice of Electronic Filing generated by the Court's CM/ECF system, including those listed below on this 11th day of September, 2014.

Terrence J. Donaue, Jr.
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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

ERNEST TAYLOR **CIVIL ACTION**

VERSUS

NO. 13-579-BAJ-RLB

THE CITY OF BATON ROUGE, ET AL

O R D E R

Considering defendants', the City of Baton Rouge, Mary Roper, Carl Dabadie, Jr., Lisa Freeman, Patrick Wennemann, James Thomas, and Jane Doe's, FRCP Rule 55(c) Motion to Set Aside Default:

IT IS ORDERED that the Ruling and Order of Default against defendants be set aside and vacated. **IT IS FURTHER ORDERED** that the hearing currently scheduled for the purpose of determining damages in cancelled. **IT IS FURTHER ORDERED** that defendants are granted leave to file an answer.

Baton Rouge, Louisiana, this _____ day of _____, 2014.

_____

DISTRICT JUDGE