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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 CWT Canada II LP, et al.,

10 Plaintiffs,

11 v.

12 Elizabeth J Danzik and Deja II LLC,

13 Defendants.
14

No. CV-16-00607-PHX-DGC

ORDER

15 Defendant Deja II LLC moves to set aside the default judgment and fee award
16 against it pursuant Rule 60(b). Doc. 72. The motion is fully briefed, and the Court heard
17 oral argument on April 24, 2017. For reasons stated below, the motion will be denied.

18 **I. Background.**

19 Plaintiff CWT Canada II LP filed this suit in March 2016, seeking monetary
20 damages and asserting claims against Defendants Elizabeth Danzik and Deja II for fraud,
21 conversion, breach of contract, unjust enrichment/restitution, constructive trust, and
22 accounting. Doc. 1. Ms. Danzik has stated under oath that she is the sole owner of Deja
23 II (Doc 33-1, ¶ 23), and her counsel confirmed during oral argument that she is the sole
24 manager as well. When neither Defendant responded to the complaint after being served,
25 default was entered by the Clerk under Rule 55(a). Doc. 16 (Deja II); Doc. 21 (Danzik).
26 On July 27, 2016, Plaintiffs moved for a default judgment against both Defendants.
27 Doc. 29; Doc. 34.
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1 Upon learning of the default entered by the Clerk against her and that Plaintiffs
2 were seeking default judgment as well, Ms. Danzik hired counsel. Her current attorney
3 stated during oral argument that she learned at the time that default had been entered
4 against Deja II as well. On August 2, 2016, Ms. Danzik moved to set aside the default
5 against her (Doc. 33), but her motion said nothing about Deja II, the default that had been
6 entered against it, or the motion for default judgement against it (*id.*). The Court granted
7 Ms. Danzik's motion and set aside her default. Doc. 47. The Court also granted the
8 unopposed motion for default judgment against Deja II in the amount of \$999,975.00,
9 with \$332,324.50 in pre-judgment interest through July 22, 2016. Doc. 49.

10 The default and default judgment against Deja II were known to Ms. Danzik. As
11 noted, her counsel confirmed during oral argument that she learned of the default entered
12 by the Clerk against Deja II when she learned of the default against herself. In addition,
13 Plaintiffs' motion for default judgement against her and Deja II was served on her
14 attorney and on Deja II's registered agent. Doc. 34 at 19. The default judgement against
15 Deja II was also sent to her attorney. Doc. 49. Ms. Danzik's answer, filed after her
16 default had been withdrawn, acknowledged that there were claims pending against Deja
17 II. Doc. 50. And after Ms. Danzik's counsel withdrew and she obtained new counsel
18 (Docs. 64, 66), her new attorneys acknowledged that the default judgement had been
19 entered against Deja II. Doc. 67 at 2 ("Defendant Deja II, LLC . . . is not represented and
20 a default judgement has been entered against it."). The new attorneys now ask the Court
21 to set aside the default judgment, arguing, largely without explanation, that it was the
22 fault of Ms. Danzik's previous lawyer.

24 **II. Analysis.**

25 In deciding whether to set aside a default judgment, a court must consider three
26 factors: (1) whether the party seeking to set aside the default engaged in culpable conduct
27 that led to the default; (2) whether the party has a meritorious defense; or (3) whether
28 withdrawing the default judgment would prejudice the other party. *United States v.*

1 *Signed Pers. Check No. 730 of Yubran S. Mesle*, 615 F.3d 1085, 1091 (9th Cir. 2010)
2 (citing *Franchise Holding II, LLC. v. Huntington Restaurants Grp., Inc.*, 375 F.3d 922,
3 925-26 (9th Cir. 2004)). Any one of these factors provides a sufficient reason for
4 refusing to set aside a default judgment. *Id.* In this instance, the Court need only
5 examine the issue of culpability.

6 **A. Culpability Standard.**

7 “[A] defendant’s conduct is culpable if he has received actual or constructive
8 notice of the filing of the action and *intentionally* failed to answer.” *TCI Grp. Life Ins.*
9 *Plan v. Knoebber*, 244 F.3d 691, 697 (9th Cir. 2001) (emphasis in original) (quoting *Alan*
10 *Neuman Productions, Inc. v. Albright*, 862 F.2d 1388, 1392 (9th Cir. 1988)); *see also*
11 *Meadows v. Dominican Republic*, 817 F.2d 517, 521 (9th Cir. 1987) (defendant
12 “intentionally declined” service). The Ninth Circuit has established two separate
13 standards for whether consciously failing to respond to a complaint fits the meaning of
14 “intentionally” as used in the definition of culpability. Which standard is applicable
15 depends on whether the party seeking to set aside default is considered “legally
16 sophisticated.” *Mesle*, 615 F.3d at 1093.

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18 When parties are legally sophisticated, the court may deem their conduct culpable
19 if they have “received actual or constructive notice of the filing of the action and failed to
20 answer[.]” *Franchise Holding II*, 375 F.3d at 926; *Mesle*, 615 F.3d at 1093 (“When
21 considering a legally sophisticated party’s culpability in a default, an understanding of
22 the consequences of its actions may be assumed, and with it, intentionality.”); *see also*
23 *Direct Mail Specialists, Inc. v. Eclat Computerized Techs., Inc.*, 840 F.2d 685, 690 (9th
24 Cir. 1988) (holding a defendant’s conduct was culpable because he “had actual notice of
25 the summons and complaint” soon “after it was served” and, “as a lawyer, presumably
26 was well aware of the dangers of ignoring service of process”).

27 When a party is not legally sophisticated, “the term ‘intentionally’ means that a
28 movant cannot be treated as culpable simply for having made a conscious choice not to

1 answer; rather, to treat a failure to answer as culpable, the movant must have acted with
2 bad faith, such as an ‘intention to take advantage of the opposing party, interfere with
3 judicial decisionmaking, or otherwise manipulate the legal process.’” *Mesle*, 615 F.3d at
4 1091 (quoting *TCI Group*, 244 F.3d at 697). “[A] defendant’s conduct [is] culpable . . .
5 where there is no explanation of the default inconsistent with a devious, deliberate,
6 willful, or bad faith failure to respond.” *Id.*

7 **B. Deja II is a legally sophisticated party.**

8 A party is legally sophisticated when it has experience in lawsuits involving issues
9 similar to those in the current litigation. *See TCI Group*, 244 F.3d at 699 n.6 (“we have
10 tended to consider the defaulting party’s general familiarity with legal processes or
11 consultation with lawyers at the time of the default as pertinent to the determination
12 whether the party’s conduct in failing to respond to legal process was deliberate, willful
13 or in bad faith.”); *Clearwater 2007 Note Program, LLC v. Piell*, No. 1:12-cv-00208-
14 BLW, 2014 WL 576098, at *3 (D. Idaho Feb. 11, 2014) (finding that a party was legally
15 sophisticated, and thus culpable for failing to respond to a summons, stating “[t]his is not
16 [defendant’s] first time in federal court and the fact of his prior familiarity with the world
17 of lending and lawsuits is of significance in this motion.”). Parties are also legally
18 sophisticated when they are “well aware of the dangers of ignoring service.” *Mesle*, 615
19 F.3d at 1093 (citing *Direct Mail Specialists*, 840 F.2d at 690); *see also Joe Hand*
20 *Promotions, Inc. v. Manzo*, 2:15-cv-00313-JWS, 2016 WL 5416141, at *3 (D. Ariz.
21 September 28, 2016) (finding that a defendant was legally sophisticated when he claimed
22 that he was “aware of the need to respond to a complaint from his experience with being
23 sued in the past” by “the same plaintiff in the case, and in the past he hired a lawyer and
24 responded to the complaint.”).

26 In contrast, parties are not legally sophisticated when they are unrepresented by
27 counsel at the time of default and are generally unfamiliar with the litigation process. *See*
28 *Mesle*, 615 F.3d at 1093 (“Here, we need not determine, however, whether the *Franchise*

1 *Holding II* standard applies to more than sophisticated parties represented by counsel who
2 may be presumed aware of their actions . . . Mesle is not a lawyer and [] he was
3 unrepresented at the time of default.”); *see also Lowery v. Barcklay*, No. CV-12-01625-
4 PHX-RCB, 2014 WL 47349, at *5 (D. Ariz. Jan. 7, 2014) (finding defendant was not
5 legally sophisticated because he was not a lawyer and was not represented when the
6 Clerk entered default in the action.).

7 In this case, Deja II and Ms. Danzik are legally sophisticated parties subject to the
8 standard of culpability set forth in *Franchise Holding II*. *See Mesle*, 615 F.3d at 1093.
9 Like the defendant in *Joe Hand Promotions*, Ms. Danzik, who is the sole owner and
10 manager of Deja II, has previously engaged in litigation with Plaintiffs. Like the
11 defendant in *Clearwater*, Ms. Danzik has experience in lawsuits involving issues similar
12 to the issues in this case. In a letter to the Court following the Clerk’s entry of default
13 against her, Ms. Danzik averred that she “is very familiar” with the techniques of
14 Plaintiffs’ counsel, Jeffery Eilender, “to get the attention of judges in an attempt to divert
15 attention from the facts and confuse the issues[.]” Doc. 24 at 1. Ms. Danzik continued:
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17 Jeffery Eilender is attempting to solidify a default judgment against me so
18 that his clients can avoid trying the case on the facts. Eilender continues
19 with misdirection, falsehoods, and omitted facts to improperly enter
20 evidence through his letter writing instead of following the rules.

21 I know for a fact that Eilender is being filed on for ethics and other charges
22 in New York, Wyoming, Arizona, British Columbia and Alberta Canada
23 for a whole host of offenses. I also know for a fact that my husband’s
24 former employer, RDX and his case for civil contempt is under appeal. As
25 well, the facts in this lawsuit filed by Eilender are being heard in the
26 Federal Bankruptcy Court in Wyoming, and in the Court of the Queen’s
27 Bench in Alberta Canada. Jeffery Eilender is also being charged with
28 willfully violating two federal stays in January of this year in New York.
Jeffery Eilender likes to omit substantial facts from his court filings in his
relentless attempts to maliciously prosecute me in the hopes of bankrupting
me by forcing me to fight a large law firm in Arizona, 1200 miles from
where I work and reside, for something that I did not do.

Also as clear proof of Eilender’s professional conduct is the fact that he
filed the lawsuit against me on March 4th, 2016, and Jeffery Eilender is
claiming that service was made only two days before the 90 day, limit,
according to my husband’s attorney. If I was evading service as Eilender
claims; Where was his process servers from March 3rd to May 24th?

1 *Id.* at 1-2. This letter shows that Ms. Danziki, the owner and manager of Deja II, has
2 substantial experience litigating against Plaintiffs' counsel. It also shows that she
3 understands service of process, the recently-amended 90-day period for service, and
4 default judgments.

5 In addition, other evidence submitted by Plaintiffs shows the extent of her legal
6 experience. Plaintiffs note that Ms. Danzik has been named as a defendant in at least
7 nine lawsuits over the past eleven years filed in Arizona state and federal courts.
8 Doc. 77, ¶ 4; Doc. 77-3 at 2 (*Intagrigo Composites LLC v. Danzik et al.*, CV-2006-
9 010512 (Maricopa Superior Ct. filed Jul. 12, 2006)); 4 (*Arrowhead Community Bank v.*
10 *Danzik et al.*, CV-2007-06408 (Maricopa Superior Ct. filed Apr. 13, 2007)); 6 (*Olson et*
11 *al. v. Danzik et al.*, CV-2008-064870 (Maricopa Superior Ct. filed Dec. 8 2008)); 10
12 (*GBJ, Ltd. v. Danzik et al.*, CV-2009-06229 (Maricopa Superior Ct. filed Feb. 18 2009));
13 12 (*Dairy Engineering Co. v. Danzik*, CV-2009-12284 (Maricopa Superior Ct. filed
14 May 15, 2009)); 13 (*N. 43rd Ent. LLC v. Danzik*, CV-2009-22305 (Maricopa Superior Ct.
15 filed Jul. 13, 2009)); 15 (*SR Bray LLC v. Danzik et al.*, CV-2009-034557 (Maricopa
16 Superior Ct. filed Oct. 30, 2009)); 18 (*Larson v. White Mountain Grp. LLC et al.*, 2:11-
17 cv-01111-FJM (D. Ariz. 2011)); 28 (*Larson v. Danzik et al.*, CV-2011-018103 (Maricopa
18 Superior Ct. filed Aug. 30, 2011)).

19 In *Larson v. White Mountain Group LLC*, a 2011 case filed in this Court, Dennis
20 Danzik was named as a Defendant along with his wife, "Jane Doe Danzik." *Larson*,
21 2:11-cv-01111-FJM (Doc. #1). The Danziks failed to answer and the Clerk entered
22 default. *Id.* (Docs. 14-15). After receiving notice of the entry of default, the Danziks
23 made a motion to set aside the default (*id.* (Doc. 27)), and included a declaration from Ms.
24 Danzik in support of that motion (*id.* (Doc. 29)).

25 Ms. Danzik is a legally sophisticated party with experience in defending litigation
26 and using legal counsel. Because she claims to be the sole owner and manager of Deja II,
27 the Court finds that Deja II is also legally sophisticated. Accordingly, the Court
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1 concludes that Deja II may be held to the *Franchise Holding II* standard of
2 culpability. *See Mesle*, 615 F.3d at 1093.

3 **C. Deja II engaged in a knowing failure to respond.**

4 When the party seeking to set aside default is legally sophisticated, the court may
5 deem their conduct to be culpable if they have “received actual or constructive notice of
6 the filing of the action and failed to answer[.]” *Franchise Holding II*, 375 F.3d 922, 926
7 (9th Cir. 2004); *Mesle*, 615 F.3d at 1093. In this case, the record shows that Deja II
8 received actual notice of the filing against it and repeatedly failed to answer.

9 On March 4, 2016, Plaintiffs filed this action against Ms. Danzik and Deja II.
10 Doc. 1. On April 1, 2016, service was executed on Deja II’s authorized agent, Lisa
11 Kline, at “c/o Harvard Business Services, Inc., 16192 Coastal Highway, Lewes, DE
12 19958.” Doc. 11. Accordingly, the Court finds that Deja II received actual notice of this
13 action by April 1, 2016. *See Fed. R. Civ. P. 4(a), (h)*.

14 Deja II argues that its failure to respond is not culpable because, while the
15 authorized agent may have been served, Ms. Danzik was not yet aware of the litigation.
16 Doc. 79 at 2. Setting aside the fact that service on a registered agent generally comes to
17 the attention of an LLC’s sole owner and manager, this position is not persuasive because
18 Deja II failed to respond even well after Ms. Danzik had retained counsel and responded
19 to this action.

20 On June 29, 2016, the Clerk entered default as to Deja II. Doc. 16. On July 7,
21 2016, the Clerk entered default against Ms. Danzik. Doc. 21. As noted above, Ms.
22 Danzik’s counsel agreed at oral argument that she learned of the default against Deja II
23 when she learned of the default against herself. Ms. Danzik wrote two letters to the
24 Court, detailing her understanding of the litigation and asking for time to hire an attorney.
25 Doc. 22, 24. Counsel appeared for her, but not for Deja II, on July 15, 2017. Doc. 26.

26 On August 4, 2016, Plaintiffs filed a motion for default judgment against both Ms.
27 Danzik and Deja II. Doc. 34. That same day, Ms. Danzik, now represented by counsel,
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1 filed a motion to set aside the Clerk's default against her, but not against Deja II.
2 Doc. 33. Two weeks later, Ms. Danzik, through her attorney, responded to Plaintiffs'
3 motion for default judgment against her and Deja II, but did not respond on behalf of
4 Deja II. Doc. 36. The Court set aside the Clerk's default against Ms. Danzik (Doc. 47),
5 and, on October 17, 2016, granted the unopposed motion for default judgment against
6 Deja II (Doc. 49). The Court's docketing system shows that the default judgement
7 against Deja II was served on Ms. Danzik's attorney. Doc. 49.

8 On October 31, 2016, Ms. Danzik filed her answer to the complaint. Doc. 50. In
9 her answer, Ms. Danzik made clear that she was representing her interests alone. She
10 responded to multiple allegations against Deja II in the following manner: "Paragraph
11 [124-28] of the Complaint does not call for an admission or denial from this answering
12 Defendant, as the cause of action is brought only against Deja II." *Id.*, ¶¶ 124-28. On
13 November 21, 2016, Ms. Danzik filed an amended answer, but made no changes on
14 behalf of Deja II. Doc. 62, ¶¶ 124-28.

15 On December 12, 2016, new counsel appeared for Ms. Danzik. Doc. 66. These
16 new attorneys did not appear for Deja II. *Id.* On January 10, 2017, the parties submitted
17 a Rule 26(f) case management report. Doc. 67. The parties jointly stated that "Defendant
18 Deja II, LLC ('Deja II') is not represented and default judgment has been entered against
19 it." *Id.*, ¶ 1. The parties acknowledged that "Defendant Deja II never appeared. On
20 October 17, 2016, the Court entered a default judgement against Deja II in the amount of
21 \$999,975.00, \$332,324.50 in pre-judgment interest through July 22, 2016, and post
22 judgment interest pursuant to 28 U.S.C. 17 1961." *Id.*, ¶ 5.

23 The Court held a case management conference on January 13, 2017. Doc. 68. No
24 suggestion was made that counsel for Ms. Danzik was representing Deja II, or that the
25 default judgment against Deja II should be withdrawn. Based on the parties'
26 representations at the conference, the Court issued a case management order on
27 January 20, 2017, setting the schedule for the remainder of this litigation. Doc. 69. On
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1 January 31, 2017, ten months after receiving notice, Deja II filed its motion to set aside
2 default, through the same counsel who two weeks earlier had stated Deja II was not
3 represented. Doc. 72.

4 The Court concludes that Deja II received notice of this lawsuit no later than
5 April 1, 2016, the date it was served. The sole owner and manager of Deja II – Ms.
6 Danzik – had actual notice that Deja II was a party to this lawsuit and that default had
7 been entered against it by the Clerk no later than July 15, 2016.¹ Based on these facts,
8 and Deja LL’s status as a legally sophisticated party, the Court concludes that Deja II’s
9 failure to respond was culpable under the *Franchise Holding II* standard. *See Franchise*
10 *Holding II*, 375 F.3d at 926; *Mesle*, 615 F.3d at 1093.

11
12 **D. Ms. Danzik’s former counsel’s alleged negligence does not constitute an**
13 **“extraordinary circumstance.”**

14 Deja II attempts to blame Ms. Danzik’s former counsel for its failure to appear in
15 this case, but Deja II has asserted no evidence in support of this assertion – no affidavits,
16 no declarations, no documents. Ms. Danzik retained counsel after she learned that default
17 had been entered against her and the LLC she solely owns and manages, but Deja II’s
18 motion provides no explanation as to why or under what circumstances counsel thereafter
19 allegedly failed to act on behalf of Deja II. And the history cited above demonstrates that
20 Ms. Danzik and her counsel were well aware of Deja II’s failure to appear and the default
21 judgment entered against it.

22 It is well established that “[c]lients must be held accountable for the acts and
23 omissions of their attorneys,’ and [Defendants] ‘cannot now avoid the consequences of
24 the acts or omissions’ of its [former] counsel. *S.E.C. v. Platforms Wireless Int’l Corp.*,
25 617 F.3d 1072, 1101 (9th Cir. 2010) (quoting *Pioneer Inv. Servs. Co. v. Brunswick*
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28 ¹ Defense counsel stated during oral argument that Ms. Danzik retained counsel
after learning that default had been entered by the Clerk against her and Deja II. Counsel
appeared on July 15, 2016. Doc. 26.

1 *Assocs. Ltd.*, 507 U.S. 380, 396-97 (1993)). “Any other notion would be wholly
2 inconsistent with our system of representative litigation, in which each party is deemed
3 bound by the acts of his lawyer-agent and is considered to have notice of all facts, notice
4 of which can be charged upon the attorney.” *Pioneer*, 507 U.S. at 397 (quotation marks
5 and citations omitted).

6 But “where the client has demonstrated gross negligence on the part of his
7 counsel, a default judgment against the client may be set aside pursuant to Rule
8 60(b)(6).” *Community Dental Services v. Tani*, 282 F.3d 1166, 1169 (9th Cir. 2002).
9 “[C]ourts have traditionally used the phrase ‘gross negligence’ to signify a greater, and
10 less excusable, degree of negligence, and have required parties alleging gross negligence
11 to establish the existence of a more serious violation of the actor’s duty[.]” *Id.* at 1170.

12 In *Community Dental*, the Ninth Circuit held that an attorney was grossly
13 negligent where he “virtually abandoned his client by failing to proceed with his client’s
14 defense despite court orders to do so.” *Id.* The attorney in question engaged in a litany
15 of extraordinary behavior, including failing to sign a stipulation for an extension of time
16 to answer that had already been signed by the opposing party, failing to serve a copy of
17 the answer on the opposing parties after filing it two weeks late, failing to contact
18 opposing counsel for preliminary settlement discussions despite being ordered to do so,
19 failing to oppose a motion to strike his client’s answer, failing to attend various hearings,
20 and actively misleading his client regarding the progress of the case. *Id.* at 1170-71.
21 “Such failures and actions cannot be characterized as simple attorney error or ‘mere
22 neglect.’ *Id.* at 1171.

23 Here, *Deja II* argues that Ms. Danzik’s former counsel engaged in gross
24 negligence that prevented *Deja II* from participating in the litigation, and that setting
25 aside the default judgment is therefore appropriate under Rule 60(b)(6). *Id.* (citing
26 *Community Dental*, 282 F.3d at 1164); Doc. 72 at 2. But the party alleging gross
27 negligence must show a more serious violation of the actor’s duty. *Community Dental*,
28

1 282 F.3d at 1170. In this instance, Deja II has put forward no evidence to show that Ms.
2 Danzik’s former counsel was grossly negligent, other than to say that he did not file a
3 motion to set aside default on behalf of Deja II. Deja II does not allege that Ms. Danzik
4 hired her former counsel to represent it. Instead, Deja II contends that “[w]hether or not
5 Elizabeth Danzik’s fee agreement included Deja II is irrelevant. In advising Mrs.
6 Danzik[,] [her former counsel] should have included Deja II as to do so would have
7 protected his client and cost her virtually no extra expenditure of fees.” Doc. 79 at 2 n.1.

8 But without any evidence that Ms. Danzik – who clearly understood the nature of
9 litigation, the concept of service and default judgments, and her own ownership and
10 management of Deja II – had sought to have Deja II represented by her counsel, the
11 Court cannot conclude that counsel’s conduct was grossly negligent. Nothing in the
12 record indicates that any such relationship existed between Ms. Danzik’s former counsel
13 and Deja II. Even Ms. Danzik’s current counsel expressly represented to the Court on
14 January 10, 2017, that Deja II was unrepresented. Doc. 67.

15
16 **E. Summary.**

17 The Court recognizes that Rule 60(b) is remedial in nature and is to be applied
18 liberally. *See TCI Group*, 244 F.3d at 696. This is one of the rare cases, however, where
19 the interest of resolving the dispute on the merits must give way to the competing interest
20 of finality. *See Mesle*, 615 F.3d at 1091 n.1 (noting that Rule 60(b) is applied less
21 liberally than Rule 55(c) because in the Rule 55(c) context “there is no interest in the
22 finality of the judgment with which to contend”). This litigation has been pending for
23 more than one year, the default against Deja II was entered by the Clerk ten months ago,
24 Deja II’s sole owner and manager has been involved in this case and represented by
25 counsel for more than nine months, the default judgment has been in place for more than
26 six months, and the discovery period is more than half over. Defendants are legally
27 sophisticated parties, and have presented no reasonable explanation for Deja II’s delay.

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