UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MASHA ALLEN, by her Parent and Guardian FAITH ALLEN,	:	Hon Joseph H. Rodriguez
Plaintiff,	:	Civil Action No. 08-4614
v.	:	ORDER
FAMILIES THRU INTERNATIONAL ADOPTION, INC., CHILD PROMISE, INC., REACHING OUT THRU INTERNATIONAL ADOPTION, INC., and JEANNENE SMITH,	:	
Defendants.	:	

This matter has come before the Court on Plaintiff's Motion for Default Judgment against Defendants Child Promises, Inc., Reaching Out Thru International Adoption, Inc., and Jeannene Smith. On September 15, 2008, Plaintiff filed a Complaint against the above-mentioned Defendants. The docket indicates that these Defendants were served on September 24, 2008. Pursuant to Federal Rule of Civil Procedure 12(a)(1)(A), which provides that a defendant shall serve an answer within twenty (20) days after being served with the summons and the complaint, Defendants were given until October 14, 2008 to file an Answer to the Complaint. On October 13 and 14, 2008, however, the parties filed Stipulations extending the time by an additional thirty days for these Defendants to respond to the Complaint. On January 16, 2009, with no Appearance or Answer having come from these Defendants, Plaintiff moved for default judgment. Despite Defendants' apparent failure to timely answer the complaint, however, Plaintiff's motion for default judgment must be denied, as the Plaintiff has failed to comply with the procedural

requirements of Federal Rule of Civil Procedure 55.[1]

Before parties may move for default judgment pursuant to Rule 55(b), they must have the Clerk enter default pursuant to Rule 55(a). DeTore v. Local No. 245 of the Jersey City Pub. Employees Union, 511 F. Supp. 171, 176 (D.N.J.1981) ("[N]o default *judgment* may be entered under Fed. R. Civ. P. 55(b) ... unless a *default* has previously been entered by the clerk under 55(a)."). Thus, Rule 55 contemplates a two-step process: first, the entry of default, then if the defendant fails to seek vacation of default, the granting of a subsequent motion for default judgment. This two-step process complements the Third Circuit's policy of disfavoring default judgments and encouraging decisions on the merits. Harad v. Aetna Casualty and Surety Co., 839 F.2d 979, 982 (3d Cir. 1988) (citations omitted); United States v. $55,518.05 in U.S. Currency, 728 F.2d 192, 194-95 (3d Cir. 1984).

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[1] Rule 55, Default, provides:
(a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default.
(b) Judgment. Judgment by default may be entered as follows:
(1) By the Clerk. When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if the defendant has been defaulted for failure to appear and is not an infant or incompetent person.
(2) By the Court. In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, the party (or, if appearing by representative, the party's representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

In this case, although entry of default is a prerequisite to obtaining a default judgment under Federal Rule of Civil Procedure 55(b)(1) or 55(b)(2), no default had been entered because Plaintiff had not filed any application with the Clerk of the Court for entry of default.[2] See 10A Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d § 2682 (1998).

Accordingly,

IT IS ORDERED on this 7th day of July, 2009 that Plaintiff's motion for default judgment [13] is hereby DENIED without prejudice.

/S/ Joseph H. Rodriguez
JOSEPH H. RODRIGUEZ
U.S.D.J.

[2] The Court notes that the Plaintiff's request for entry of default should be accompanied by an affidavit proving service of the summons and complaint upon Defendants and an affidavit of non-military service.

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Defendants.	:	

This matter has come before the Court on Plaintiff's second Motion for Default Judgment against Defendants Child Promises, Inc. and Reaching Out Thru International Adoption, Inc. On September 15, 2008, Plaintiff filed a Complaint against the above-mentioned Defendants. The docket indicates that these Defendants were served on September 24, 2008. Pursuant to Federal Rule of Civil Procedure 12(a)(1)(A), which provides that a defendant shall serve an answer within twenty (20) days after being served with the summons and the complaint, Defendants were given until October 14, 2008 to file an Answer to the Complaint. On October 13, 2008, however, the parties filed Stipulations extending the time by an additional thirty days for these Defendants to respond to the Complaint. On March 4, 2009, with no Appearance or Answer having come from these Defendants, Plaintiff requested entry of default and moved for default judgment. The same day, the Clerk of Court entered default against Defendants Child Promises, Inc. and Reaching Out Thru International Adoption, Inc. for failure to answer or otherwise appear.

Plaintiffs now move for Default Judgment pursuant to Rule 55 of the Federal Rules of Civil Procedure. Rule 55 provides, in relevant part:

> **(a) Entry.** When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default.
>
> **(b) Judgment.** Judgment by default may be entered as follows:
>
> **(1) By the Clerk.** When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if the defendant has been defaulted for failure to appear and is not an infant or incompetent person.
>
> **(2) By the Court.** In all other cases the party entitled to a judgment by default shall apply to the court therefor . . . .

Fed. R. Civ. P. 55. Under Rule 55, "the entry of default is an essential predicate to any default judgment." DeTore v. Local No. 245 of the Jersey City Pub. Employees Union, 511 F. Supp. 171, 176 (D.N.J. 1981).

A party is not entitled to the entry of a judgment of default as of right because the entry of such a judgment is left primarily to the discretion of the district court. Hritz v. Woma, 732 F.2d 1178, 1180 (3d Cir. 1984). Defendants are deemed to have admitted the factual allegations of the Compliant by virtue of their default, except those factual allegations related to the amount of damages. See 10A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2688, at 58-59 (3d ed. 1998); see also Comdyne I, Inc. v. Corbin, 908 F.2d 1142 (3d Cir. 1990); In re Industrial Diamonds Anitrust Litig., 119 F. Supp.2d 418, 420 (S.D.N.Y. 2000) (holding "a default is not an admission of the amount of damages claimed"). The Court need not accept a

plaintiff's legal conclusions, however, because "[e]ven after default . . . it remains for the court to consider whether the unchallenged facts constitute a legitimate cause of action, since a party in default does not admit mere conclusions of law." Id. § 2688 at 63.

The unchallenged factual allegations in the Complaint demonstrate that the Plaintiff has stated legitimate claims. The Complaint has alleged that negligent practices by the Defendants resulted in a minor being placed for adoption with, and forced to remain in the custody of, an individual who sexually abused the child for five years subsequent to the adoption proceedings.

However, before entering a default judgment, a court must consider: (1) whether there would be prejudice to the plaintiff if no default judgment was entered; (2) whether a meritorious defense has been asserted by the defendant; and (3) whether the default was willfully caused by the defendant. See Livingston Powdered Metal, Inc. v. NLRB, 669 F.2d 133, 136 (3d Cir. 1982); Medunic v. Lederer, 533 F.2d 891, 894 (3d Cir. 1976); Tozer v. Charles A. Krause Milling Co., 189 F.2d 242, 245 (3d Cir. 1951). In considering these factors, a court must apply a standard of liberality so that any doubt is resolved in favor of hearing claims on their merits. Medunic, 533 F.2d at 894.

Since Defendants Child Promises, Inc. and Reaching Out Thru International Adoption, Inc. have not filed any responsive pleading nor shown cause why a default judgment should not be granted, the Court need not determine the meritorious defense or whether the default was a result of willful misconduct. Carpenters Health & Welfare Fund v. Naglak Design, Civil No. 94-2829, 1995 WL 20848 *2 (E.D.Pa. Jan. 18, 1995); Teamsters Health and Welfare Fund of Philadelphia and Vicinity v. Dimedio Lime Company, Civil No. 06-4519, 2007 WL 4276559 *2 (D.N.J. Nov. 30, 2007). The Court's

sole consideration is whether the Plaintiff will be prejudiced if default is denied. Id.

Under the circumstances, Plaintiff will be prejudiced if no default judgment is entered, because she has no other means of vindicating her claim against Child Promises, Inc. and Reaching Out Thru International Adoption, Inc., which have not offered any excusable reason for their default.

Accordingly,

IT IS ORDERED on this 7th day of July, 2009 that Plaintiff's motion for default judgment against Child Promises, Inc. and Reaching Out Thru International Adoption, Inc. [24] is hereby GRANTED.

/S/ Joseph H. Rodriguez
JOSEPH H. RODRIGUEZ
U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MASHA ALLEN, by her Parent and Guardian FAITH ALLEN,	:	Hon Joseph H. Rodriguez
Plaintiff,	:	Civil Action No. 08-4614
v.	:	
FAMILIES THRU INTERNATIONAL ADOPTION, INC., CHILD PROMISE, INC., REACHING OUT THRU INTERNATIONAL ADOPTION, INC., and JEANNENE SMITH,	:	ORDER
Defendants.	:	

This matter has come before the Court on Defendant Jeannene Smith's motion to dismiss the Complaint against her for failure to state a claim under Fed. R. Civ. P. 12(b)(6). Smith has argued that Plaintiff's guardian, Faith Allen, lacks standing to pursue this matter because she allegedly is no longer the legal guardian of Masha Allen.

In support of her argument, Smith cites to a February 15, 2008 e-mail from attorney James Marsh captioned Notice of Third Party Interest. The e-mail and accompanying notice states that on August 3, 2005, Marsh's law firm became the attorney in fact and in law for Masha Allen, subsequently was not properly discharged, and therefore holds an attorney's lien on any litigation proceeds payable to Masha Allen. Both also state "according to a determination by the State Bar of Georgia, a suitable independent guardian must be appointed for the minor child."

Smith also attaches a Douglas County [Georgia] Sheriff's Office Complaint Report dated September 27, 2006, relating details of an incident in which an individual with whom Masha Allen had been staying refused to relinquish custody back to Faith Allen, for fear of possible abuse. Eventually, after a phone call from Marsh, the Sheriff's Office took Masha Allen to the hospital for evaluation.

On or about February 10, 2007, James Marsh apparently filed a statutory notice of claim against Allegheny County, Pennsylvania and its agencies and individual employees allegedly responsible for Faith Allen's adoption of Masha Allen. The Statutory Notice of Claim is attached to Smith's motion and alleges that the Respondents failed to adequately investigate and supervise Faith Allen, as Masha Allen should not have been placed in Faith Allen's care on May 27, 2003 or anytime thereafter. A follow-up Internet post by Marsh on September 21, 2008 alleged that she had been "abused and neglected by her current caretaker."

Finally, Smith has provided the Court with a transcript of Faith Allen's December 7, 2004 testimony against her former minister who was charged with indecent assault but found not guilty by a judge in Allegheny County, Pennsylvania.

In an affidavit captioned "in support of her motion to dismiss for lack of personal jurisdiction," Jeannene Smith states that "it was not [her] position to make determinative judgment evaluations as to the suitability of persons to qualify as adoptive parents under the various State licensing requirements. . . . My duties were administerial [sic] in nature only; all of my efforts and work was within the scope of my employment. . . . [Plaintiff's attorney] is completely mistaken . . . that I had any personal involvement in the decision-making process of placing Masha . . . as an adoptive child . . . ."

In opposition to the motion to dismiss, Plaintiff has provided a Certificate of Adoption from Allegheny County, Pennsylvania showing that Faith Allen legally adopted Masha Allen on May 14, 2004.

A complaint should be dismissed pursuant to Rule 12(b)(6) if the alleged facts, taken as true, fail to state a claim. Fed. R. Civ. P. 12(b)(6). When deciding a motion to dismiss pursuant to Rule 12(b)(6), ordinarily only the allegations in the complaint, matters of public record, orders, and exhibits attached to the complaint, are taken into consideration.[1] See Chester County Intermediate Unit v. Pa. Blue Shield, 896 F.2d 808, 812 (3d Cir. 1990). It is not necessary for the plaintiff to plead evidence. Bogosian v. Gulf Oil Corp., 561 F.2d 434, 446 (3d Cir. 1977). The question before the Court is not whether the plaintiff will ultimately prevail. Watson v. Abington Twp., 478 F.3d 144, 150 (2007). Instead, the Court simply asks whether the plaintiff has articulated "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).

"A claim has facial plausibility[2] when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. - - - , 129 S. Ct. 1937, 1949 (2009) (citing Twombly, 550 U.S. at 556). "Where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Iqbal, 129 S. Ct. at 1950.

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[1]"Although a district court may not consider matters extraneous to the pleadings, a document integral to or explicitly relied upon in the complaint may be considered without converting the motion to dismiss into one for summary judgment." U.S. Express Lines, Ltd. v. Higgins, 281 F.3d 383, 388 (3d Cir. 2002) (internal quotation marks and citations omitted) (emphasis deleted).

[2]This plausibility standard requires more than a mere possibility that unlawful conduct has occurred. "When a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" Id.

The Court need not accept "'unsupported conclusions and unwarranted inferences,'" Baraka v. McGreevey, 481 F.3d 187, 195 (3d Cir. 2007) (citation omitted), however, and "[l]egal conclusions made in the guise of factual allegations . . . are given no presumption of truthfulness." Wyeth v. Ranbaxy Labs., Ltd., 448 F. Supp. 2d 607, 609 (D.N.J. 2006) (citing Papasan v. Allain, 478 U.S. 265, 286 (1986)); see also Kanter v. Barella, 489 F.3d 170, 177 (3d Cir. 2007) (quoting Evancho v. Fisher, 423 F.3d 347, 351 (3d Cir. 2005) ("[A] court need not credit either 'bald assertions' or 'legal conclusions' in a complaint when deciding a motion to dismiss.")). Accord Iqbal, 129 S. Ct. at 1950 (finding that pleadings that are no more than conclusions are not entitled to the assumption of truth).

Further, although "detailed factual allegations" are not necessary, "a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do." Twombly, 550 U.S. at 555 (internal citations omitted). See also Iqbal, 129 S. Ct. at 1949 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.").

Thus, a motion to dismiss should be granted unless the plaintiff's factual allegations are "enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true (even if doubtful in fact)." Twombly, 550 U.S. at 556 (internal citations omitted). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not 'shown'-'that the pleader is entitled to relief.'" Iqbal, 129 S. Ct. at 1950 (quoting Fed. R. Civ. P. 8(a)(2)).

In this case, the Complaint makes clear that Faith Allen is the parent and guardian of Masha Allen. This factual allegation must be taken as true in considering the merits of the instant Rule 12(b)(6) motion. Moreover, even if the Court were to consider the extraneous exhibits attached to the motion, they would not have adequately established that the Complaint fails to state a claim, as they do not establish that Faith Allen is an improper representative of Masha Allen.

Accordingly,

IT IS ORDERED on this 9th day of July, 2009 that Defendant Jeannene Smith's motion to dismiss the Complaint against her for failure to state a claim under Fed. R. Civ. P. 12(b)(6) [16] is hereby DENIED without prejudice.

JOSEPH H. RODRIGUEZ
U.S.D.J.

UNITED STATES DISTRICT COURT
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MASHA ALLEN, by her Parent and Guardian FAITH ALLEN,	:	Hon Joseph H. Rodriguez
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FAMILIES THRU INTERNATIONAL ADOPTION, INC., CHILD PROMISE, INC., REACHING OUT THRU INTERNATIONAL ADOPTION, INC., and JEANNENE SMITH,	:	
Defendants.	:	

This matter has come before the Court on Plaintiff's Motion to Strike the Answer of Defendant Jeannene Smith. On September 15, 2008, Plaintiff filed a Complaint against the above-mentioned Defendants. The docket indicates that Defendant Smith was served on September 24, 2008. Pursuant to Federal Rule of Civil Procedure 12(a)(1)(A), which provides that a defendant shall serve an answer within twenty (20) days after being served with the summons and the complaint, Smith was given until October 14, 2008 to file an Answer to the Complaint. On October 14, 2008, however, the parties filed a Stipulation extending the time by an additional thirty days for the Defendant to respond to the Complaint. On January 16, 2009, with no Appearance or Answer having come from the Defendant, Plaintiff moved for default judgment. Despite Defendant's apparent failure to timely answer the complaint, however, Plaintiff's motion for default judgment was denied for failure to comply with the procedural requirements of Federal Rule of Civil Procedure 55.

Even before the Court's ruling, however, Defendant Smith filed an Answer to the Complaint on February 27, 2009. Plaintiff seeks to have the Answer stricken because it was filed out of the agreed upon time, which expired November 15, 2008, and was filed while Defendant Smith had a Rule 12(b)(6) motion pending, having filed that motion on February 2, 2009.

Federal Rule 12(f) permits a court to "strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." FED. R. CIV. P. 12(f). "'All well-pleaded facts are taken as admitted on a motion to strike but conclusions of law or of fact do not have to be treated in that fashion. Matter outside the pleadings normally is not considered on a Rule 12(f) motion.'" United States v. Kramer, 757 F. Supp. 397, 409 (D.N.J. 1991) (quoting 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 1380, 655-56 (1990)).

Generally, motions to strike are disfavored because of their dilatory character. Id. Additionally, courts are reluctant to grant such motions out of a concern that they often involve a premature evaluation of a defense's merits, before the necessary factual background is developed. See id. at 410. Nonetheless, a motion to strike will be granted "where the insufficiency of the defense is clearly apparent." United States v. Rohm & Haas (Rohm & Haas II), 939 F. Supp. 1142, 1151 (D.N.J. 1996). Under such circumstances, motions to strike "serve a useful purpose by eliminating insufficient defenses and saving the time and expense which would otherwise be spent in litigating issues which would not affect the outcome of the case." United States v. Marisol, Inc., 725 F. Supp. 833, 836 (M.D. Pa. 1989).

The Court, having considered the instant motion, and having denied Plaintiff's motion for default judgment against Smith, and having denied Smith's motion to dismiss the Complaint; and

In the interest of justice,

IT IS ORDERED on this 9th day of July, 2009 that Plaintiff's Motion to Strike the Answer of Defendant Jeannene Smith [26] is hereby DENIED.

JOSEPH H. RODRIGUEZ
U.S.D.J.