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RULE 55: WHY BROADLY INTERPRETING “OTHERWISE DEFEND” PROTECTS A DILIGENT PARTY’S RIGHTS AND ENCOURAGES AN ORDERLY AND EFFICIENT JUDICIAL SYSTEM

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When a defendant fails to answer a complaint, it is easy to say that a default should be entered against that defendant. However, when the defendant has answered the complaint, but fails to participate in the proceedings that follow—including pretrial conferences, discovery, and trial—the line becomes blurrier on whether a default should be entered. Consider this scenario: The defendant answers the complaint but fails to submit a pretrial brief. Once the trial date is set, the defendant and his attorney do not appear. The plaintiff, having already spent a considerable amount of time and money on this case, moves for entry of default. A default is entered against the defendant. The plaintiff is relieved because his case has some finality.

This scenario implicates Federal Rule of Civil Procedure 55(a), which states that a default must be entered against a party that “fail[s] to plead or otherwise defend.”¹ While failing to answer a complaint is within the meaning of failing to plead,² the question of whether a default should be entered becomes more difficult when the defendant³ has answered the complaint but

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¹ FED. R. CIV. P. 55(a).

² An answer to a complaint is considered a pleading under the Federal Rules of Civil Procedure. *See* FED. R. CIV. P. 7(a).

³ While typically a default is entered against a defendant, a default can be entered against a plaintiff if the plaintiff “fail[s] to plead or otherwise defend” a counterclaim. *See* 10A CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 2682 (3d ed. 1998). For simplicity’s sake, this Note refers to the defendant as the one against whom a default or default judgment is entered.

subsequently fails to appear at trial or a pretrial conference. On one hand, it seems fair to the plaintiff that the default be entered against the defendant. On the other hand, the defendant has shown, through its actions, an interest in defending against the lawsuit and has merely missed the trial date or a pretrial deadline. At the same time, however, to ensure an expeditious and efficient judicial system, it is important to deter undue delay where it can be prevented.

Rule 55(a) is the first step of a two-step process for entering a default judgment under Rule 55.⁴ A court clerk must enter a default against a party that "has failed to plead or otherwise defend."⁵ While failure to plead is well recognized as a failure to answer any one of the pleadings found in Rule 7(a),⁶ the federal circuit courts have inconsistently interpreted the words "otherwise defend."⁷ A majority of circuits have interpreted "otherwise defend" broadly, while a minority of circuits have interpreted this language narrowly.⁸

This Note argues that a uniform interpretation of "otherwise defend" is needed. Part I of this Note discusses the history and purpose of Rule 55, the procedure for entries of default and default judgment, and other alternatives to Rule 55 default judgments. Part II of this Note examines how the language "otherwise defend" has been interpreted differently by the federal circuit courts. Part III of this Note argues that the majority's broad interpretation of "otherwise defend" should be adopted as the uniform interpretation because it is supported by statutory interpretation and the underlying purpose of Rule 55.

⁴ See FED. R. CIV. P. 55.

⁵ FED. R. CIV. P. 55(a).

⁶ See WRIGHT ET AL., *supra* note 3. The types of pleadings include an answer to a complaint, an answer to a counterclaim, an answer to a cross-claim, a third-party complaint, an answer to a third-party complaint, and, if the court orders one, a reply to an answer. FED. R. CIV. P. 7(a).

⁷ See *infra* Part II (discussing the circuit split on the interpretation of "otherwise defend").

⁸ See *infra* Part II.A-B (discussing the broad interpretation of "otherwise defend" adopted by a majority of the circuit courts and the narrow interpretation adopted by a minority of the circuit courts).

I. HISTORY AND FRAMEWORK OF FEDERAL RULE OF CIVIL PROCEDURE 55

A. *The History and Purpose of Default Judgments*

Before the Federal Rules of Civil Procedure were enacted in 1938, a default judgment could be entered in law or in equity.⁹ In law, a default judgment was referred to as a decree "nil dicit."¹⁰ A decree "nil dicit" could be entered when the defendant failed to plead, regardless of whether the defendant appeared or not.¹¹ In equity, a default judgment was referred to as a decree "pro confesso."¹² Under the original Federal Equity Rules, a decree "pro confesso" could be entered against a properly served defendant if the defendant did not appear within the time specified, or did appear, but failed to plead, demur, or answer the bill within a specified time.¹³ Once the decree was entered, a defendant was barred from alleging anything in opposition to the decree or questioning correctness on appeal, unless the defendant could show that the bill was erroneously and improperly granted.¹⁴

The enactment of Rule 55 in 1938 represents the joining of the decree "nil dicit" and decree "pro confesso."¹⁵ A substantial portion of the text of Rule 55 came from Federal Equity Rules 16 and 17.¹⁶ Federal Equity Rule 16 provided that "[i]t shall be the duty of the defendant . . . to file his answer or other defense to the bill in the clerk's office" and that "[i]n default thereof the

⁹ WRIGHT ET AL., *supra* note 3, § 2681. An early Supreme Court case, *Thomson v. Wooster*, equated a decree "pro confesso" in equity to a decree "nil dicit" at law. See 114 U.S. 104, 111 (1885) ("[T]he method in equity of taking a bill *pro confesso* is consonant to the rule and practice of the courts at law, where, if the defendant makes default by *nil dicit*, judgment is immediately given in debt . . .").

¹⁰ See Arthur J. Park, *Fixing Faults in the Current Default Judgment Framework*, 34 CAMPBELL L. REV. 155, 157 (2011).

¹¹ *Id.*

¹² WRIGHT ET AL., *supra* note 3, § 2681.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ See FED. R. CIV. P. 55 advisory committee's note; WRIGHT ET AL., *supra* note 3, § 2681.

¹⁶ See WRIGHT ET AL., *supra* note 3, § 2681.

plaintiff may . . . take an order as of course that the bill be taken pro confesso."¹⁷ Federal Equity Rule 17 provided the procedure for setting aside a default or for entering a final decree.¹⁸

The text of Rule 55 has remained essentially the same since its promulgation in 1938, except for some stylistic changes.¹⁹ Prior to the stylistic changes in 2007, Rule 55(a) stated: "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."²⁰ The language, "as provided by these rules," was deleted from Rule 55(a) to preclude an entry of default where a party engaged in an act that showed intent to defend but that the rules did not specifically account for.²¹ The advisory committee noted that "[a]cts that showed an intent to defend . . . frequently prevented [an entry of] default," and the change in the text made it clear that acts that showed intent to defend, whether addressed by the rules or not, should prevent entry of default.²² The advisory committee's note, however, did not specifically address what those acts were.

A default judgment's purpose is to protect the diligent party's rights.²³ When the adversary process is halted due to an essentially unresponsive defendant, a default judgment is available,²⁴ protecting a plaintiff from "undue delay-

¹⁷ *Id.*

¹⁸ *See id.* Federal Equity Rule 17 stated:

When the bill is taken pro confesso the court may proceed to a final decree at any time after the expiration of thirty days after the entry of the order pro confesso, and such decree shall be deemed absolute, unless the court shall, at the same term, set aside the same, or enlarge the time for filing the answer, upon cause shown upon motion and affidavit. No such motion shall be granted, unless upon the payment of the costs of the plaintiff up to that time, or such part thereof as the court shall deem reasonable, and unless the defendant shall undertake to file his answer within such time as the court shall direct, and submit to such other terms as the court shall direct, for the purpose of speeding the cause.

Id. n.12.

¹⁹ *Id.*; FED. R. CIV. P. 55 advisory committee's note.

²⁰ FED. R. CIV. P. 55(a) (2006) (amended 2007) (emphasis added), available at <http://www.gpo.gov/fdsys/pkg/CPRT-109HPRT31308/pdf/CPRT-109HPRT31308.pdf>.

²¹ FED. R. CIV. P. 55 advisory committee's note; WRIGHT ET AL., *supra* note 3, § 2681.

²² *See* FED. R. CIV. P. 55 advisory committee's note.

²³ *See* WRIGHT ET AL., *supra* note 3, § 2681.

²⁴ *See id.*

harassment."²⁵ For example, in *New York v. Green*,²⁶ the defendants never answered the complaint, and a default judgment was entered against them.²⁷ In deciding whether to vacate the default judgment, the court assessed the defendants' conduct in light of the basic purpose of the default judgment and found that the defendants "willfully" failed to file an answer as part of a scheme to delay the proceedings.²⁸ Accordingly, the court affirmed the district court's refusal to vacate the default judgment.²⁹

Further, the threat of entry of default is a deterrent to defendants that choose delay as part of their litigation strategy.³⁰ Accordingly, the entry of default allows a court to enforce compliance with the Federal Rules of Civil Procedure, which in turn, allows the court to maintain an "orderly and efficient judicial system."³¹ This enforcement is consistent with how the Federal Rules of Civil Procedure "should be construed and administered"—"to secure the just, speedy, and inexpensive determination of every action and proceeding."³²

While an underlying purpose exists for entering default judgments, there is also a strong competing public policy in favor of resolving disputes on the merits.³³ As a result, "modern courts do not favor default judgments,"³⁴ and "any doubts usually will be resolved in favor of the defaulting party."³⁵ To reconcile these conflicting notions, the goals of justice and efficiency are weighed against the policy of deciding matters on the merits.³⁶ However,

²⁵ *Am. Alliance Ins. Co. v. Eagle Ins. Co.*, 92 F.3d 57, 61 (2d Cir. 1996).

²⁶ 420 F.3d 99 (2d Cir. 2005).

²⁷ *Id.* at 103.

²⁸ *See id.* at 108 ("[T]heir failure to file an answer was a 'part of an overall plan to delay the proceedings . . .'" (quoting *New York v. Green*, No. 01-CV-196A, 2004 WL 1375555, at *6 (W.D.N.Y. June 18, 2004))).

²⁹ *Id.* at 110.

³⁰ *H.F. Livermore Corp. v. Aktiengesellschaft Gebrüder Loepfe*, 432 F.2d 689, 691 (D.C. Cir. 1970).

³¹ *Pikofsky v. Jem Oil*, 607 F. Supp. 727, 733 (E.D. Wis. 1985).

³² FED. R. CIV. P. 1.

³³ *See Am. Alliance Ins. Co. v. Eagle Ins. Co.*, 92 F.3d 57, 61 (2d Cir. 1996).

³⁴ *Boland v. Elite Terrazzo Flooring, Inc.*, 763 F. Supp. 2d 64, 67 (D.D.C. 2011).

³⁵ WRIGHT ET AL., *supra* note 3, § 2681.

³⁶ *See Adam Owen Glist, Note, Enforcing Courtesy: Default Judgments and the Civility Movement*, 69 *FORDHAM L. REV.* 757, 765 (2000).

courts do recognize that the plaintiff must be protected and courts will enter a default when the plaintiff is "faced with interminable delay and continued uncertainty as to his rights."³⁷

B. *The Procedure for Entering a Default and Default Judgment*

Federal Rule of Civil Procedure 55 provides a two-step process for entering a default judgment.³⁸ The first step is to obtain an entry of default pursuant to Rule 55(a).³⁹ Under Rule 55(a), the clerk must enter a default if a party "has failed to plead or otherwise defend."⁴⁰ The court clerk enters the default once the non-defaulting party shows failure to plead or otherwise defend through an "affidavit or otherwise."⁴¹ A court also has the power to enter a default in its discretion.⁴² This first step "formalizes a judicial recognition that [the] defendant has . . . admitted liability to the plaintiff."⁴³ The entry of default only establishes liability and "is not an admission of damages."⁴⁴ Moreover, "a defendant's default does not in itself warrant the court entering a default judgment."⁴⁵

The second step is to obtain a judgment by default pursuant to Rule 55(b).⁴⁶ Once a default is entered, the plaintiff can request an entry of a default judgment under Rule 55(b).⁴⁷ Under Rule 55(b)(1), a clerk must enter a default judgment if the

³⁷ *District of Columbia v. Butler*, 713 F. Supp. 2d 61, 64 (D.D.C. 2010). A plaintiff can be faced with uncertainty as to its rights when the defendant is totally unresponsive. *See id.* For example, in *Butler*, the defendant failed to plead or otherwise respond to the complaint in a timely manner. *Id.* at 63. The court found that the entry of default against the defendant was proper, because the defendant failed to request to set aside the default or even suggest a meritorious defense. *See id.* at 64.

³⁸ *See* FED. R. CIV. P. 55; *New York v. Green*, 420 F.3d 99, 104 (2d Cir. 2005); *Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986).

³⁹ *See Green*, 420 F.3d at 104.

⁴⁰ FED. R. CIV. P. 55(a).

⁴¹ *Id.*

⁴² *See Beller & Keller v. Tyler*, 120 F.3d 21, 22 n.1 (2d Cir. 1997) (noting that since the court has the power to enter a default judgment, it impliedly has the power to perform the ministerial function of entering a default).

⁴³ *City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 128 (2d Cir. 2011).

⁴⁴ *Id.* (citing *Finkel v. Romanowicz*, 577 F.3d 79, 83 n.6 (2d Cir. 2009)).

⁴⁵ *Bonifacio v. Ne. Acquisitions Grp., Inc.*, 798 F. Supp. 2d 1321, 1323 (S.D. Fla. 2011) (citing *Tyco Fire & Sec. LLC v. Alcocer*, 218 F. App'x. 860, 863 (11th Cir. 2007)).

⁴⁶ *See New York v. Green*, 420 F.3d 99, 104 (2d Cir. 2005).

⁴⁷ FED. R. CIV. P. 55(b).

plaintiff's claim is for a "sum certain."⁴⁸ If the plaintiff's claim is not for a "sum certain," the plaintiff must apply to the court for a default judgment under Rule 55(b)(2).⁴⁹ Once the plaintiff applies, the court may enter a default judgment and has the authority to hold a hearing to "conduct an accounting; determine the amount of damages; establish the truth of any allegation by evidence; or investigate any other matter."⁵⁰ Unlike other final judgments, a default judgment "must not differ in kind from, or exceed in amount, what is demanded in the pleadings."⁵¹

In determining whether a default judgment should be entered under Rule 55(b)(2), the court is required to exercise sound discretion.⁵² The court can consider factors such as "whether the default is largely technical, whether the plaintiff has been substantially prejudiced by the delay, whether grounds for default are clearly established, and whether the [c]ourt thinks it later would be obliged to set aside the default on defendant[']s motion."⁵³ Additional factors a court can consider are the amount of money at stake in the action, the likelihood of a dispute concerning material facts, and the strong policy underlying the Federal Rules of Civil Procedure favoring a decision on the merits.⁵⁴

When the court engages in a factor analysis to determine whether a default should be entered, it should take as true all the factual allegations in the complaint, except damages.⁵⁵ For example, in *Twentieth Century Fox Film Corp. v. Streeter*,⁵⁶ in

⁴⁸ FED. R. CIV. P. 55(b)(1). A clerk may not enter a default judgment against a minor or incompetent person. *Id.*

⁴⁹ FED. R. CIV. P. 55(b)(2).

⁵⁰ FED. R. CIV. P. 55(b)(2)(A)–(D). The court may not enter a default judgment against a minor or incompetent person unless the minor or incompetent person is represented by a guardian or other fiduciary. FED. R. CIV. P. 55(b)(2). Moreover, if the defendant has previously, personally, or by representative, appeared, then the defendant or its representative must be served with at least seven days' notice before the hearing. *Id.*

⁵¹ FED. R. CIV. P. 54(c).

⁵² *Rashidi v. Albright*, 818 F. Supp. 1354, 1356 (D. Nev. 1993). The discretionary power for entering a default judgment is implicitly granted because of the discretionary power a judge has in setting aside a default judgment in Rule 55(c) and because the plaintiff must apply to the court for entry of a default judgment. *Id.* at 1356 n.4.

⁵³ *Id.* at 1356.

⁵⁴ *Eitel v. McCool*, 782 F.2d 1470, 1471–72 (9th Cir. 1986); see also *Twentieth Century Fox Film Corp. v. Streeter*, 438 F. Supp. 2d 1065, 1070 (D. Ariz. 2006).

⁵⁵ *Twentieth Century Fox Film Corp.*, 438 F. Supp. 2d at 1070.

⁵⁶ 438 F. Supp. 2d 1065.

determining whether the default judgment should be granted, the court accepted as true all the factual allegations in the complaint.⁵⁷ The court concluded that: (1) the plaintiff would suffer prejudice if default judgment was denied because it would be without recourse for recovery; (2) the plaintiff had adequately stated a claim on which it could recover; (3) the amount in controversy was proportionate to the defendant's conduct; (4) the possibility of a dispute concerning material facts was small because the defendant had made no attempt to appear in the case; (5) the default was most likely not due to excusable neglect; and (6) the defendant's failure to answer the complaint made a decision on the merits impractical.⁵⁸ Based on these factors, the court granted the plaintiff's motion for a default judgment.⁵⁹

A default judgment under Rule 55(b) is considered conclusive, like any other judgment on the merits, and is appealable.⁶⁰ "A defendant, by his default, admits the plaintiff's well-pleaded allegations of fact," and the defendant is barred from contesting these facts on appeal.⁶¹ On appeal, however, a defendant may contest the sufficiency of the complaint.⁶² Moreover, like any other judgment, a default judgment is void if there is a lack of subject matter jurisdiction or personal jurisdiction.⁶³

⁵⁷ See *id.* at 1070.

⁵⁸ See *id.* at 1070–72.

⁵⁹ *Id.* at 1073.

⁶⁰ See *United States v. \$23,000 in U.S. Currency*, 356 F.3d 157, 163 (1st Cir. 2004).

⁶¹ *Eagle Hosp. Physicians, LLC v. SRG Consulting, Inc.*, 561 F.3d 1298, 1307 (11th Cir. 2009) (internal quotation marks omitted).

⁶² *Id.*

⁶³ See *City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 138 (2d Cir. 2011). The determination of whether a default judgment is void for lack of subject matter jurisdiction or personal jurisdiction usually is only seen on a motion to set aside the judgment or on enforcement of the judgment with another court. See, e.g., *Marcus Food Co. v. DiPanfilo*, 671 F.3d 1159, 1163–64 (10th Cir. 2011) (affirming the district court's denial to set aside the default judgment for lack of personal or subject matter jurisdiction); *Covington Indus., Inc. v. Resintex A.G.*, 629 F.2d 730, 731 (2d Cir. 1980) (affirming the district court's decision to grant relief from a default judgment in an enforcement proceeding for lack of personal jurisdiction); see also *WRIGHT ET AL.*, *supra* note 3.

C. *The Procedure for Setting Aside Rule 55 Defaults and Default Judgments*

Rule 55(c) provides the process for a defendant to set aside a default or default judgment.⁶⁴ An entry of a default by the clerk may be set aside for "good cause" under Rule 55(c).⁶⁵ To determine whether "good cause" exists, courts consider a number of factors. These factors tend to center around the public policy in favor of a judgment on the merits.⁶⁶ Some of these factors include whether the defendant had a meritorious defense, whether the defendant acted with reasonable promptness, whether the plaintiff would be prejudiced, whether there is a history of dilatory action, whether less drastic sanctions are available, and whether the defendant engaged in culpable conduct.⁶⁷

Under Rule 55(c), a default judgment, like any other final judgment, can be set aside pursuant to Federal Rule of Civil Procedure Rule 60(b), which addresses relief from a judgment or order.⁶⁸ A motion to set aside a default judgment is not the equivalent of an appeal, and a defendant should also file a timely appeal.⁶⁹ The factors the court evaluates in setting aside an entry of default are generally the same factors the court evaluates in setting aside a default judgment;⁷⁰ however, the

⁶⁴ FED. R. CIV. P. 55(c) ("The court may set aside an entry of default for good cause, and it may set aside a default judgment under Rule 60(b).").

⁶⁵ *Id.*

⁶⁶ *See, e.g., Payne ex rel. Estate of Caldaza v. Brake*, 439 F.3d 198, 204–05 (4th Cir. 2006); *FOC Fin. Ltd. P'ship v. Nat'l City Commercial Capital Corp.*, 612 F. Supp. 2d 1080, 1082 (D. Ariz. 2009) (noting that the factors are interpreted in favor of setting aside default).

⁶⁷ *Payne*, 439 F.3d at 204–05; *FOC Fin. Ltd. P'ship*, 612 F. Supp. 2d at 1082, 1085. In *FOC Financial Ltd. Partnership*, the court found "good cause" to set aside the default against the defendant. *See* 612 F. Supp. 2d at 1085. The court found: (1) that the defendant's failure to file a timely answer was not culpable conduct because it was not intentional and the defendant had cooperated with discovery; (2) that the plaintiff would not be prejudiced by setting aside the default because the default had caused no delay other than the parties having to file additional briefs; and (3) that the defendant had a meritorious defense because the defendant had potential defenses to the claims brought against it. *See id.* at 1083–84.

⁶⁸ FED. R. CIV. P. 55(c).

⁶⁹ *See WRIGHT ET AL.*, *supra* note 3, § 2692 (noting that the defendant can lose the right to appeal if it is not timely made).

⁷⁰ *See TCI Grp. Life Ins. Plan v. Knoebber*, 244 F.3d 691, 696 (9th Cir. 2001) ("[The] three factors derived from the 'good cause' standard that governs the lifting of entries of default . . . govern the vacating of a default judgment . . . as well."). For example, in *Franchise Holding II, LLC v. Huntington Restaurants Group, Inc.*, the

court conducts a more rigorous review in the latter case.⁷¹ The most common grounds for setting aside a default judgment under Rule 60(b) are usually for “mistake, inadvertence, surprise, or excusable neglect; . . . the judgment is void; . . . or any other reason that justifies relief.”⁷² A district court’s denial of a motion to set aside either default under Rule 55(c) or default judgment under Rule 60(b) is reviewable on appeal.⁷³ The standard of review on appeal of this denial is abuse of discretion.⁷⁴

A default judgment is also appealable.⁷⁵ Though rarely done, a defendant may directly appeal the default judgment instead of seeking to vacate the entry of default or the default judgment.⁷⁶ On appeal from a default judgment, the court can review both the entry of default and the final default judgment.⁷⁷ The standard of review on appeal of an entry of a default judgment is abuse of discretion.⁷⁸

court found that the defendant failed to meet its burden in showing that any of the factors favored setting aside the default judgment. 375 F.3d 922, 926–27 (9th Cir. 2004). First, the defendant engaged in culpable conduct when the defendant received notice of the filing of the action but failed to file an answer. *Id.* at 926. Second, the defendant did not present sufficient facts, only conclusory statements, to constitute a meritorious defense. *Id.* Third, prejudice to the plaintiff existed because any delay in judgment would allow the defendant to hide its assets, and the defendant showed no behavior that indicated that it was willing and able to resolve the dispute. *Id.* at 926–27.

⁷¹ See *Davis v. Musler*, 713 F.2d 907, 918 (2d Cir. 1983) (Van Graafeiland, J., concurring); see also *First Interstate Bank of Okla., N.A. v. Serv. Stores of Am., Inc.*, 128 F.R.D. 679, 680 (W.D. Okla. 1989) (“Relief from an entry of default will be granted more readily and with a lesser showing than in the case of a default judgment.”).

⁷² See FED. R. CIV. P. 60(b); see also *WRIGHT ET AL.*, *supra* note 3, § 2695. Other grounds for setting aside a default judgment pursuant to Rule 60(b) are discovery of new evidence that could not have been discovered with reasonable diligence in time to move for a new trial; fraud, misrepresentation, or misconduct on the part of an opposing party; or the judgment has been satisfied, released or discharged, it is based on an earlier judgment that has been reversed or vacated, or applying it going forward no longer serves an equitable purpose. FED. R. CIV. P. 60(b).

⁷³ *Brandt v. Am. Bankers Ins. Co. of Fla.*, 653 F.3d 1108, 1110 (9th Cir. 2011).

⁷⁴ *Id.*

⁷⁵ *United States v. \$23,000 in U.S. Currency*, 356 F.3d 157, 163 (1st Cir. 2004).

⁷⁶ *City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 128 (2d Cir. 2011).

⁷⁷ *Id.* at 129.

⁷⁸ *Swarna v. Al-Awadi*, 622 F.3d 123, 133 (2d Cir. 2010).

D. Sanctions Are Available as an Alternative to Rule 55 Default Judgments

Not all default judgments are entered under Rule 55.⁷⁹ The Federal Rules of Civil Procedure contain provisions that allow an entry of default judgment against a party as a sanction.⁸⁰ A default judgment can be entered against a party that fails to appear or participate in a scheduling or pretrial conference, or that fails to obey a pretrial order.⁸¹ A default judgment can also be entered against a party that fails to obey discovery orders.⁸² Moreover, a court has statutory and inherent powers to sanction parties that act in bad faith.⁸³ Depending on which jurisdiction the action is brought in, the alternate provisions under the Federal Rules of Civil Procedure and the court's inherent and statutory powers may provide for an alternative path for sanctioning a defendant that fails to "otherwise defend."⁸⁴

Federal Rules of Civil Procedure 16 and 37 provide for sanctions for failure to comply with these rules.⁸⁵ Under Rule 16, a court on its own or on motion, may issue a sanction if a party or its attorney fails to appear at a pretrial conference, fails to participate in good faith at the conference, or fails to obey a pretrial order.⁸⁶ Under Rule 37, a court may issue sanctions for failure to obey or permit a discovery order.⁸⁷ Sanctions under

⁷⁹ See FED. R. CIV. P. 16(f), 37(b)(2)(A)(vi), (d)(3).

⁸⁰ See *id.*

⁸¹ FED. R. CIV. P. 16(f).

⁸² FED. R. CIV. P. 37(b)(2)(A)(vi), (d)(3).

⁸³ See 28 U.S.C. § 1927 (2012); *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (holding that the court's inherent powers to sanction bad-faith conduct may still subject a party to sanctions even though such conduct does not fall within the reach of certain statutory provisions).

⁸⁴ Some acts, like failing to appear at a pretrial conference or failing to participate in discovery, are interpreted to fall within the meaning of Rule 55's "otherwise defend." See *infra* Part II.A–B.

⁸⁵ FED. R. CIV. P. 16(f), 37(b)(2)(A). Sanctions were added to Rule 16 to prevent dependence on other rules or the court's inherent powers to impose sanctions for failing to comply with Rule 16. See FED. R. CIV. P. 16 advisory committee's note. Sanctions under Rule 37 are to deter those from failing to comply with discovery orders and to penalize conduct that warrants a sanction. See *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 763–64 (1980).

⁸⁶ FED. R. CIV. P. 16(f).

⁸⁷ FED. R. CIV. P. 37(b)(2)(A), (d)(3).

Rule 16 and Rule 37 can include a stay of the proceeding, a dismissal of the action or proceeding, or an entry of a default judgment.⁸⁸

Courts also have statutory authority under 28 U.S.C. § 1927 to impose sanctions against an attorney who “unreasonably and vexatiously” multiplies the proceedings.⁸⁹ Sanctions may be in the form of “excess costs, expenses, and attorneys’ fees reasonably incurred because of [the unreasonable and vexatious] conduct.”⁹⁰ Courts have entered sanctions when an attorney’s “unreasonable and vexatious” conduct included failure to appear at trial,⁹¹ interference with the discovery process,⁹² and failure to prosecute.⁹³ An award under 28 U.S.C. § 1927 should only be made against an attorney when there is a serious disregard for the orderly process of justice, which the courts consider an “extreme standard.”⁹⁴ The standard of review on appeal of sanctions is abuse of discretion.⁹⁵

In addition to authority vested in courts under 28 U.S.C. § 1927, courts also have inherent power to sanction parties and their attorneys.⁹⁶ This inherent power stems from a court’s necessity to manage its own affairs so that it may resolve trials in an organized and prompt manner.⁹⁷ Courts exercise this

⁸⁸ FED. R. CIV. P. 16(f), 37(b)(2)(A), (d)(3).

⁸⁹ 28 U.S.C. § 1927 (2012).

⁹⁰ *Id.*

⁹¹ See *Morrison v. Int’l Programs Consortium, Inc.*, 240 F. Supp. 2d 53, 59 (D.D.C. 2003) (imposing monetary sanctions on defendant’s lawyer for multiplying the proceedings by knowingly and intentionally failing to appear at trial); *Rathburn v. Warren City Sch. (In re Ruben)*, 825 F.2d 977, 990 n.13 (6th Cir. 1987) (“[F]ailure to appear for trial may, in a proper case, result in a sanction under 28 U.S.C. § 1927 . . .”).

⁹² See *Resolution Trust Corp. v. Dabney*, 73 F.3d 262, 266–67 (10th Cir. 1995) (affirming sanctions imposed on plaintiff’s counsel for instructing the witness not to answer questions).

⁹³ See *Monk v. Roadway Express, Inc.*, 599 F.2d 1378, 1381 (5th Cir. 1979), *aff’d sub nom. Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980) (upholding the district court’s finding of deliberate and vexatious conduct where plaintiffs’ attorneys totally and deliberately failed to prosecute and abide by the Federal Rules of Civil Procedure).

⁹⁴ *White v. Am. Airlines, Inc.*, 915 F.2d 1414, 1427 (10th Cir. 1990).

⁹⁵ *Grider v. Keystone Health Plan Cent., Inc.*, 580 F.3d 119, 134 (3d Cir. 2009).

⁹⁶ See *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (“It has long been understood that ‘[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution,’ powers ‘which cannot be dispensed with in a Court, because they are necessary to the exercise of all others.’”).

⁹⁷ *Id.*; *Revson v. Cinque & Cinque, P.C.*, 221 F.3d 71, 78 (2d Cir. 2000).

power when a party or attorney acts in "bad faith, vexatiously, wantonly, or for oppressive reasons."⁹⁸ Judges recognize that the "threshold for the use of inherent power sanctions is high."⁹⁹ Moreover, since inherent power is not subject to democratic control, courts must act prudently and with discretion when using their power to sanction a party.¹⁰⁰

Under its inherent powers, a court has discretion in determining the proper sanction to impose for conduct that abuses the judicial process.¹⁰¹ Sanctions can be as severe as the "outright dismissal" of a lawsuit or as minor as the imposition of attorney fees.¹⁰² Sanctions can also be in the form of a default judgment.¹⁰³ A court uses its inherent powers to sanction parties and their attorneys when they fail to appear at trial¹⁰⁴ and when they engage in misconduct during the discovery process.¹⁰⁵ The standard of review on appeal is abuse of discretion.¹⁰⁶

II. THE DIVERGENT INTERPRETATIONS OF "OTHERWISE DEFEND" BY THE FEDERAL CIRCUIT COURTS

While the Supreme Court has specifically addressed inherent powers,¹⁰⁷ it has not addressed how to interpret "otherwise defend" in Rule 55(a). As a result, no uniform interpretation of

⁹⁸ *Roadway Express, Inc.*, 447 U.S. at 766. To determine whether a party or attorney acts in bad faith, there must be "clear evidence that the challenged actions are *entirely without color*," and the conduct was engaged in for "reasons of harassment or delay or for other improper purposes," and there was a "high degree of specificity" in the lower court's factual findings regarding the reasons for imposing sanctions. *Revson*, 221 F.3d at 78.

⁹⁹ *Crowe v. Smith*, 151 F.3d 217, 226 (5th Cir. 1998) (quoting *Elliott v. Tilton*, 64 F.3d 213, 217 (5th Cir. 1995)).

¹⁰⁰ *Chambers*, 501 U.S. at 44; *Roadway Express, Inc.*, 447 U.S. at 764.

¹⁰¹ *Chambers*, 501 U.S. at 44–45.

¹⁰² *See id.* at 45.

¹⁰³ *Shepherd v. Am. Broad. Cos.*, 62 F.3d 1469, 1475 (D.C. Cir. 1995).

¹⁰⁴ *See Morrison v. Int'l Programs Consortium, Inc.*, 240 F. Supp. 2d 53, 59 (D.D.C. 2003).

¹⁰⁵ *See Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 107 (2d Cir. 2002) (stating that the district court has discretion in determining what sanction to impose on a party who fails to produce evidence during discovery); *Wyle v. R.J. Reynolds Indus., Inc.*, 709 F.2d 585, 588 (9th Cir. 1983) (dismissing the plaintiff's complaint for failure to abide by the court's discovery orders).

¹⁰⁶ *Chambers*, 501 U.S. at 55.

¹⁰⁷ *See id.* at 35 (examining the extent to which the district court may use its inherent powers to sanction a party for bad-faith conduct and finding that the district court properly used discretion under its inherent powers to impose a sanction of attorney fees and related expenses).

“otherwise defend” exists. Part II of this Note discusses the federal circuits’ differing approaches on how to interpret “otherwise defend.”¹⁰⁸ Section A discusses the broad interpretation of “otherwise defend” adopted by the majority of these circuits. Section B discusses the minority’s narrow interpretation of “otherwise defend.”

A. *A Majority of Federal Circuit Courts Broadly Interpret “Otherwise Defend”*

The majority of federal circuits—the First, Second, Third, Fourth, Eighth, and Ninth Circuits—faced with the issue of interpreting Rule 55 have stated that the failure to “otherwise defend” is broader than the failure to plead.¹⁰⁹ Accordingly, the majority of circuits interpret “otherwise defend” broadly to encompass entry of default against parties that answer a complaint but fail to appear at trial or participate in pretrial proceedings.¹¹⁰ The majority has explicitly rejected the minority’s narrow interpretation of “otherwise defend.”¹¹¹

According to the majority’s broad interpretation, a defendant’s failure to appear at trial can result in entry of default.¹¹² The majority considers “[t]he failure to plead . . . no greater an impediment to the orderly progress of a case than is the failure to appear at trial.”¹¹³ Further, the judge must have broad discretion to impose a sanction of default for failure to attend trial because the judge is responsible for the “orderly and expeditious conduct of litigation.”¹¹⁴

¹⁰⁸ To date, the Sixth, Seventh, Tenth, and D.C. Circuits have not addressed the interpretation of “otherwise defend.”

¹⁰⁹ See *Hoxworth v. Blinder, Robinson & Co.*, 980 F.2d 912, 917–18 (3d Cir. 1992) (collecting cases).

¹¹⁰ See *City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 129–31 (2d Cir. 2011); *Akra Direct Mktg. Corp. v. Fingerhut Corp.*, 86 F.3d 852, 856 (8th Cir. 1996); *Goldman, Antonetti, Ferraiuoli, Axtmayer & Hertell v. Medfit Int’l, Inc.*, 982 F.2d 686, 692–93 (1st Cir. 1993); *Hoxworth*, 980 F.2d at 918; *Home Port Rentals, Inc. v. Ruben*, 957 F.2d 126, 133 (4th Cir. 1992); *Ringgold Corp. v. Worrall*, 880 F.2d 1138, 1141 (9th Cir. 1989).

¹¹¹ See, e.g., *Mickalis Pawn Shop, LLC*, 645 F.3d at 131 (“[T]his interpretation of Rule 55 has not been embraced by this Court. Nor has it found favor in a majority of our sister circuits.” (citations and footnote omitted)).

¹¹² See, e.g., *Hoxworth*, 980 F.2d at 918.

¹¹³ *Id.*

¹¹⁴ *Id.*

As a result, a default is entered against a defendant that fails to appear at trial, because it is fair to do so.¹¹⁵ For example, in *Hoxworth v. Blinder, Robinson & Co.*,¹¹⁶ the defendants answered the complaint but failed to produce documents or respond adequately to discovery requests.¹¹⁷ The defendants also did not respond timely to the court's pretrial memorandum order.¹¹⁸ When the trial date came, the defendants did not appear.¹¹⁹ The clerk entered a default against the defendants under Rule 55.¹²⁰ The Third Circuit affirmed the entry of default, because it seemed fair that if a clerk could enter a default after a party failed to plead, a clerk should be allowed to enter a default after a party failed to appear at trial.¹²¹

A court's power to maintain an orderly docket warrants the entry of a default against a defendant that does not appear at trial.¹²² For example, in *Brock v. Unique Racquetball & Health Clubs, Inc.*,¹²³ the defendant failed to appear at trial after it was adjourned to the next day, and he subsequently failed to send anyone in his place or notify the court.¹²⁴ The court found that the entry of default against the defendant was proper.¹²⁵ The court held that the trial court judge had "broad latitude" to enter a default against a party that fails to appear at trial because such conduct jeopardizes "orderly and expeditious . . . litigation."¹²⁶

Under the majority's broad interpretation, failing to appear at trial is not the only reason why a default can be entered against a defendant for failing to "otherwise defend." For example, in *Home Port Rentals, Inc. v. Ruben*,¹²⁷ the defendants did not respond to certified notices sent by the court, did not appear at the show-cause hearing, and did not participate in

¹¹⁵ *See id.*

¹¹⁶ 980 F.2d 912.

¹¹⁷ *See id.* at 915-16.

¹¹⁸ *See id.* at 916.

¹¹⁹ *See id.* at 916-17.

¹²⁰ *See id.* at 917.

¹²¹ *See id.* at 918.

¹²² *Id.*

¹²³ 786 F.2d 61 (2d Cir. 1986).

¹²⁴ *See id.* at 63.

¹²⁵ *See id.* at 64.

¹²⁶ *Id.*

¹²⁷ 957 F.2d 126 (4th Cir. 1992).

discovery.¹²⁸ The Fourth Circuit held that the entry of default was proper because there was ample evidence in the record to show that the defendants failed to defend.¹²⁹

Failing to respond to a court's order can also result in an entry of default.¹³⁰ For example, in *Eagle Associates v. Bank of Montreal*,¹³¹ defaults were entered against both the defendant partnership and the defendant partners.¹³² A default was entered against the defendant partnership because it failed to appear at a court ordered status conference.¹³³ Similarly, a default was entered against the defendant partners after they did not appear at scheduled conferences.¹³⁴ The Second Circuit found that a "cavalier disregard" for a court order falls within the meaning of Rule 55(a).¹³⁵ Accordingly, the entry of default was proper because the defendants "willfully disregarded" the district court's orders.¹³⁶

Similarly, in *Cotton v. Slone*,¹³⁷ a default was entered after the defendant failed to comply with the district court's order.¹³⁸ The defendant answered the complaint and actively participated in discovery,¹³⁹ but failed to comply with the court's order regarding a joint pretrial memorandum.¹⁴⁰ The Second Circuit affirmed the district court's entry of default.¹⁴¹

B. *A Minority of Federal Circuit Courts Narrowly Interpret "Otherwise Defend"*

Unlike the majority of circuits, the minority of circuits—the Fifth and Eleventh Circuits—interpret "otherwise defend"

¹²⁸ See *id.* at 128–29.

¹²⁹ *Id.* at 133.

¹³⁰ See, e.g., *Eagle Assocs. v. Bank of Montreal*, 926 F.2d 1305, 1310 (2d Cir. 1991) (holding that a default judgment against a defendant who willfully disregarded the district court's order was proper and such conduct constitutes a failure to otherwise defend).

¹³¹ 926 F.2d 1305.

¹³² See *id.* at 1306.

¹³³ See *id.* at 1307.

¹³⁴ See *id.*

¹³⁵ *Id.* at 1310 (quoting *Shapiro, Bernstein & Co. v. Cont'l Record Co.*, 386 F.2d 426, 427 (2d Cir. 1967)).

¹³⁶ *Id.*

¹³⁷ 4 F.3d 176 (2d Cir. 1993).

¹³⁸ *Id.* at 179.

¹³⁹ *Id.* at 178.

¹⁴⁰ *Id.* at 179.

¹⁴¹ *Id.* at 181.

narrowly and will not enter a default against a defendant if that defendant has answered the complaint.¹⁴² The minority interprets "otherwise defend" to encompass attacks on service or motions to dismiss, which prevent a default without pleading on the merits.¹⁴³ When a defendant answers a complaint, the "issue has been joined," and a default cannot be entered.¹⁴⁴ Instead of entering a default, the court will let the plaintiff present its case at the trial despite the absent defendant.¹⁴⁵ If the plaintiff proves all of the elements of its claim, a judgment will be entered in its favor.¹⁴⁶

If a defendant fails to appear at trial, a default will not be entered against the defendant so long as the defendant has answered the complaint.¹⁴⁷ For example, in *Bass v. Hoagland*,¹⁴⁸ neither the defendant nor his attorney showed up at the trial.¹⁴⁹ The Fifth Circuit found that a default could not be entered against the defendant because the defendant had answered the complaint and the case was not confessed.¹⁵⁰ Despite the absent defendant, the burden of proof was on the plaintiff to prove his case at trial.¹⁵¹ Accordingly, the Fifth Circuit remanded the case to the district court for the case to proceed to trial.¹⁵²

Unlike the majority, the minority will not enter a default pursuant to Rule 55(a) against a defendant that fails to participate in pretrial proceedings.¹⁵³ In *Fogerty v. Condor Guaranty, Inc. (In re Condor Insurance Ltd.)*,¹⁵⁴ the court held that an entry of default was improper against a party that answered the complaint but failed to appear at any of the status

¹⁴² See, e.g., *Solaroll Shade & Shutter Corp. v. Bio-Energy Sys., Inc.*, 803 F.2d 1130, 1134 (11th Cir. 1986); *Bass v. Hoagland*, 172 F.2d 205, 210 (5th Cir. 1949).

¹⁴³ *Bass*, 172 F.2d at 210.

¹⁴⁴ *Solaroll Shade & Shutter Corp.*, 803 F.2d at 1134.

¹⁴⁵ See *id.*

¹⁴⁶ *Id.*

¹⁴⁷ See *Bass*, 172 F.2d at 210.

¹⁴⁸ 172 F.2d 205.

¹⁴⁹ *Id.* at 207.

¹⁵⁰ *Id.* at 210.

¹⁵¹ *Id.*

¹⁵² See *id.* at 210–11 (finding that "judgment for the plaintiff ought not to have been entered on the pleadings in the present case, and that the truth of the answer ought to be tried.").

¹⁵³ See, e.g., *Fogerty v. Condor Guar., Inc. (In re Condor Ins. Ltd.)*, Ch. 15 Case No. 07-51045-NPO, Adv. No. 07-05049-NPO, slip op. at *3 (Bankr. S.D. Miss. Mar. 5, 2012).

¹⁵⁴ Ch. 15 Case No. 07-51045-NPO, Adv. No. 07-05049-NPO, slip op. at *3.

conferences or hearings.¹⁵⁵ The court reasoned that the defendant did not meet the minimum procedural requirements needed to satisfy the entry of default because the defendant had answered the complaint; therefore, the default was not entered.¹⁵⁶

Under the minority's narrow interpretation, a default judgment can still be entered against a defendant for failure to appear at a pretrial proceeding, but under Rule 16(f), which concerns scheduling and management, not Rule 55.¹⁵⁷ For example, in *SEC v. First Houston Capital Resources Fund, Inc.*,¹⁵⁸ the judge entered a default judgment after the defendant failed to appear at a pretrial conference.¹⁵⁹ The defendant sought to vacate the default judgment but was denied.¹⁶⁰ On appeal, the court noted that it was unclear whether the default judgment was entered under Rule 16 or Rule 55.¹⁶¹ The court stated that the appropriate rule to enter the default judgment under was Rule 16 because that rule provided for sanctions for failing to appear at a pretrial conference.¹⁶²

III. "OTHERWISE DEFEND" SHOULD BE INTERPRETED BROADLY

Part III of this Note argues that the majority's broad interpretation of "otherwise defend" should be adopted as the uniform interpretation. First, the statutory interpretation of Rule 55(a) supports a broad interpretation of "otherwise defend." Second, the purpose behind default judgments and the Federal Rules of Civil Procedure supports a broad interpretation of "otherwise defend." Third, Rule 55 default judgment alternatives—the court's rule-based, statutory, and inherent

¹⁵⁵ See *id.* at *3–4 ("According to the Fifth Circuit, Rule 55 'does not require that to escape default the defendant must not only file a sufficient answer to the merits, but must also have a lawyer or be present in court when the case is called for a trial.'" (quoting *Bass*, 172 F.2d at 210)).

¹⁵⁶ *Id.* at *4.

¹⁵⁷ See FED. R. CIV. P. 16(f); *SEC v. First Hous. Capital Res. Fund, Inc.*, 979 F.2d 380, 381 (5th Cir. 1992).

¹⁵⁸ 979 F.2d 380.

¹⁵⁹ *Id.* at 381.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

powers—are insufficient to protect a diligent party’s rights and ensure compliance with the judicial process if the minority’s narrow interpretation is adopted.

A. *Statutory Interpretation Supports a Broad Interpretation of “Otherwise Defend”*

The Supreme Court has provided guidance on how to interpret language in a statute.¹⁶³ The first step is to determine whether the language at issue has a “plain and unambiguous meaning” with regard to the particular dispute in the case.¹⁶⁴ The Court has held that “[t]he plainness or ambiguity of [a statute] is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.”¹⁶⁵ If the statute is plain and unambiguous, then the statute must be applied according to its terms.¹⁶⁶

1. *The Language Itself and the Specific Context in Which the Language of Rule 55(a) Is Used Supports a Broad Interpretation of “Otherwise Defend”*

The meaning of “otherwise defend” in Rule 55(a) is plain and unambiguous.¹⁶⁷ To “defend” means (1) “[t]o deny, contest, or oppose (an allegation or claim),” or (2) “[t]o represent (someone)

¹⁶³ See *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). The Federal Rules of Civil Procedure should be treated like a statute for purposes of statutory interpretation. See, e.g., *Pavelic & LeFlore v. Marvel Entm’t Grp.*, 493 U.S. 120, 123 (1989) (applying principles of statutory interpretation to Federal Rule of Civil Procedure 11); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 350–61 (1981) (applying general rules of statutory interpretation to Federal Rule of Civil Procedure 68).

¹⁶⁴ *Robinson*, 519 U.S. at 340.

¹⁶⁵ *Id.* at 341.

¹⁶⁶ See *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1330 (2011) (quoting *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006)) (“[I]nterpretation of this phrase ‘depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.’”); see also *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009); 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, *SUTHERLAND STATUTORY CONSTRUCTION* § 45:2 (7th ed. 2007) (providing that the duty of interpretation does not arise when the language is plain and only has one possible meaning).

¹⁶⁷ Cf. *Carcieri*, 555 U.S. at 388 (finding the word “now” unambiguous after considering the rest of the language of the Act in question and analyzing the dictionary definition of “now”).

as an attorney.”¹⁶⁸ Using this plain meaning of Rule 55(a), failure to “otherwise defend” encompasses failure to appear at trial or pretrial conferences because the party is not there “to deny, contest, or oppose” the claim against it, and no attorney is at the trial or pretrial conference to represent that party.

Moreover, the specific context in which “otherwise defend” is used in Rule 55(a) suggests that the failure to “otherwise defend” is broader than the failure to plead.¹⁶⁹ According to one of the statutory canons of construction, “words separated by [a] disjunctive are intended to convey different meanings unless the context indicates otherwise.”¹⁷⁰ Since “plead” and “otherwise defend” are separated by the word “or,” the latter should encompass a broader range of acts than the former.¹⁷¹

The 2007 advisory committee’s note to Rule 55 also sheds light on the specific context in which “otherwise defend” is used.¹⁷² In 2007, Rule 55(a) was changed stylistically to remove the text “as provided by these rules.”¹⁷³ This text was removed to prevent the confusion that a default should be entered against a party that showed an intent to defend, but did not do so in a way specifically provided for in the Federal Rules of Civil Procedure.¹⁷⁴ The advisory committee noted that acts that showed intent to defend, including those not specifically described in the Federal Rules of Civil Procedure, frequently prevent an entry of default.¹⁷⁵ The advisory committee did not provide examples of what those acts were. However, acts like appearing at trial are not specifically described in the Federal Rules of Civil Procedure.¹⁷⁶

¹⁶⁸ BLACK’S LAW DICTIONARY 482 (9th ed. 2009).

¹⁶⁹ *Hoxworth v. Blinder, Robinson & Co.*, 980 F.2d 912, 917 (3d Cir. 1992).

¹⁷⁰ *See, e.g., Mizrahi v. Gonzales*, 492 F.3d 156, 164 (2d Cir. 2007); 1A SINGER & SINGER, *supra* note 166, § 21:14 (“[T]erms joined by the disjunctive ‘or’ must have different meanings because otherwise the statute or provision would be redundant.”).

¹⁷¹ *See* FED. R. CIV. P. 55(a) (entering a default when a party has “failed to plead or otherwise defend” (emphasis added)).

¹⁷² *See* SINGER & SINGER, *supra* note 166, § 48:11 (stating that “[i]n the interpretation[,] . . . the reports of these committees . . . are considered valuable aids.”).

¹⁷³ FED. R. CIV. P. 55 advisory committee’s note.

¹⁷⁴ WRIGHT ET AL., *supra* note 3, § 2681.

¹⁷⁵ FED. R. CIV. P. 55 advisory committee’s note.

¹⁷⁶ *See, e.g.,* FED. R. CIV. P. 16, 37, 55 (providing for sanctions for actions such as failure to participate in pretrial proceedings, failure to obey discovery orders, and failure to plead, but not for failure to appear at trial).

Appearing at trial shows intent to defend and would prevent an entry of default, absent other circumstances.¹⁷⁷ If a defendant does not appear at trial, that action—or lack thereof—is incapable of showing an intent to defend.¹⁷⁸ Moreover, the intent to defend is not a static concept and can change over time.¹⁷⁹ For example, while initially answering the complaint can show intent to defend, when the defendant later fails to appear at pretrial conferences or trial, those actions can show a failure to defend.¹⁸⁰

2. The Broader Context of Rule 55(a) Within the Federal Rules of Civil Procedure Supports a Broad Interpretation of "Otherwise Defend"

Like the language itself and the specific context in which "otherwise defend" is used, the broader context of Rule 55 within the Federal Rules of Civil Procedure supports the majority's broad interpretation. The Federal Rules of Civil Procedure do not provide a special provision for imposing sanctions against a defendant that does not appear at trial; however, they do provide for entering a sanction of default against a party that has failed to participate in discovery or some other pretrial conference.¹⁸¹ Surely the drafters of the Federal Rules of Civil Procedure did not intend for a party to be sanctioned for failing to participate in pretrial acts but not to be sanctioned for failing to appear at trial.¹⁸² If an interpretation of failure to "otherwise defend" encompasses failure to appear at trial, this anomalous result does not occur. Adopting the broad interpretation of "otherwise defend" ensures that defendants that do not appear at trial will endure consequences for their actions.

Moreover, under Federal Rule of Civil Procedure 41(b), a defendant can move to dismiss the case for failure to prosecute.¹⁸³ The purpose of Rule 41(b) is similar to the purpose of Rule 55. Rule 41(b) serves as a "safeguard against delay in litigation and

¹⁷⁷ See *supra* Part II.A.

¹⁷⁸ See *supra* Part II.A.

¹⁷⁹ See *supra* Part II.A.

¹⁸⁰ See *supra* Part II.A.

¹⁸¹ See FED. R. CIV. P. 16(f), 37(b)(2)(A), (d)(3).

¹⁸² Construing the rules in a way that does not allow the court to sanction a party for failing to appear at trial does not "secure the just, speedy, and inexpensive determination of every action and proceeding." *Cf.* FED. R. CIV. P. 1.

¹⁸³ FED. R. CIV. P. 41(b).

harassment of a defendant.”¹⁸⁴ Taking into consideration the purpose of Rule 41(b), courts have dismissed cases for failure to prosecute for a broad range of reasons. For example, in *DuBose v. Minnesota*,¹⁸⁵ the trial court dismissed the case for failure to prosecute when the plaintiff failed to appear at a pretrial conference and the trial itself.¹⁸⁶

Since a defendant can make a motion for failure to prosecute when the plaintiff fails to appear at pretrial conferences and trial, a plaintiff should similarly be allowed to move for entry of default if the defendant fails to appear at those same stages. If the purpose behind both of the rules is the same, then the broad range of reasons for dismissal for failure to prosecute should also extend to entry of default for failure to “otherwise defend.” Further, if Rules 41(b) and 55(a) are interpreted similarly, the plaintiff and the defendant in an action will both have equal rights and remedies should the opposing party fail to appear at trial or pretrial conferences.

Since the language itself, the specific context in which the language was used, and the broader context of Rule 55 within the Federal Rules of Civil Procedure supports a broad interpretation of “otherwise defend” that is plain and unambiguous, the analysis can stop here.

B. The Purpose of Rule 55 Supports a Broad Interpretation of “Otherwise Defend”

However, even if the text is considered ambiguous, the majority’s broad interpretation takes into account the purpose of a default judgment: to protect the diligent party’s rights.¹⁸⁷ Therefore, a default should be available when the non-diligent party is unresponsive.¹⁸⁸ Moreover, an entry of default in favor of the diligent party will also promote an efficient and orderly judicial system.¹⁸⁹

¹⁸⁴ 9 WRIGHT ET AL., *supra* note 3, § 2370; *see also* United States *ex rel.* Drake v. Norden Sys., Inc., 375 F.3d 248, 250–51 (2d Cir. 2004) (“[T]he involuntary dismissal is an important tool for preventing undue delays and avoiding docket congestion.”).

¹⁸⁵ 893 F.2d 169 (8th Cir. 1990).

¹⁸⁶ *See id.* at 170–71 (noting that the plaintiff was playing games with the court by consistently failing to comply with pretrial orders).

¹⁸⁷ *See* WRIGHT ET AL., *supra* note 3, § 2681.

¹⁸⁸ *See id.*

¹⁸⁹ *Pikofsky v. Jem Oil*, 607 F. Supp. 727, 733 (E.D. Wis. 1985).

If "otherwise defend" is interpreted broadly, then the diligent party's rights are protected. When the plaintiff appears at a pretrial conference or trial, and the defendant is not present, the plaintiff is unsure of whether the defendant will continue to defend the case and whether the plaintiff will be able to recover on its claim.¹⁹⁰ If the plaintiff has the remedy to move for entry of default, then the plaintiff is able to protect its rights.¹⁹¹

Furthermore, the entry of a default for failure to appear at trial or pretrial conferences results in a more efficient judicial system.¹⁹² If a defendant is aware that a default will be entered against it if the defendant does not show up at a pretrial conference or trial, then the defendant will make every effort to be there.¹⁹³ The judicial system is more efficient then because disputes are resolved at the time they were scheduled to be resolved and are not delayed because of the extra time spent on default and default judgment motions.¹⁹⁴

The majority's broad interpretation of Rule 55(a) is consistent with how the Federal Rules of Civil Procedure are to be construed. The Federal Rules of Civil Procedure are to be "construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."¹⁹⁵ Entering a default secures "the just, speedy, and inexpensive determination"¹⁹⁶ of an action because it deters future litigants from using delay as a legitimate strategic tactic.¹⁹⁷

While default judgments are not favored over judgments on the merits,¹⁹⁸ three procedural protections are in place to ensure that where a judgment on the merits should be entered, it is. First, Rule 55 provides a two-step process to enter a default judgment.¹⁹⁹ A default judgment is not automatically entered after a default is entered. Instead, the plaintiff must move for

¹⁹⁰ See *supra* note 37 and accompanying text.

¹⁹¹ See *supra* notes 23–25 and accompanying text.

¹⁹² See *supra* notes 30–32 and accompanying text.

¹⁹³ See *supra* note 30 and accompanying text.

¹⁹⁴ See *supra* notes 31–33, 122–26 and accompanying text.

¹⁹⁵ FED. R. CIV. P. 1.

¹⁹⁶ *Id.*

¹⁹⁷ See *supra* notes 30–32 and accompanying text.

¹⁹⁸ See, e.g., *Boland v. Elite Terrazzo Flooring, Inc.*, 763 F. Supp. 2d 64, 67 (D.D.C. 2011) (noting that default judgments are not favored among the modern courts).

¹⁹⁹ See FED. R. CIV. P. 55; *New York v. Green*, 420 F.3d 99, 104 (2d Cir. 2005).

entry of a default judgment.²⁰⁰ Unless the party pleads damages in a "sum certain,"²⁰¹ the court uses its discretion to determine whether the default judgment should be entered.²⁰² In using its discretion, the court considers a number of factors, including the public policy of favoring a judgment on the merits.²⁰³ The court also has the ability to conduct a hearing to "establish the truth of any allegation by evidence" or "investigate any other matter."²⁰⁴ Because the entry of a default judgment is subject to discretion, a protection exists to preserve a judgment on the merits where appropriate.

Second, even before the default judgment is entered, the defendant has the opportunity to set aside the default.²⁰⁵ If "good cause" is found by the court,²⁰⁶ the default can be set aside.²⁰⁷ Again, the court analyzes a number of factors that center on the policy of favoring judgments on the merits over default judgments.²⁰⁸

Third, even if a default judgment is entered against a defendant, the defendant still has the opportunity to set that judgment aside pursuant to Rule 60(b).²⁰⁹ To set aside a default judgment, the court considers the same factors it does in deciding whether to set aside a default, including the policy of favoring a judgment on the merits over a default judgment.²¹⁰ While the standard for vacating a default judgment is higher than for vacating an entry of default,²¹¹ a protection still exists to protect the policy of favoring a judgment on the merits.

²⁰⁰ See FED. R. CIV. P. 55(b).

²⁰¹ FED. R. CIV. P. at 55(b)(1) ("If the plaintiff's claim is for a *sum certain* or a sum that can be made certain by computation, *the clerk* . . . must enter judgment for that amount and costs . . ." (emphasis added)).

²⁰² FED. R. CIV. P. 55(b)(2) ("In all other cases, the party must *apply* to the court for a default judgment." (emphasis added)).

²⁰³ See *supra* notes 53–55 and accompanying text.

²⁰⁴ FED. R. CIV. P. 55(b)(2)(C)–(D).

²⁰⁵ FED. R. CIV. P. 55(c) (providing that an entry of default may be set aside for "good cause").

²⁰⁶ See *id.*; see also *supra* notes 68–70 and accompanying text (discussing the factors analyzed to determine whether "good cause" is found).

²⁰⁷ FED. R. CIV. P. 55(c).

²⁰⁸ See *supra* notes 68–70 and accompanying text.

²⁰⁹ See FED. R. CIV. P. 55(c).

²¹⁰ See *TCI Grp. Life Ins. Plan v. Knoebber*, 244 F.3d 691, 696 (9th Cir. 2001) ("[The] three factors derived from the 'good cause' standard that governs the lifting of entries of default . . . govern the vacating of a default judgment . . . as well.").

²¹¹ See *Davis v. Musler*, 713 F.2d 907, 918 (2d Cir. 1983) (Van Graafeiland, J., concurring); see also *First Interstate Bank of Okla., N.A. v. Serv. Stores of Am., Inc.*,

C. *The Court's Rule-Based, Statutory, and Inherent Powers Are Not Adequate Alternatives to Rule 55 Defaults*

Adopting the minority's narrow interpretation and relying on the court's rule-based, statutory, and inherent powers to sanction a party or attorney is insufficient to protect a diligent party's rights and ensure compliance with the judicial process. While Rule 16 and Rule 37 provide for sanctions for some acts that would constitute "otherwise defend" under the majority's broad interpretation—including failure to appear at a pretrial conference or participate in discovery—Rule 16 and Rule 37 do not provide for sanctions when a party fails to appear at trial.²¹² Further, Rule 16 and Rule 37 sanctions do not have to be in the form of a default judgment and are not mandatory.²¹³ On the other hand, the majority's broad interpretation of "otherwise defend" covers a wide range of acts, including failure to appear at trial.²¹⁴ Since a default must be entered by the clerk if the failure to "otherwise defend" is shown by affidavit,²¹⁵ a Rule 55 default is more likely to ensure compliance with the judicial process than the discretionary sanctions under Rule 16 and Rule 37.

Sanctions under Rule 16 and Rule 37 are also an inadequate alternative because they serve a different function within the Federal Rules of Civil Procedure than entry of default under Rule 55. Sanctions under Rules 16 and 37 are to ensure compliance with those particular rules.²¹⁶ A default under Rule 55 serves the broader purpose of protecting a diligent party's rights.²¹⁷ The majority's broad interpretation of "otherwise defend" encompasses a larger range of acts than Rules 16 and 37 do, protecting a diligent party's rights at *any* stage of litigation, not just at pretrial conferences or during discovery.

Unlike the court's rule-based power, its statutory or inherent powers allows it to sanction a defendant for failure to appear at trial; however, the latter powers are insufficient on their own to

128 F.R.D. 679, 680 (W.D. Okla. 1989) ("Relief from an entry of default will be granted more readily and with a lesser showing than in the case of a default judgment.").

²¹² See FED. R. CIV. P. 16(f), 37(b)(2)(A)(vi), (d)(3).

²¹³ See *id.*

²¹⁴ See *supra* Part II.A.

²¹⁵ FED. R. CIV. P. 55(a).

²¹⁶ FED. R. CIV. P. 16(f), 37(b)(2)(A), (d)(3).

²¹⁷ WRIGHT ET AL., *supra* note 3, § 2681.

protect a diligent party's rights. Under the court's statutory and inherent powers to sanction a party, a showing of "vexatious" or "bad faith" behavior is required.²¹⁸ Since the standard for imposing a sanction under the court's statutory and inherent powers is a high standard to meet, the diligent plaintiff's rights are unprotected if the plaintiff is unable to show that the defendant's behavior met that high standard.²¹⁹ However, bad faith is not required to enter a default under Rule 55.²²⁰ Under Rule 55, if the plaintiff shows by affidavit that the defendant failed to "otherwise defend," the clerk must enter a default.²²¹

Further, sanctions under the court's statutory or inherent powers do not deter parties from being neglectful about attending trial or other pretrial proceedings.²²² Neglect does not meet the high standard for imposing a sanction under the court's statutory or inherent powers.²²³ Interpreting "otherwise defend" broadly deters that behavior. Encouraging diligent behavior for attorneys and the parties they represent ensures that all deadlines are met, resulting in an orderly and efficient judicial system.²²⁴

Moreover, entry of default also allows for the punishment of both the attorney and the defendant. The defendant is punished because it is potentially liable for a judgment.²²⁵ The attorney is punished because the attorney's reputation is tainted and the client's trust is broken.²²⁶ Under the court's inherent powers, the court can sanction the party or the attorney,²²⁷ but under

²¹⁸ See *supra* Part I.D (discussing the standards needed for the court to exercise its statutory and inherent powers).

²¹⁹ See *supra* Part I.D.

²²⁰ See FED. R. CIV. P. 55(a).

²²¹ *Id.*

²²² See *supra* notes 104–05 and accompanying text.

²²³ See *Fink v. Gomez*, 239 F.3d 989, 993 (9th Cir. 2001) ("[R]ecklessness suffices for § 1927, but bad faith is required for sanctions under the court's inherent power. . . . [I]gnorance or negligence . . . would not meet the appropriate standard of either basis for sanctions.").

²²⁴ See *supra* notes 31–32, 115–21 and accompanying text.

²²⁵ A default judgment is considered conclusive like any other judgment on the merits. See *United States v. \$23,000 in U.S. Currency*, 356 F.3d 157, 163 (1st Cir. 2004).

²²⁶ Cf. *Williams v. United States (In re Williams)*, 156 F.3d 86, 90 (1st Cir. 1998) ("[A] lawyer's professional reputation is his stock in trade, and blemishes may prove harmful in a myriad of ways.").

²²⁷ *Revson v. Cinque & Cinque, P.C.*, 221 F.3d 71, 78 (2d Cir. 2000) ("The court has inherent power to sanction parties and their attorneys . . .").

28 U.S.C. § 1927 a court can only impose sanctions against the attorney.²²⁸ The threat of entry of default is needed to ensure the parties themselves comply with all stages of litigation. Relying on 28 U.S.C. § 1927 will not deter parties from failing to appear at trial or at other pretrial proceedings. Interpreting “otherwise defend” broadly deters both the parties and their attorneys from engaging in undue delay or harassment.²²⁹

Ultimately, a court can still use its discretion in determining whether entry of default or a sanction under its statutory or inherent powers is appropriate.²³⁰ This discretion is important when failure to appear at trial or participate in other pretrial proceedings is the fault of the attorney and not of the defendant.²³¹ Moreover, if a judge wants to preserve a judgment on the merits, lesser sanctions than a default judgment are available.²³²

Adopting the broad interpretation of “otherwise defend” provides for a bright-line rule, which protects the diligent party’s rights and ensures compliance with the judicial process at any stage in litigation. Leaving the power to sanction parties who fail to “otherwise defend” to the court’s rule-based, statutory, and inherent powers is insufficient to protect a diligent party’s rights and ensure compliance with the judicial process. If “otherwise defend” is interpreted broadly to include failure to appear at pretrial conferences and trial, an efficient judicial system will result.

²²⁸ See 28 U.S.C. § 1927 (2012) (“Any attorney . . . who so multiplies the proceedings . . . unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys’ fees reasonably incurred because of such conduct.” (emphasis added)).

²²⁹ See *supra* note 24–25 and accompanying text.

²³⁰ See 28 U.S.C. § 1927; *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (recognizing that the court is vested with these powers and cannot waive them).

²³¹ In *Morrison v. International Programs Consortium, Inc.*, the defendants’ attorney failed to appear at trial, and the defendants were unaware of their attorney’s misconduct. 240 F. Supp. 2d 53, 56 (D.D.C. 2003). The plaintiff moved for default judgment. *Id.* at 54. The court found that a default judgment was too severe a sanction because it was the defendants’ attorney who acted in bad faith, not the defendants. See *id.* at 60. The court imposed sanctions under 28 U.S.C. § 1927 against the attorney instead. See *id.*

²³² See *supra* Part I.D (discussing alternatives to default judgments).

CONCLUSION

A broad interpretation of the language "otherwise defend" in Rule 55(a) is needed to protect a diligent party's rights and encourage an efficient and orderly judicial system. The broad interpretation adopted by the majority of federal circuit courts is consistent with the text of Rule 55(a) and the underlying purpose of Rule 55 and the Federal Rules of Civil Procedure. If the minority's narrow interpretation is adopted, the court's rule-based, statutory, and inherent powers are insufficient to protect a diligent party's rights and ensure compliance with the judicial system.

Applying the broad interpretation of "otherwise defend" to the scenario presented at the beginning of this Note leads to the conclusion that the entry of default is proper. A pretrial brief was not submitted, and neither the party nor his attorney appeared at trial. The defendant failed to "otherwise defend," and the plaintiff can move for an entry of default. Once the default is entered, the plaintiff can move for entry of a default judgment. The entry of a default judgment is not absolute, but entered in the trial court's discretion. Any concerns that a judgment would not be entered on the merits are mitigated by the fact that the party has procedural protections for vacating the entry of default or default judgment.