UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

SHANE M. GATES	**CIVIL RIGHTS: 42 U.S.C. § 1983 ACTION AS TO TREASON**
VERSUS	
JUDGE RICHARD SWARTZ, WALTER P. REED, ADA NICHOLAS F. NORIEA, JR., CLERK OF COURT-ST TAMMANY, MARIE-ELISE PRIETO, STPSO SHERIFF RODNEY "JACK" STRAIN, CAPTAIN SHERWOOD, KATHRYN LANDRY, THE OFFICE OF THE CLERK OF COURT OF ST. TAMMANY, LOUISIANA ATTORNEY GENERAL JAMES D. "BUDDY" CALDWELL, THE OFFICE OF THE LOUISIANA ATTORNEY GENERAL, THE OFFICE OF WALTER P. REED DISTRICT ATTORNEY FOR THE PARISH OF ST TAMMANY, ADA RONNIE GRACIANETTE, JOHN AND JANE DOES OF THE PARISH AND STATE OFFICES NAMED, AND TRAVELERS-ST. PAUL INSURANCE COMPANIES	**CIVIL ACTION NO.: 2:13-cv-06425-SRD-JCW** **JUDGE: HONORABLE STANWOOD R. DUVAL** **MAG. JUDGE: JOSEPH C. WILKINSON, JR.** **JURY TRIAL**

MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR ENTRY OF DEFAULT AND AS TO INTENTIONAL DELAY OF PROCEEDING AND TO PREVENT INJUNCTIVE RELIEF

MAY IT PLEASE THE COURT:

Defendants, St. Tammany Parish Sheriff, Rodney "Jack" Strain, in his official and individual capacity as Sheriff, St. Tammany Parish Sheriff Captain Sherwood, St. Paul Fire & Marine Insurance Company (improperly named as "Travelers-St. Paul Insurance Companies"), Louisiana Attorney General James D. "Buddy" Caldwell, the Office of the Louisiana Attorney General, Kathryn Landry, District Attorney Walter P. Reed, ADA Nicholas F. Noriea Jr., ADA

Ronnie Gracianette, and the Honorable Judge Richard Swartz (collectively hereinafter "Defendants") aver as follows:

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff currently has pending two related lawsuits before this Court arising out of the same operative facts. The first lawsuit, *Gates v. Strain, et al*., 2:07-cv-06983-SRD-JCW ("*Gates I*"), was filed on October 17, 2007. That lawsuit is stayed pending resolution of the ongoing criminal charges against plaintiff in the 22nd Judicial District Court.[1] Plaintiff was unsuccessful in his first attempt to re-open the case in March 2011.[2] However, in August 2012, *Gates I* was re-opened after plaintiff's counsel represented to the Court that Gates had been acquitted of all criminal charges.[3] This was addressed by defendants in a Joint Motion for Rehearing that this Court granted, vacating the prior order re-opening the case.[4]

This lawsuit, *Gates v. Swartz, et al*., 2:13-cv-06425-SRD-JCW ("*Gates II*"), is the second lawsuit plaintiff has pending in this Court. Suit was originally filed in the Middle District of Louisiana on August 5, 2013.[5] Before any summons was requested by Gates, some defendants moved to change the venue of *Gates II* from the Middle District to the Eastern District pursuant to 28 U.S.C. § 1404 and, alternatively moved the Court to dismiss the matter for insufficient service of process pursuant to Federal Rule of Civil Procedure 12(b)(5).[6] On October 4, 2013, Gates sought an extension of time to respond to the motion to change venue to which, out of

[1] R. Doc. 81 and R. Doc. 196 in *Gates I.*
[2] R. Doc. 84 and R. Doc. 121 in *Gates I.*
[3] R. Doc. 143 in *Gates I.*
[4] R. Doc. 145 and R. Doc. 196 in *Gates I.*
[5] R. Doc. 1.
[6] R. Doc. 3.

professional courtesy, defendants consented.[7] On October 8, 2013, Gates filed an opposition to the defendants' motions to change venue and dismiss.[8]

On November 15, 2013, Judge Brady of the Middle District granted the Motion to Change Venue and deferred ruling on the Rule 12(b)(5) motion.[9] The case was transferred to the Eastern District of Louisiana on November 15, 2013 where it was originally allotted to District Judge Vance.[10] After the transfer of venue, certain defendants filed motions for extensions of time[11] which were uniformly granted, giving the defendants until January 6, 2014 to respond to *Gates II*.[12] On or before January 6, 2014, certain defendants filed a Motion to Transfer the case from Judge Vance to this Honorable Court[13] (where *Gates I* was filed and is presently stayed) and a Motion to Stay *Gates II* for essentially the same reasons that *Gates I* is presently stayed.[14]

The St. Tammany Parish Clerk of Court also filed a Motion for More Definite Statement and Motion to Strike.[15] Gates, again through the professional courtesy granted by defense counsel, obtained another extension of time to respond to these two defense motions.[16] Gates' counsel submitted an order requesting that he be granted until June 18, 2014 (approximately six months) to file responses to these motions.[17] Judge Vance entered an order extending the submission date on Record Documents 25, 29 and 30 to February 26, 2014.[18]

[7] R. Doc. 6.
[8] R. Doc. 8.
[9] R. Doc. 14.
[10] R. Docs. 15 and 16.
[11] R Docs. 20, 21, 23 and 24.
[12] R. Docs. 22, 26, 27 and 28.
[13] R. Doc. 25.
[14] R. Doc. 29.
[15] R. Doc. 30.
[16] R. Doc. 31.
[17] R. Doc. 32.
[18] R. Doc. 33.

Thereafter, on February 18, 2014, Gates' counsel yet again requested a continuance of the hearings on the various motions.[19] Judge Vance granted Gates' counsel's motion to continue the submission dates, this time to April 9, 2014.[20] On April 1, 2014, Gates filed a "no position" response to the Motion to Transfer to this Court[21] and filed oppositions to the motion for more definite statement, motion to strike[22] and motion to stay these proceedings.[23] The defendants requested leave to file a reply in support of the motion to stay.[24] Ultimately, Judge Vance transferred *Gates II* to this Court, recognizing that *Gates I* and *Gates II* arose out of the same operative facts.[25]

This Honorable Court granted defendants' motion for leave to file their reply in support of the Motion for Stay on April 22, 2014.[26] The Reply was filed into the record that day.[27] Thus, the Motion for Stay had been fully briefed and was awaiting a decision of the Court as of April 22, 2014. Thereafter, Gates counsel attempted to take default judgments on July 11, 2014.[28] At no time prior to this date did Gates' counsel suggest that any additional responsive pleading was necessary (which these defendants would vehemently dispute) and by Gates' counsel's repeated requests for continuances and in contesting the various defense motions by filing oppositions into the record, Gates has engaged in an eleven month silence and litigation as usual conduct.

There can be little doubt when comparing *Gates I* with *Gates II* that they both arise out of the same operative facts. In *Gates I*, plaintiff alleged unlawful arrest and false charges, asserted that the Sheriff and District Attorney engaged in malicious prosecution and abuse of process and

[19] R. Doc. 34.
[20] R. Doc. 36.
[21] R. Doc. 40.
[22] R. Doc. 41.
[23] R. Doc. 42.
[24] R. Doc. 44.
[25] R. Doc. 46.
[26] R. Doc. 47.
[27] R. Doc. 48.
[28] R. Docs. 49, 50.

that the defendants conspired in their actions. In *Gates II*, plaintiff alleges that the District Attorney of St. Tammany Parish, the St. Tammany Parish Clerk of Court and the Bench in St. Tammany Parish have conspired against him, committing a "fraud upon the Court." Plaintiff essentially alleges that the named defendants have committed crimes against him in the pursuit of the same criminal prosecution as complained of in *Gates I*. In both lawsuits, plaintiff seeks "injunctive relief to prevent bad faith prosecution." In both complaints, plaintiff asserts that evidence has been destroyed, altered or fabricated. The duplication in the lawsuits is evident in the enumerated §1983 violations, including:

1. Concerted unlawful and malicious subsequent arrest and charges;
2. Sheriff, Clerk of Court and District Attorney's malicious prosecution;
3. A §1983 conspiracy cause of action;
4. A §1983 count alleging liability of the District Attorney and his Office. (In the most recent complaint, Gates joins the Clerk of Court in this count); and
5. Both complaints set out due process and equal protection violations.

Although new facts are alleged in *Gates II* due to a significant passage of time since *Gates I* was filed in 2007, the factual predicate for both complaints is essentially the same. *Gates I* is simply an extension in time, to the present, of complaints and allegations pertaining to the ongoing criminal prosecution having its genesis in plaintiff's arrest by St. Tammany Sheriff's Deputies on November 16, 2006.

Because this case arises out of the same operative facts, has many of the same or similar defendants named in *Gates I* and, frankly, picks up where *Gates I* left off when filed several years ago, with allegations to the present day, it likewise should be subject to stay as a conviction on the resisting arrest charge could likewise impact any allegations in *Gates II*. If *Gates I* is

stayed and this case is simply a chronological extension of alleged deprivations of rights secured by law by state actors, then, by extension, it is appropriate to stay *Gates II* as well.

Prior to plaintiff's attempt to take defaults against the defendants in *Gates II*, there has been no activity in this case since April 22, 2014. The same is true of Mr. Gates still-pending state court criminal trial on the charge of resisting an officer. The attached minute entry from the 22nd Judicial District Court makes clear that the standstill in Mr. Gates' criminal prosecution is the result of his failure to appear.[29] As noted in the minute entry, there is an outstanding attachment for Mr. Gates' arrest.

Considering the time and effort of defendants to have the case transferred from the Middle District to the Eastern District and transferred from Judge Vance's court to this Court, as well as the pending Motion to Stay, Rule 12(b)5 motion for insufficient service of process, the Rule 12(e) motion for more definite statement and Rule 12(f) motion of defendants Prieto and the St. Tammany Parish Clerk of Court's Office,[30] it is unclear how plaintiff's counsel could possibly allege in good faith that all defendants have "failed to plead or otherwise defend"[31] plaintiff's claims in *Gates II*. Indeed, contrary to the allegations in the default pleadings, any delay in both the civil cases (*Gates I* and *Gates II*) and Mr. Gates' criminal trial has been caused by plaintiff and his counsel.

LAW AND ARGUMENT

I. ENTRY OF DEFAULT IS A DRASTIC REMEDY DISFAVORED BY THE COURTS

It has long been held in the United States Fifth Circuit that entry of Judgment by Default is a drastic remedy that should only be resorted to in extreme situations. *E.F. Hutton and Co.*,

[29] *See* the 3/27/14 Minute Entry from the 22nd JDC, attached as Exhibit A.
[30] Defendants Marie Elise Prieto and the St. Tammany Parish Clerk of Court's Office have filed a separate response to Plaintiff's motion. *See* R. Doc. 57.
[31] Fed. R. Civ. P. 55(a).

Inc. v. Moffatt, 460 F.2d 284 (5th Cir. 1972); *see also Southern Distributing Co., Inc. v. Technical Support Associates, Inc.*, 105 F.R.D. 1 (D.C. Tex. 1984). The Fifth Circuit has long held that the drastic sanction of judgment by default is permitted only in extreme situations where there is a clear record of contumacious conduct. *GFI Computer Industries, Inc. v. Fry*, 476 F.2d 1 (5th Cir. 1973).

Many other federal courts likewise view default as a drastic remedy. *Wendt v. Pratt*, 154 F.R.D. 229 (D. Minn. 1994); *Lichtenstein v. Jewelart, Inc.*, 95 F.R.D. 511 (E.D.N.Y. 1982). As a general rule, default judgments are ordinarily disfavored because cases should be decided on the merits whenever reasonably possible. *Creative Tile Marketing, Inc. v. SICIS Intern., S.r.L.*, 122 F.Supp. 1534 (S.D. Fla. 1996). Further, defaults are looked upon with disfavor, especially in actions implicating a public issue. In *Wilson v. Winstead*, 84 F.R.D. 218 (E.D. Tenn. 1979), citing *Wright and Miller*, the Court noted that the matter before it involved the employment of an elected public official.[32] Doubt with respect to whether to grant a default should generally be resolved in favor of trial on the merits. *Davis v. Parkhill-Goodloe Co.*, 302 F.2d 489 (5th Cir. 1962); *see also U.S. v. $55, 518.05 in U.S. Currency*, 728 F.2d 192 (3rd Cir. 1984).

As previously stated, to be culpable, Defendants' conduct leading to entry of default judgment must have been willful, intentional, reckless or in bad faith, and more than negligence is required for culpability for purposes of determining whether a default judgment should be set aside. *Monah v. Albert Einstein Medical Center*, 161 F.R.D. 304 (E.D. Pa. 1995).

Any doubts as to the propriety of granting a default judgment should be resolved in favor of the non-moving party. *Cincinnati Bell Telephone Company v. Allnet Communications*

[32] In the present case, the Defendants are uniformly public officials or employees, some elected, others employed, some more significantly in the public eye. There is little debate that Gates' lawsuits pertain to a State court criminal prosecution and implicate a public issue.

Services, Inc., 810 F.Supp. 217 (S.D. Ohio 1992) (citing Charles Allen Wright, Arthur R. Miller and Mary K. Kane, 10 FEDERAL PRACTICE AND PROCEDURE, §§ 2681-2701 (2d Ed., 1983)).

It is only in those circumstances where a defendant fails to make any type of appearance at all, thus failing to plead or otherwise defend the claims made against the defendant, that an entry of default is warranted. *District 2A, Transp., Technical, Warehouse, Indus. and Service Employees Union v. Government of the Virgin Islands*, 759 F.Supp. 278 (D.C. V.I. 1990).

II. DEFENDANTS' PENDING FED. R. CIV. P. 12(b)(5), 12(e) AND 12(f) MOTIONS PRECLUDE THE ENTRY OF DEFAULT

As previously set forth in the Defendants' factual statement, *Gates II* was filed on August 5, 2013 in the United States District Court, Middle District of Louisiana. In response, defendants St. Tammany Parish Sheriff Rodney "Jack" Strain, St. Tammany Parish Sheriff Deputy Captain Sherwood, Travelers-St. Paul Insurance Companies and Louisiana Attorney General James D. "Buddy" Caldwell filed a Motion for Change of Venue pursuant to 28 USC §1404 and, alternatively, a Motion to Dismiss for Insufficient Service of Process pursuant to Federal Rule of Civil Procedure 12(b)(5).[33] The Defendants made clear that they did not want to waive the defense of insufficient service of process pursuant to Rule 12(h). Rather, Defendants sought to preserve this motion and its defense by asserting it contemporaneous with the Motion to Transfer Venue. Judge Brady ultimately ruled favorably to the Defendants on the Motion to Transfer Venue and, in regard to the Rule 12(b)(5) motion, stated: " Accordingly, the court will not rule on this motion, as a ruling is premature" and "[t]his Court will not rule on defendant's Motion (Doc. 3) to Dismiss for Insufficient Service of Process pursuant to FRCP 12(b)(5), as it is

[33] R. Doc. 3.

premature."[34] Judge Brady likewise recognized that the Defendants had filed the Rule 12(b)(5) "in order to preserve the defense pursuant to Federal Rule of Civil Procedure 12(h)."[35]

Subsequently, Defendants filed a Motion to Stay these proceedings[36] and the aforementioned Rule 12(b)(5) motion is still pending as it has not been reset for hearing, dismissed or otherwise disposed of to date. Further, Defendants Marie Elise Prieto and the Office of the Clerk of Court of St. Tammany filed a Motion for a More Definite Statement under Rule 12(e) and a Motion to Strike under Rule 12(f).[37]

The jurisprudence uniformly states that timely serving and filing a Motion to Dismiss under Rule 12(b) precludes the entry of default. *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622 (D. Del. 2007) (citing *Francis v. Joint Force Headquarters Nat'l Guard*, 2006 WL 2711459 (D.N.J. Sept. 19, 2006)). Filing a Motion to Dismiss pursuant to Rule 12(b) is clearly a response to a lawsuit and a reflection that the filing Defendants are "otherwise defending" the lawsuit, precluding default under Rule 55. *Langdon* at 628. In *Wickstrom v. Ebert*, 101 F.R.D. 26 (E.D. Wis. 1984), the Court noted that although certain defendants had not filed answers to plaintiff's complaint, the defendants had "defended" by filing Motions to Dismiss and a default could not be entered. The Court in *Wickstrom* specifically stated:

> Pursuant to Rule 55 of the Federal Rules of Civil Procedure, default judgment is appropriate when "a party against whom a judgment for affirmative relief is sought has failed to plead *or otherwise defend* as provided by these rules…" Fed. R. Civ. P. 55 (a) (emphasis supplied). The words "otherwise defend" presume the absence of some affirmative action on the part of a defendant which would operate as a bar to the satisfaction of the moving party's claim. *George & Anna Portes Cancer Prevention Center, Inc. v. Inexco Oil Company*, 76 F.R.D. 216, 217 (W.D. La. 1977); *see also Bryant v. City of Marianna*, 532 F.Supp. 133, 137 (N.D. Fla. 1982) (default is appropriate where defendants have not taken a single action in lawsuit).

[34] R. Doc. 14 (emphasis added).
[35] *Id.*
[36] R. Doc. 29.
[37] R. Doc. 30.

> In this context, it is generally held that the interposition of various challenges to matters such as service, venue and the sufficiency of the complaint preclude a default even if pursued in the absence of a responsive pleading. 10 Wright and Miller, FEDERAL PRACTICE AND PROCEDURE, § 2682 at 409-410 (2d ed. 1983); *see also Olson v. International Supply Company*, 22 F.R.D. 221, 223, 17 Alaska 643 (D. Alaska 1958) (words "otherwise defend" refer, among other things, to attacks on service or motions to dismiss or for particulars, which serve to prevent default without presently pleading to the merits). It is undisputed that motions challenging a complaint for failure to state a claim following which relief can be granted, falls squarely within the ambit of the phrase "otherwise defend". *Rudnicki v. Sullivan*, 189 F.Supp. 714, 715 (D. Mass. 1960); *Bass v. Hoagland*, 172 F.2d 205, 210 (5th Cir.), cert. denied, 338 U.S. 816, 70 S. Ct. 57, 94 L. Ed. 494 (1949).

Wickstrom at pp. 32-33.

In *Rogers v. Barnhart*, 365 F.Supp. 2d 803 (S.D. Texas, 2004), the court stated:

> In this case, the Commissioner has "otherwise" defended the case by filing a Motion to Dismiss for Lack of Jurisdiction. See *Sun Bank v. Ocala v. Pelican Homestead and Sav. Ass'n.*, 874 F.2d 274, 277 (5th Cir. 1989) ("The filing of a Motion to Dismiss is normally considered to constitute an appearance").

In *Ojelade v. Unity Healthcare, Inc.*, 962 F. Supp. 258 (D.D.C. 2013), the Court held that a Motion to Dismiss brought pursuant to Rule 12(b)(5) was a response to the plaintiff's complaint which mandated denial of a Motion for Default Judgment.

It is respectfully submitted that by filing a Motion to Dismiss pursuant to Rule 12(b)(5), along with defendants Prieto and the St. Tammany Parish Clerk's Office's Motion for a More Definite Statement under Rule 12(e) and a Motion to Strike under Rule 12(f), all defendants have manifested a clear intention to defend against Mr. Gates' claims as set forth in *Gates II*. The Defendants are "otherwise defending" this lawsuit.

III. SETTING ASIDE THE RULE 12 MOTIONS AND OTHER RESPONSIVE PLEADINGS, THE DEFENDANTS' PENDING MOTION TO STAY PROCEEDINGS (R. DOC. 29) EVIDENCES THAT THE DEFENDANTS ARE VIGOROUSLY DEFENDING THEIR POSITION IN THIS LITIGATION

In *Cincinnati Bell Telephone Company v. Allnet Communication Services, Inc.*, *supra*, the local telephone carrier ("Bell") commenced an action in State court. Allnet moved for a change of venue, "claiming that the case should be transferred to the Federal District Court in Washington, D.C., or in the alternative that the action should be stayed until the FCC has resolved Allnet's complaint about Cincinnati Bell's access charges during 1987-1988." *Cincinnati Bell Telephone Company* at 219 (emphasis added). Despite the pleadings of Allnet, Bell moved the Court for a default judgment. The Court rejected such a motion, stating:

> In the matter before this Court, Allnet has defended itself in this suit. Allnet removed this matter to Federal court. Furthermore, Allnet has vigorously defended its position in this litigation, by arguing that this case should be transferred or stayed. Therefore, although Allnet has not filed an answer, we conclude that a default judgment is inappropriate because Allnet has "…otherwise defend[ed]…" itself under the rules. *See id.*

Cincinnati Bell Telephone Company at 221 (citing Charles Allen Wright, Arthur R. Miller and Mary K. Kane, 10 FEDERAL PRACTICE AND PROCEDURE, §§ 2681-2701 (2d Ed. 1983)).

In *Mitsubishi Shoji Kaisha Limited v. MS Galini*, 323 F.Supp. 79 (S.D. Tex. 1971), the defendant filed a Motion for a Stay pending arbitration along with other motions after the plaintiff moved for a default. *Mitsubishi Shoji Kaisha Limited* at 84. The trial court stated: "In that circumstance, the Motion for Default Judgment will be denied." *Id.* Certainly the Motion for Stay was viewed as a demonstration of the defendant's intent to defend the case, even though it was filed after the filing of the default judgment.

Finally, in *HC Dalmoreproduct v. Kogan*, 145 F.3d 1338 (9th Cir. 1998) (unpublished), the court noted that a motion for stay pending arbitration, although not on the list of defenses that may be made by Rule 12(b) motion, should be treated the same as a Rule 12(b) motion for purposes of delaying the need to file an answer. Id. at *1 (citing Wright & Miller § 1360, pp. 432, 439-441 (motion for a stay pending arbitration may be treated as a Rule 12(b) motion);

Buckley v. Gallo Sales Co., 949 F.Supp. 737, 739-40 (N.D. Cal. 1996) (treating a motion to stay pending arbitration as a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction).

In the present case, certain defendants have filed a Motion to Stay in *Gates II* just as *Gates I* is currently stayed as both *Gates I* and *Gates II* arise out of the same operative facts. The Defendants respectfully submit that they are vigorously defending their position in this litigation by arguing that the case should be stayed. As such, a default judgment is inappropriate.

IV. DEFENDANTS HAVE NOT BEEN TOTALLY UNRESPONSIVE TO THE COMPLAINT IN *GATES II* AND ARE CERTAINLY INDICATING THAT THEY INTEND TO OFFER A DEFENSE IN THE MATTER

For a default judgment, a defendant must be considered a "totally unresponsive" party and its default plainly willful, reflected by its failure to respond to the summons and complaint, the entry of default or the motion for default judgment. *International Painters and Allied Trades Indus. Pension Fund v. Auxier Drywall, LLC*, 531 F.Supp. 2d 56 (D. D.C. 2008) (citing *Gutierrez v. Burg Contracting, Inc.*, 2000 WL 331721 at *1 (D. D.C. Mar. 20, 2000)); *see also Jackson v. Beech*, 636 F.2d 831, 836 (D. D.C. Cir. 1980), in which the court had held that the default judgment usually is only available when the adversary process has been brought to a halt because of an essentially unresponsive party. *Jackson* 636 F.2d at 836. Default judgments entered pursuant to Rule 55 are intended to protect plaintiffs whose adversaries "are clearly unresponsive." *Niemic v. Maloney*, 409 F.Supp. 2d 32, 37 (D. Mass. 2005); citing *Ortiz-Gonzalez v. Fonovisa*, 277 F.3d 59, 63 (1st Cir. 2002)(citation omitted).

Further, Rule 55 contemplates the entry of a default judgment if the defendant fails to "appear." Courts have construed the term in a liberal fashion in order to support the policy against unnecessary defaults. *Trust Co. Bank v. Tingen-Millford Drapery Co. Inc.*, 119 F.R.D. 21 (E.D. N.C. 1987). In *Trust Co. Bank*, the court found that the defendant had appeared in the

case by implication in that defendant's attorney had a telephone call with plaintiff's attorney in which he indicated that the defendants intended to defend the lawsuit. The court noted that an appearance can arise as a result of an objective manifestation of intent on the part of the defendant or counsel to defend the action. *Trust Co. Bank* at 22 (other citations omitted). The Court concluded that the defense attorney had every intention of defending the case.

Admittedly, the Court is empowered to enter a default judgment against a defendant who fails to defend its case. *Kegel v. Key West and Caribbean Trading Co.*, 627 F.2d 372, 375 (D.C. Cir. 1980). Here, however, the Defendants have clearly manifested an intent to defend the case and a default judgment pursuant to Rule 55(b)(2) is totally unwarranted. In the present case, the Defendants have filed a Motion to Transfer Venue, Motions to Dismiss Pursuant to Rule 12, a Motion to Transfer within the Eastern District and a Motion to Stay, all evidencing a vigorous intent to defend the case.

V. PLAINTIFF'S MOTION IS PROCEDURALLY IMPROPER AND PREMATURE

As directed in the Notice of Deficient Document entered on July 14, 2014, Gates was required to file a Motion for Entry of Default prior to seeking a default judgment against Defendants. While the pleading's caption includes the phrase "Motion for Entry of Default," the very first sentence of his motion and supporting memorandum make clear that Gates impermissibly seeks to skip the requirement of an entry of default and, instead, "Mr. Gates and counsel move the Court to enter judgments in default."[38] The Clerk afforded Gates the opportunity to remedy this procedural misstep and this opportunity was ignored.

A Judgment of Default may be taken only after the Clerk of Court first enters the party's default. *Onyiah v. St. Cloud State University*, 655 F. Supp. 2d 948 (D. Minn. 2006) (citing Fed R. Civ. P. 55(b); *Johnson v. Dayton Electric Manufacturing Co.*, 140 F.3d 781, 783 (8th Cir.

[38] R. Doc. 52, p. 1, R. Doc. 52-1, p. 1.

1998)); *Christenson Media Grp., Inc. v. Lang Indus., Inc*., 782 F. Supp. 2d 1213 (D. Kan. 2011). In *Structural Concrete Products, LLC v. Clarendon America Ins. Co.*, 244 F.R.D. 317 (E.D. Va. 2007), the Court stated:

> Before the plaintiff can move for default judgment the Clerk or the Court must enter default. *Eagle Fire, Inc. v. Eagle Integrated Controls, Inc.*, 2006 WL 1720681, at *5 (E.D. Va. June 20, 2006); 10A Charles Allen Wright and Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 2682 (3d ed. 2007) ("Prior to obtaining a default judgment under either Rule 55(b)(1) or Rule 55(b)(2), there must be an Entry of default as provided by Rule 55(a)").

Structural Concrete Products, 244 F.R.D. at 328.

Likewise, in *U.S. v. Manriques*, 2013 WL 5592191 (M.D. N.C. 2013), the court reiterated the Rule in a clear expression of Rule 55 that, before attempting to obtain a default judgment under Rule 55(b), there must be an entry of default by the Clerk of Court as provided by Rule 55(a). *Id*. at *2. When petitioner does not first seek entry of a default with the Clerk of Court, it is procedurally improper for that party to move the Court for the entry of a default judgment. *Id.* (other citations omitted).

In the present case, Gates has not obtained an entry of default from the Clerk of Court. It is procedurally improper for Gates to move this Court for entry of default judgment under Rule 55(b). For this reason alone, Gates' motion should be denied by the Court.

VI. BY PARTICIPATING IN THE PROSECUTION OF THIS MATTER WITH "LITIGATION AS USUAL" CONDUCT, GATES HAS WAIVED ANY RIGHT TO SEEK A DEFAULT JUDGMENT

Gates II was filed in the United States District Court, Middle District of Louisiana on August 5, 2013. Before any summons was requested by Gates, defendants moved to change the venue of *Gates II* from the Middle District to the Eastern District pursuant to 28 U.S.C. § 1404 and, alternatively moved the Court to dismiss the matter for insufficient service of process

pursuant to Federal Rule of Civil Procedure 12(b)(5).[39] On October 4, 2013, Gates sought an extension of time to respond to the motion to change venue to which, out of professional courtesy, defendants consented.[40] On October 8, 2013, Gates filed an opposition to the defendants' motions to change venue and dismiss.[41]

On November 15, 2013, Judge Brady of the Middle District granted the Motion to Change Venue and deferred ruling on the Rule 12(b)(5) motion.[42] The case was transferred to the Eastern District of Louisiana on November 15, 2013.[43] Defendants filed a Motion to Transfer the case from Judge Vance to this Honorable Court[44] (where *Gates I* was filed and is presently stayed) and a Motion to Stay in *Gates II* for essentially the same reasons that *Gates I* has been and is presently stayed.[45]

The St. Tammany Parish Clerk of Court also filed a Motion for More Definite Statement and Motion to Strike.[46] Gates, again through the professional courtesy granted by defense counsel, obtained another extension of time to respond to these two defense motions.[47] Setting forth health issues as the basis for his request, Gates' counsel submitted an order requesting that he be granted until June 18, 2014 to file responses to these motions.[48] Judge Vance entered an order extending the submission date on Record Documents 25, 29 and 30 to February 26, 2014, noting "[t]his will provide counsel with ample time to enroll additional counsel and respond to defendants' motions."[49]

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[39] R. Doc. 3.
[40] R. Doc. 6.
[41] R. Doc. 8.
[42] R. Doc. 14.
[43] R. Docs. 15 and 16.
[44] R. Doc. 25.
[45] R. Doc. 29.
[46] R. Doc. 30.
[47] R. Doc. 31.
[48] R. Doc. 32.
[49] R. Doc. 33.

On February 18, 2014, Gates' counsel yet again requested a continuance of the hearings on the various motions.[50] Judge Vance granted Gates' counsel's motion to continue the submission dates, this time to April 9, 2014.[51] On April 1, 2014, Gates filed a "no position" response to the Motion to Transfer to this Court[52] and filed oppositions to the motion for more definite statement, motion to strike[53] and motion to stay these proceedings.[54] The defendants requested leave to file a reply in support of the motion to stay.[55] Ultimately, Judge Vance transferred *Gates II* to this Court, recognizing that *Gates I* and *Gates II* arose out of the same operative facts.[56]

This Honorable Court granted defendants' motion for leave to file their reply in support of the Motion for Stay on April 22, 2014.[57] Thus, the Motion for Stay had been fully briefed and was awaiting a decision of the Court as of April 22, 2014. Thereafter, Gates counsel attempted to take default judgments on July 11, 2014.[58] At no time prior to this date did his counsel suggest that any additional responsive pleading was necessary (which these defendants would vehemently dispute) and by Gates' counsel's repeated requests for continuances and in contesting the various defense motions by filing oppositions into the record, Gates has engaged in an eleven month silence and litigation as usual conduct.

In *FOC Financial Ltd. Partnership v. National City Commercial Capital Corporation*, 612 F.Supp. 2d 1080 (D. Ariz. 2009), a Motion to Dismiss had been filed and subsequently denied by the Court and defendant failed to timely file an answer. The Court stated:

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[50] R. Doc. 34.
[51] R. Doc. 36.
[52] R. Doc. 40.
[53] R. Doc. 41.
[54] R. Doc. 42.
[55] R. Doc. 44.
[56] R. Doc. 46.
[57] R. Doc. 47.
[58] R. Docs. 49, 50.

> It is also noted that defendant's failure to timely answer was a technical error with little bearing on the disposition of the case. Defendant promptly responded to service of process by filing a notice of removal and motion to dismiss and the failure to answer was not noticed by both the Court and the plaintiff's competent counsel for five months during which time the proceedings continued as if an answer had been filed (Docs. 1, 6, 28). The Court agrees with defendant that plaintiff's five-month silence and litigation-as-usual conduct effectively waived any right to entry of default judgment. *See e.g., Ciccarello v. Joseph Schlitz Brewing Co.*, 1 F.R.D. 491, 493 (S.D. W.Va. 1940) (plaintiff's conduct may constitute "waiver of any right to a default judgment"); *La. Farmer's Protective Union v. Great Atl. & Pac. Tea Co. of Am., Inc.*, 83 F.Supp. 646, 656 (E.D. Ark. 1949) (plaintiff's delay in seeking default constituted an effective waiver).

FOC Financial Ltd. Partnership, et al., at 1084-85.

In *Ciccarello*, *supra*, the court held that plaintiff's motion for entry of a default judgment could not be sustained where plaintiffs consented to several continuances and other proceedings. The Court found plaintiff's actions amounted to a "waiver" of any right to a default judgment. *Ciccarello* at 493.

Likewise, in the present case, even assuming Gates' counsel has some justifiable basis for seeking a default (which he does not), Gates' silence in fully engaging in the litigation process by filing various pleadings, including motions to continue and opposition memoranda to the Defendants' motions, should constitute a waiver of any right whatsoever to a default judgment.

VII. GATES HAS NOT FILED RETURNS OF SERVICE AS TO SEVERAL DEFENDANTS AND AS SUCH ANY MOTION FOR DEFAULT SHOULD BE DENIED

Gates has not filed returns on summonses for the following defendants:

1. Richard A. Swartz;
2. Marie-Elise (Malise) Prieto;
3. Office of the Clerk of Court, 22nd JDC for the Parish of St. Tammany;
4. Nicholas Noriea Jr.;
5. Ronnie Gracianette;
6. Walter Reed;
7. Office of the District Attorney for St. Tammany Parish;
8. Sheriff Rodney "Jack" Strain;
9. STP Captain Sherwood.

Gates' motion for default should be denied as to each of these defendants because Gates has failed to file a return of service of summons as to these defendants. *Zeviar v. Local No. 2747, Airline, Aerospace and Allied Employees, IBT*, 733 F.2d 556, 558 (8th Cir. 1984); *Brown v. Florida*, 2013 WL 869534 (M.D. Fl. 2013). Where there is no service return of record, there is no evidence of service. *Sisk v. U.S.*, 2007 WL 1963000 (W.D. La. 2007).

VIII. APPLICATION OF A MULTI-FACTORAL TEST REVEALS THAT GATES' MOTION FOR DEFAULT JUDGMENT SHOULD BE DENIED

Courts, including the Eastern District of Louisiana, have implemented a multi-factor analysis to determine whether the entry of a default judgment is warranted. *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986); *DameWare Development LLC v. Northern Software, S.A.*, 2003 WL 1341209 (E.D. La. 2003).

(1) Potential prejudice to Gates.

There is no prejudice to Gates. If *Gates II* is stayed as *Gates I* is presently, both awaiting the outcome of Gates' criminal trial (which is fundamental to the disposition of *Gates I* and *II*), then all parties will wait to proceed until after the criminal trial. If the stay is denied, Defendants will move forward with defending the case and ostensibly, motion practice and possibly discovery could be initiated. Gates misrepresents the proceedings by suggesting that Defendants have "acted to continue…these matters" and filed dilatory motions.[59] To the contrary, a review of the docket sheet reflects that Gates has no less than three times sought extensions of time to respond to the meritorious pleadings of these Defendants. Recognizing *Gates II* is wholly a continuation of allegations made in *Gates I*, Judge Brady of the Middle District and Judge Vance of the Eastern District both ordered venue transfer and transfer to this division respectively.[60]

[59] R. Doc. 52, p.1, R. Doc. 52-1, p. 4.
[60] R. Docs. 15, 46.

The motions to transfer venue and to transfer divisions of court thus have already been determined to have merit and any time allocated to such motions has not been prejudicial to Gates.

Further, Gates cannot claim prejudice in having to respond to the Defendants' motion for stay. *Gates I* is stayed and the reasons to stay *Gates II* are essentially the same.[61] Further, Defendants also have Rule 12 motions pending before the Court that, based on the record and pleadings, also have merit.[62] It is respectfully submitted that these "otherwise defending" motions have merit and if there is any prejudice it is to the Defendants if these motions are not decided before allowing the case to move forward. Because the ongoing state court criminal proceeding complained of in both *Gates I* and *II* necessarily has implications for the §1983 allegations as set forth in *Gates I* and *II*, Defendants have filed a joint motion to stay proceedings, as a conviction in the state court criminal proceeding could render moot both *Gates I* and *II* as *Heck v. Humphrey*, 512 US 477, 114 S. Ct. 2364 (1994), would potentially bar plaintiff's claims against these Defendants. Awaiting a decision on the motion to stay these proceedings does not act to prejudice Gates. *Heck* provides a compelling basis for the motion to stay and the FRCP 12 motions are meritorious as well. There simply is no prejudice to the plaintiff. This factor favors defendants.

(2) Gates' claims lack merit.

As previously stated, under *Heck v. Humphrey*, if Gates is convicted in state court of resisting arrest, both *Gates I* and *II* could potentially be dismissed. *Gates II* was filed on August

[61] *See* Memorandum in Support of Motion for Stay (R. Doc. 29-1) and Reply to Plaintiff's Opposition to Motion to Stay (R. Doc. 48) which set forth these arguments.

[62] Defendant St. Tammany Parish Sheriff, Rodney "Jack" Strain in his official and individual capacity as Sheriff, St. Tammany Parish Sheriff Captain Sherwood and St. Paul Insurance Company (improperly named as "Travelers-St. Paul Insurance Companies") have not reset the FRCP 12(b)(5) motion for hearing as the motion for stay (R. Doc. 29) has been filed and is pending before the Court.

5, 2013, just one week before Gates' criminal resisting arrest and DUI trial was set to begin before Judge Swartz on August 12, 2013 in the 22nd Judicial District Court for the Parish of St. Tammany. In an obvious attempt to derail the criminal proceeding, which had already been the subject of numerous delays and continuances, Mr. Abel filed *Gates II*. The complaint is full of scorched earth, highly personal attacks on the Defendants and its filing alone, naming Judge Swartz as a defendant, led to the entire bench of the 22nd Judicial District Court being recused and the criminal case yet again being continued. Retired Louisiana State Fifth Circuit Court of Appeal Judge Walter Rothschild, took over the adjudication of the criminal matter at the direction of the Louisiana Supreme Court. Gates has obtained numerous continuances and remains a fugitive from justice refusing to participate in the criminal process, despite having recused every single judge in the 22nd Judicial District Court.[63]

Gates' counsel suggests that the facts set forth in *Gates II* have nothing to do with the facts underlying the original civil rights matter also assigned to this Court (*Gates I*).[64] A side-by-side comparison of the original §1983 complaint (*Gates I*) with the present matter reflects that it all arises out of the same operative facts. In *Gates I*, plaintiff alleged unlawful arrest and charges, asserts that the sheriff and district attorney engaged in malicious prosecution and abuse of process and the defense conspired in their actions.

In *Gates II*, plaintiff alleges the District Attorney of St. Tammany Parish, the St. Tammany Parish Clerk of Court, and the entire bench in St. Tammany Parish have conspired against him, committing a "fraud upon the Court." Plaintiff alleges that the named Defendants committed crimes against him in the pursuit of the criminal prosecution. In both *Gates I* and *Gates II*, plaintiff seeks "injunctive relief to prevent bad faith prosecution." In both complaints,

[63] *See* Minute Entry attached as Exhibit A.
[64] *See* R. Doc. 52-1, p. 4.

plaintiff asserts that evidence has been destroyed, altered or fabricated. The duplication in the lawsuits is evident in the enumerated §1983 violations, including:

1. Concerted unlawful and malicious subsequent arrest and charges;
2. Sheriff, Clerk of Court and District Attorney's malicious prosecution;
3. A §1983 conspiracy cause of action;
4. A §1983 count alleging liability of the District Attorney and his office. (In *Gates II*, Gates joins the Clerk of Court in this count); and
5. Both *Gates I* and *II* set out due process and equal protection violations.

Although new facts are alleged in *Gates II* due to the passage of time since the first filing in 2007 of *Gates II*, the factual predicate for both complaints is essentially the same. The complaint filed in *Gates II* is simply an extension of time to the present of complaints and allegations pertaining to the ongoing criminal prosecution. It becomes obvious that *Gates II* is a further effort to derail the criminal prosecution which outcome all counsel recognize could have a significant impact on *Gates I* and *II*.

Apart from vague references to "treason, fraud and Hobbs Act violations,"[65] plaintiff cites no compelling facts or legal authority to support *Gates II*. Although it is the same criminal prosecution for which counsel for Gates told the Court that he was opting not to pursue a Hobbs Act claim, counsel for Gates continues to make vague references to the Hobbs Act in an effort to provide some seemingly convincing basis for *Gates II* when, in fact, none exists. [66]

In opposition to the motion to stay, plaintiff attempted to argue that it is the prosecution of Gates that should be stayed. Like the bulk of the pleadings that Gates has filed thus far, this argument was also already made to this Honorable Court and rejected.[67] This Court has previously given careful consideration to whether there was any basis for the Federal court to

[65] R. Doc. 52-1, p. 4.
[66] In *Gates I*, Gates' counsel told the Court on the record that Gates is not alleging any claims for violations of the Hobbs Act whatsoever (See R. Doc. 81, *Gates I*).
[67] *See* this Court's Order and Reasons to Deny Plaintiff's Motion to Re-open 42 USC §1983 Action and Stay Unconstitutional Prosecution in the 22nd Judicial District Court for the Parish of St. Tammany (R. Doc. 121, p. 9 in *Gates I*).

stay the plaintiff's ongoing criminal prosecution. In this Court's Order and Reasons, this Court concluded that "the issues raised by plaintiff surrounding the arrest and alleged manufacturing of evidence can be addressed in the context of a defense to the criminal charges at trial on the merits."[68]

Younger abstention provides that a federal court must abstain from considering a case in favor of an ongoing state proceeding, if the relief sought in federal court would interfere with a state proceeding. *See Younger v. Harris*, 401 U.S. 37 (1971). A federal court must abstain from hearing a claim under Younger abstention where three conditions are present: (1) pending states judicial proceedings; (2) the state proceedings implicate important state interests; and (3) the state proceedings afford an adequate opportunity to raise federal claims. *See Middlesex County Ethics Committee v. Garden State Bar Ass'n*., 457 U.S. 423, 432 (1982). When a person is the target of an ongoing state action involving important state matters, that person cannot interfere with the pending state action by maintaining a parallel federal action involving claims that could have been raised in the state case. If the state defendant files such a case, *Younger* requires the federal court to defer to the state proceedings. *See Borkowski v. Fremont Inv. And Loan of Anaheim, Cal*., 368 F. Supp. 2d 822 (N.D. Ohio 2005).

This Court has already rejected any notion that a stay of the state proceedings should be granted and that any of the issues raised by Gates can be addressed in the context of a defense to the criminal charges at the trial on the merits. Plaintiff offers nothing with regard to alleged claims of treason and fraud other than hyperbole and speculation. The root of the problem is that Gates simply does not want to face a criminal trial realizing the potential implications for *Gates I*. Gates' claim simply lacks merit.

(3) Gates' complaint is wholly insufficient and not well-supported by the record.

[68] *Id.*

Gates II is an unmitigated diatribe seeking to disqualify Judge Swartz (which was accomplished), bringing personal attacks against the attorney for the District Attorney's office (Kathryn Landry) as well as claims against the Louisiana Attorney General, Buddy Caldwell in addition to the defendants already named in *Gates I*. Forty pages of hollow, unsupported allegations do not simply make the complaint well-supported by the record. Further, adding the Clerk of Court of St. Tammany Parish as a defendant is simply without merit. The complaint is vague and ambiguous throughout and impracticable to respond to in that in numerous instances it lumps all the defendants together without specifying which defendant allegedly engaged in the acts complained of and which defendant is allegedly liable for such acts.[69]

The complaint also fails to provide specific facts regarding when the acts were allegedly committed, which person committed the alleged acts and which acts support the allegations. A review of the Clerk of Court's Memorandum in Support of its Rule 12 motion for a more definite statement and to strike is reflective of the numerous deficiencies with the complaint itself.[70] The claims of fraud and treason are truly scandalous as set forth by the Clerk of Court. The complaint simply lacks merit.

(4) Gates is vague and ambiguous with regard to damages as well.

The complaint in *Gates II* states that "Gates avers all damages arising from these violations of his rights under the United States Constitution and that of the State of Louisiana."[71] That said, based on prior knowledge and the fact that Gates allegedly suffered a facial fracture with damage to his right eye, it is fully anticipated that Gates will seek millions of dollars in this matter. It is well-stated that "default judgment is disfavored where the sum of money at stake is too large or unreasonable in light of defendant's actions." *Trindade v. Reach Media Group,*

[69] R. Doc. 30-1, p. 2.
[70] R. Doc. 30-1.
[71] R. Doc. 1, p. 38.

LLC, 2014 WL 3572132 (N.D. Cal. 2014), citing *Truong Giang Corp. v. Twinstar Tea Corp.*, 2007 WL 1545173 at *12 (N.D. Cal. 2007). This factor weighs in favor of denying plaintiff's motion for default.

(5) Material facts are in dispute and there is no neglect or bad faith or the need to analyze excusable neglect.

Defendants hotly contest all facts as alleged in *Gates II*. Defendants' allegations are meritorious if they contain "even a hint of a suggestion" which proven at trial, would constitute a complete defense. *Keegel v. Key West & Caribbean Trading Co., Inc.*, 627 F.2d 372 (D.C.C. 1980) (other citations omitted). Certainly, defense counsel contest the forty pages worth of allegations set forth in *Gates II*.

Defendants have fully participated in the process. And while the tactical decisions cited by plaintiff may in fact be indicative of Defendants' litigation strategy, this strategy is not, on the face of the record, one of improper delay but rather of asserting a justifiable stay in *Gates II* when a stay in *Gates I* has already been granted. *See FOC Financial Ltd. Partnership v. National City Commercial Capital Corporation*, *supra*, at 1083. The suggestion that such motions as filed by the Defendants are "dilatory" is wholly without merit. The Defendants have not avoided participating in the proceedings. The preference to adjudicate cases, especially here where Defendants have vigorously "otherwise defended" the action would warrant the denial of plaintiff's motion. This factor weighs in favor of Defendants.

CONCLUSION

For the reasons discussed above, Plaintiff is entitled neither to an entry of default nor a default judgment. Defendants have actively defended this lawsuit. Any delay has been due to Plaintiff and his counsel. Plaintiff's motion must be denied.

Respectfully submitted:

s/ Mark E. Hanna
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been served on all counsel of record via the Court's CM/ECF system, this 29th day of July, 2014. I further certify that there are no non-CM/ECF parties.

s/ Mark E. Hanna

Thursday, March 27, 2014

COURT MET THIS DAY PURSUANT TO ADJOURNMENT PRESENT AND PRESIDING HIS HONOR, WALTER J. ROTHSCHILD, AD HOC JUDGE, DIVISION "C"; NICK NORIEA, ASSISTANT DISTRICT ATTORNEY; RODNEY J. STRAIN, JR, SHERIFF AND MALISE PRIETO, CLERK OF COURT (Lillie Burch, Court Reporter and Willie Cooper, Bailiff)

423509 STATE OF LOUISIANA
VS
SHANE MICHEAL GATES

The defendant not being present in open Court but represented by Counsel Daniel G Abel and this matter on assignment for Status Conference, argument was heard on behalf of State and Defense regarding service to the defendant; whereupon, Court advised that there is an outstanding attachment for the defendant's arrest.

Court asked Defense Counsel if he is still attorney of record, to which Defense confirmed he was, pending his outcome at MD Anderson. Court advised status will be determined upon the defendant's arrest.

Further, the deputy clerk returned exhibits to Counsel Abel that were denied admittance into evidence; whereupon, Court ordered let the record reflect the exhibits were excluded and returned to Defense, to which Defense confirmed receipt.

COURT ADJOURNED SINE DIE MINUTES READ AND APPROVED

Minute Clerk/Linda Forman WALTER J. ROTHSCHILD, AD HOC JUDGE

A TRUE EXTRACT OF THE MINUTES OF THIS COURT

DEPUTY CLERK
22ND JUDICIAL DISTRICT COURT
ST. TAMMANY PARISH, LOUISIANA

EXHIBIT
tabbies
A