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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

REDDING BANK OF COMMERCE,
Plaintiff,

No. 2:10-cv-00385-MCE-DAD

v.

MEMORANDUM AND ORDER

SCOTT JOHANNESSEN and LORIE
JOHANNESSEN,
Defendants.

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Pursuant to Federal Rule of Civil Procedure 55(c), Defendant
Scott Johannessen ("Defendant") presently moves to vacate the
default judgment entered against him on March 31, 2010 in this
action for Money and Account Stated by Plaintiff Redding Bank of
Commerce ("Plaintiff"). For the reasons set forth below,
Defendant's Motion is granted.

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1 **BACKGROUND**

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3 On April 24, 2007 Defendant, along with co-defendant Lorrie
4 Johannessen, obtained a \$300,000 line of credit from Plaintiff
5 secured by a Deed of Trust on their home. A more senior deed of
6 trust also encumbered the home. When Defendants defaulted on the
7 senior loan, the house was sold in foreclosure. None of the
8 proceeds from the trustee's sale went to the junior loan.
9 Subsequently, Defendants defaulted on the junior loan as well.
10 According to Plaintiff, the entire balance of the credit line,
11 plus interest, remains unpaid.

12 Plaintiff filed suit against defendants for Money and
13 Account Stated in the Superior Court, County of Shasta.
14 Plaintiff states it hired a process server who made three
15 attempts at personal service before opting for substitute
16 service, which under California law allows service to be
17 effectuated by leaving a copy of the Summons and Complaint at the
18 Defendant's place of business with a person apparently in charge,
19 and thereafter mailing the summons and complaint to Defendant by
20 first-class mail. See Cal. Code. Civ. Proc. 415.20.

21 Plaintiff states that on February 3, 2010, the process
22 server left a copy of the Summons and Complaint with a person
23 apparently in charge at Defendant's place of business. Plaintiff
24 states it mailed the Summons and Complaint to Defendant on
25 February 12, 2010. On February 15, 2010, Defendant responded by
26 removing the action to federal court. Defendant's Notice of
27 Removal acknowledges receipt of the Summons and Complaint on or
28 about February 3, 2010.

1 Pursuant to Federal Rule of Civil Procedure 81, Defendant
2 was required to file a response by the later of a) 21 days after
3 receipt of the complaint by service or otherwise; b) 21 days
4 after service of the complaint; or c) 7 days after notice of
5 removal is filed. Therefore, Defendant's responsive deadlines
6 were approximately February 24, March 5, and February 22
7 respectively. Defendant did not file a responsive pleading with
8 the prescribed timelines.

9 Plaintiff states that on March 24, 2010, counsel left a
10 voicemail for Defendant stating that Plaintiff intended to take a
11 default if a responsive pleading was not filed. Plaintiff states
12 that on March 25, 2010 it sent a letter informing Defendant that
13 it would take a default if a responsive pleading was not filed by
14 March 29, 2010 at 4:00 p.m. On March 30, 2010, Defendant
15 contacted Plaintiff's counsel asking that a copy of the letter
16 and Complaint be emailed to him as he was on a trip and had left
17 the items at home. Plaintiff's counsel sent him the materials
18 that same day. The next day, on March 31, 2010, Plaintiff filed
19 for default judgment. The Court entered judgment against
20 Defendant, and seven days later, on April 7, 2010, Defendant
21 filed this Motion to Vacate.

22 23 STANDARD

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25 Federal Rule of Civil Procedure 55(c) provides that "[f]or
26 good cause shown the court may set aside an entry of default and,
27 if a judgment by default has been entered, may likewise set it
28 aside in accordance with Rule 60(b)."

1 The Ninth Circuit has indicated that a district court's
2 discretion is "especially broad where...it is entry of default
3 that is being set aside, rather than a default judgment."
4 Mendoza v. Wight Vineyard Mgmt., 783 F.2d 941, 945 (9th Cir.
5 1986) (citation omitted); see also Brady v. United States, 211
6 F.3d 499, 504 (9th Cir. 2000). The defaulting party bears the
7 burden of establishing "good cause" to set aside an entry of
8 default. Franchise Holding II, LLC v. Huntington Restaurants
9 Group, Inc., 375 F.3d 922, 925 (9th Cir. 2004). In determining
10 whether there is good cause to set aside entry of default, the
11 court considers: (1) whether the defaulting party engaged in
12 culpable conduct which led to the default; (2) whether the
13 defaulting party has a meritorious defense; and (3) whether
14 setting aside the default would prejudice the party who obtained
15 it. Mendoza, 783 F.2d at 946. These factors are disjunctive,
16 therefore, the court may deny a Rule 55(c) motion if it finds any
17 one of the foregoing factors. Franchise Holding, 375 F.2d at 926
18 (citation omitted). However, where timely relief is sought from
19 a default and the movant has a meritorious defense, doubt, if
20 any, should be resolved in favor of the motion to set aside the
21 default so that cases may be decided on their merits. Mendoza,
22 783 F.2d at 946 (other citations omitted).

23 24 **ANALYSIS**

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26 Although the Court is not impressed by Defendant's failure
27 to timely file a responsive pleading, nonetheless a resolution of
28 the dispute on its merits is preferable.

1 See Schwab v. Bullock, 508 F.2d 353, 355 (9th Cir. 1974). It is
2 clear from Defendant's moving papers that he did not willfully
3 abandon his claim, but rather he acted untimely. His Motion to
4 Vacate comes only thirty-two days after his responsive pleading
5 deadline. Once learning of the Default, Defendant acted to
6 remedy the situation, filing this Motion to Vacate seven (7) days
7 after the entry of judgment.

8 Additionally, Defendant alleges that service of process was
9 defective as the address served was not his true "place of
10 business," and he does not believe personal service was ever
11 attempted as required by California Code of Civil Procedure
12 415.20. Plaintiff counters that the address served was listed as
13 Defendant's place of business of the State Bar of California
14 website, and that the process server signed an affidavit,
15 subsequently provided to the Court, stating that personal service
16 was attempted. Plaintiff admits that this signed affidavit of
17 service was inadvertently left out of previous filings. While
18 the Court finds that service was properly effectuated, the cloud
19 of impropriety created by Plaintiff's failure to timely file a
20 signed affidavit of service further warrants vacating the
21 Default.

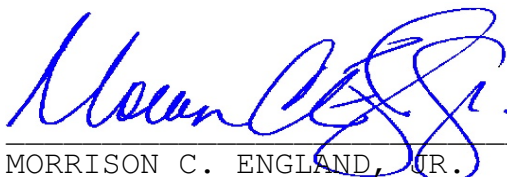
22 23 **CONCLUSION**

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25 For good cause appearing, Defendant's Motion to Vacate
26 (Docket No. 10) is GRANTED. The Clerk's March 31, 2010 entry of
27 Default Judgment against Defendant Scott Johannessen (Docket
28 No. 9) is hereby vacated.

1 However, as a result of Defendant's noncompliance with the
2 mandates of Federal Rule of Civil Procedure 81, Defendant shall
3 pay to Plaintiff the amount of \$500.00 as costs incurred for
4 Defendant's failure to timely file a responsive pleading after
5 repeated notice and warnings of default. Payment is to be made
6 within ten (10) days from the date this order is electronically
7 filed or the default will be reinstated.

8 IT IS SO ORDERED.

9 Dated: July 23, 2010

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13 MORRISON C. ENGLAND, JR.
14 UNITED STATES DISTRICT JUDGE
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