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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ZACKS & UTRECHT, P.C.,	)	
	)	No. C 10-1739 BZ
Plaintiff(s),	)	
v.	)	<b>ORDER GRANTING MOTION</b>
LATRELL SPREWELL,	)	<b>TO SET ASIDE DEFAULT</b>
	)	
Defendant(s).	)	
_____	)	

This Court is required to consider three factors in deciding whether there is good cause to vacate an entry of default: (1) Whether plaintiff will be prejudiced if the default is vacated; (2) whether defendant has a meritorious defense; (3) whether defendant's culpable conduct lead to the default. TCI Group Life Ins. Plan v. Knobber, 244 F.3d 691, 696 (9 Cir. 2001). See also Franchise Holding II, LLC. v. Huntington Restaurants Group, Inc., 375 F.3d 922, 925-6 (9 Cir. 2004) (Factors may be considered in disjunctive).

Here there is no question that defendant's culpable

1 conduct led to the entry of the default. Counsel for  
2 defendant, who removed this action to federal court,  
3 "inadvertently failed" to file an answer. Default was entered  
4 about a month and a half after the case was removed and more  
5 than a month after the answer was due. No explanation is  
6 given for the inadvertence. Counsel argues that "he forgot"  
7 but this appears in no declaration. Counsel fails to allege  
8 facts sufficient to show excusable neglect.

9       Shortly after the default was entered, defendant, a  
10 resident of Wisconsin, participated in an unsuccessful  
11 mediation in San Francisco. Plainly, defendant is not  
12 ignoring this suit. Absent other factors, the Court is  
13 reluctant to dispose of a contested action without reaching  
14 the merits when the fault is not that of the defendant, but  
15 that of his counsel. It is preferable, wherever possible, to  
16 allow cases to be resolved on the merits. Pena v. Seguros La  
17 Comercial,S.A., 770 F.2d 811, 814 (9th Cir. 1985).

18       Although counsel failed to provide sufficient facts to  
19 demonstrate a meritorious defense in his moving papers, some  
20 facts supporting a claimed defense of attorney malpractice  
21 were articulated during oral argument.

22       Finally, setting aside the default will result in minimal  
23 prejudice to the plaintiff. The default was taken after the  
24 answer was about a month overdue and defendant has  
25 participated in an unsuccessful mediation.

26       Accordingly, Defendant's motion to set aside default is  
27 **GRANTED**, on condition that defendant pay to plaintiff  
28 reasonable attorney's fees and costs for having the default

1 entered. Plaintiff shall provide defendant with an itemized  
2 declaration of fees and costs, which shall be paid within 10  
3 days unless contested. Defendant shall file proof of payment  
4 along with his amended answer. A status conference to set a  
5 trial date is scheduled for **March 21, 2011 at 4:00 p.m.**, in  
6 Courtroom G, 15th Floor, Federal Building, 450 Golden Gate  
7 Avenue, San Francisco, California 94102. A **joint** statement  
8 containing a proposed trial scheduled is due **March 14, 2011.**

9 Dated: February 22, 2011



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Bernard Zimmerman  
United States Magistrate Judge