

1 **Mrs. Darla Padgett**
Mr. Joe Padgett
2 **3533 262nd Avenue SE**
Sammamish, Washington 98075
3 **Telephone (425) 313-0872**
Facsimile (425) 313-0873
4 *In propria Persona*

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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA,
10 SAN JOSE DIVISION

12 DARLA PADGETT, JOE PADGETT,)

13 Plaintiffs,)

14 vs.)

15 BRIAN LOVENTHAL, an individual;)
A. CURTIS WRIGHT, an individual; LISA RICE,)
16 an individual; and DOES 2 TO 100, inclusive,)

17 Defendants.)
18)
19)
20)

Case No. C-04-03946 JW (RS)
[PROPOSED] ORDER DENYING
DEFENDANT LOVENTHALS MOTION TO
SET ASIDE SEPTEMBER 4, 2007 DEFAULT
ORDER

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23 **1. BACKGROUND**

24 This case involves a claim by Plaintiffs Darla and Joseph Padgett (the “Padgetts”) that officials
25 of the City of Monte Sereno engaged in a campaign of harassment, intimidation and discrimination

1 against them in violation of their civil rights pursuant to 42 U.S.C. § 1983. The Padgetts became
2 involved in a dispute with City officials over the height of a fence on their property. They claimed that
3 other Monte Sereno residents had similar fences or had violated other city codes, but were not
4 prosecuted by the City. Ultimately, the Padgetts came to claim that Brian Loventhal (“Loventhal”), the
5 City Manager and Planning director was discriminating against them. Shortly after they made that
6 charge, the Padgetts received a letter demanding that they leave town. The letter threatened that if the
7 Padgetts did not leave town, a 1994 newspaper article involving the circumstances under which Joseph
8 Padgett resigned from his employment with the San Jose Police Department would be disseminated to
9 everyone in the City. An archive copy of the newspaper article was attached to the letter. The Padgetts
10 believed that Loventhal had sent the threatening letter in retaliation against them for claiming
11 discrimination. A pre-lawsuit investigation revealed that Loventhal had downloaded the 1994
12 newspaper article.

13 Before filing the lawsuit and throughout the case, Plaintiffs demanded that City officials preserve
14 computers used by particular City employees and records from those computers during the relevant time
15 period. Todd master (“Master”) of Howard, Rome, Martin & Ridley stipulated that computer records
16 would be preserved. However, there was no stipulation to cease using computers that were being used
17 on a daily basis. Eventually, the Plaintiffs moved the Court for a formal preservation order. After a
18 series of hearings involving the Magistrate Judge assigned to the case and Judge Ware, a preservation
19 Order was issued. The final outcome of these hearings was that the City was permitted to continue to
20 use its computers but that the contents of the computers would be preserved.

21 The court conducted a hearing on April 14, 2006. With respect to whether the Court should
22 permit inspection of the City’s computers, the Court stated:

23 I want to know if this is a letter written by Rice or is this a letter that some City official
24 put her up to harass these people. If I know the answer to that question because that’s
25 what the jury has to figure out in this case, then we know whether we have a lawsuit for
damages or simply a waste of time. But I can’t make that judgment unless I have the
information.

1 (Transcript of April 14, 2006 Hearing at 49.) Defendant’s counsel, Mr. Todd Master, asked that the
2 Defendants be given the opportunity to brief the motion pursuant to Civil Local Rules 72-2. (Id.)
3 Recognizing that Plaintiffs had filed their motion for reconsideration of Judge Seeborg’s discovery order
4 as an administrative motion, the Court signaled that it would give Defendants an opportunity to brief the
5 matter. However, the Court ordered counsel to “continue to preserve everything.” (Id.) Mr. Master
6 asked the Court to permit that the computers in question remain in use and represented that “nothing is
7 being deleted.” (Id.)

8 On April 27, 2006, Defendants filed their formal memorandum in opposition to Plaintiffs’
9 appeal of Judge Seeborg’s order. (See Docket Item No. 237.)

10 On 12.28.06 the Court ordered the inspection of certain computer workstations, hard drives,
11 and laptop computers used by City employees Rice, Wright, and Loventhal. (Order Granting Plaintiffs’
12 Motion to Allow Inspection of Computer Equipment ¶ 1-2, 280].

13 In January 2007, Plaintiffs learned that the City had destroyed Loventhal’s laptop hard
14 drive in August 2006. According to Defendants, a the City Finance Officer, Mrs. Sue L’Heureux, had
15 thrown out Mr. Loventhal’s laptop hard drive after it had “crashed”. (Notice of Motion and Motion
16 for Protective Order re: Computer Inspection/Clarification of December 28, 2006 Order, Declaration
17 of Sue L’Heureux ¶ 4, [290])

18 On 2.19.07 [298], Plaintiffs Joseph and Darla Padgett filed their First Motion for
19 Terminating Sanctions. Plaintiffs filed on the grounds that (1) Defendants had a duty to preserve the
20 hard drive on Loventhal’s computer laptop, (2) Defendants destroyed the hard drive in bad faith, and
21 (3) Plaintiffs’ are prejudiced by the spoliation. (Motion at 8-11.)

22 On 3.20.07 [312], The Court reserved its’ ruling with respect to terminating sanctions or
23 entry of default judgment. However, The Court imposed monetary sanctions for spoliation of
24 evidence and appointed a Special Master, at the defendants’ expense, to handle ongoing discovery.
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1 See Id. ¶ 20. On May 4th- 6th, plaintiffs' expert, Mr. Scott Cooper was finally allowed to
2 enter the City premises and conduct the inspection that had been granted the previous December.
3 Using evidence of further spoliation garnered from this search, from CA Public Records Requests and
4 from additional depositions taken from two City employees, plaintiffs again approached the Court.

5 See Id. ¶21. On 5.29.07 [340], the plaintiffs filed to amend their previous Motion For
6 Terminating Sanctions, [298], and again asked for a default judgment. The plaintiffs provided
7 evidence that throughout the litigation, despite three letters to preserve, assurances from defendants
8 that nothing was being deleted and a preservation Order by the Court, Defendant Loventhal was
9 systematically and deliberately destroying City computer storage devices and hiding evidence. It is
10 Plaintiffs contention that Loventhal's actions were done deliberately in order to frustrate efforts by
11 Plaintiffs to document defendants' involvement in the campaign against them.

12 See Id. ¶22. The Court conducted an evidentiary hearing on August 7, 2007 and through
13 its' findings, granted Plaintiffs' motion by Granting Plaintiffs' renewed Motion for Terminating
14 Sanctions; Striking Defendant Brian Loventhal's Answer, and ordered the Clerk to enter Default as to
15 Defendant Brian Loventhal. [405].

16 On 9.06.07 [413], Defendant Loventhal filed a Motion for Reconsideration. Loventhal
17 contended that the Court had failed to consider specific material facts and the Adriana factors in
18 issuing the terminating sanction.

19 On 9.21.07 [419], the Court denied the defendants' motion for reconsideration. The Court
20 indicated that for a party to obtain leave of the court for reconsideration, the moving party must show
21 that (1) At the time of the motion for leave, a material difference in fact or law exists. (2) The
22 emergence of new material facts or a change of law occurring after the time of such order; or
23 (3) a manifest failure by the Court to consider material facts or dispositive legal arguments which were
24 presented to the Court before such interlocutory order. As Defendant Loventhal didn't argue any of
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1 those factors, but rather argued the default as too severe a sanction, his motion was denied and his
2 default stood as an appropriate remedy.

3 Before the Court is Plaintiffs Renewed Motion for Terminating Sanctions for ongoing
4 violations of F.R.Civ.P. 37(a)(3), F.R. Civ.P 34, spoliation and secretion of evidence, and a pattern of
5 violating direct Orders of the District Court, along with repeated non-compliance with Discovery Orders
6 issued by the Special Master, Thomas Denver.

7 Also before the Court is [505], dated 5.16.08, Loventhal's Motion To Set Aside September 4,
8 2007 Default Order. Loventhal requests, pursuant to Federal Rule of Civil Procedure 55(c) and 60(b),
9 that the Court set aside and/or vacate his default.

10 F. R. C. P. 55(c) and F.R.C.P. 60(b) both provide that a Court may set aside an entry of
11 default "for good cause shown." The "good cause" standard that governs vacating an entry of default
12 under rule 55 (c) is the same standard that applied to vacation of an order of default under Rule 60(b).
13 *TCI Group Life Ins. Plan v. Knoebber*, 244 F. 3d 691, 696 (2001). In determining whether to set aside
14 a default pursuant to Rule 55, courts consider three issues: (1) whether setting aside the default would
15 prejudice the plaintiff; (2) whether the defendant has meritorious defenses; and (3) whether the
16 defendant's culpable conduct led to the default. *American Ass'n of Naturopathic Physicians*, 227 F.
17 3d at 1108; *Falk v. Allen*, 739 F.2d 461, 463 (9th Cir. 1984).

18 This tripartite test is disjunctive, thus a finding that any of these factors is present is
19 sufficient to justify the district court's denial of the motion. *Hammer*, 940F.2d 525(9th Cir. 1991).

20 The Court has examined material facts and evidence presented in this Motion and in
21 opposition papers filed by the plaintiffs.

22 The Court has weighed the three factors required for the setting aside of a default. The Court has
23 found that the first and the third considerations have already been examined when deciding to Order a
24 Default. The Court does not find that a meritorious defense can be made that separates the link
25 between the discovery violations and the civil right violations. The Court will not reward defendant

1 Loventhal for his intentional violation of the Court's Orders. Nor will the Court believe that
2 Loventhal's destruction of evidence which he had reason to believe might be used against him in this
3 litigation was not a culpable act.

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5 For the foregoing reasons, this Court denies Loventhal The Motion To Set Aside Default.
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8 Dated:

JAMES WARE
United States District
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