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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

ALFRED BANKS,  
  
v.  
  
ACS EDUCATION, et al.,  
  
Plaintiff,  
  
Defendants.

Case No. 10cv1886-BTM (CAB)

**ORDER RE MOTIONS TO SET  
ASIDE ENTRY OF DEFAULT AND  
MOTION FOR DEFAULT  
JUDGMENT**

Pending before the Court are Defendants JPMorgan’s and Kathleen Barnhill’s motions to set aside default [docks. # 44, 50] and Plaintiff’s motion for default judgment against Defendants JPMorgan, Kathleen Barnhill, “Charlette,” and State Student Aid Commission [dock. #55].

**I. MOTIONS TO SET ASIDE DEFAULT**

Fed. R. Civ. P. 55(c) provides that a court may set aside the entry of default “for good cause shown.” Factors to be considered when deciding whether to set aside an entry of default judgment include: (1) whether the defendant’s “culpable conduct” led to the default; (2) whether the plaintiff would be prejudiced by a set-aside; and (3) whether the defendant can present a meritorious defense to the claim. *Falk v. Allen*, 739 F.2d 46, 463 (9th Cir. 1984); *American Ass’n of Naturopathic Physicians v. Hayhurst*, 227 F.3d 1104, 1108 (9th Cir. 2000).

Here, both JPMorgan and Ms. Barnhill were improperly served. According to an executed summons filed on December 28, 2010, a process server served a summons on

1 JPMorgan at 10834 International Drive, Suite 100, Rancho Cordova, California 95670  
2 (“International Drive”), delivering a copy of the summons to Janet McDuffie. Internet  
3 searches show that this is the address of California Student Aid Commission, the employer  
4 of Ms. McDuffie. JPMorgan does not maintain a place of business on International Drive and  
5 Ms. McDuffie is not an employee of JPMorgan. (Brinker Decl. ¶¶ 3, 4) With respect to Ms.  
6 Barnhill, according to an executed summons filed on January 3, 2011, service of a summons  
7 was made to Richard E. Carter, her alleged agent for service of process. However, Ms.  
8 Barnhill has not appointed Mr. Carter, nor any other individual as a designated agent for  
9 service of process. (Barnhill Decl. ¶ 43)

10 Improper service of the complaint presents good cause to set aside entries of default.  
11 See *Mason v. Genisco Technology Corp.*, 960 F.2d 849, 851 (9th Cir. 1992). JPMorgan’s  
12 and Ms. Barnhill’s motions to set aside default are **GRANTED** and Plaintiff’s motion for  
13 default judgment as to these defendants is **DENIED** as moot.

## 14 **II. MOTION FOR DEFAULT JUDGMENT**

15 Similarly, Plaintiff has not provided sufficient evidence that Defendants “Charlette” and  
16 State Student Aid Commission were properly served. As proof of service, Plaintiff provides  
17 affidavits by a process server stating the summons was served on Dona Niemeyer on behalf  
18 of “Charlette” and Janet McDuffie on behalf of State Student Aid Commission. [Dock. # 35,  
19 36] However, Plaintiff does not provide evidence that either Ms. Niemeyer or Ms. McDuffie  
20 is authorized to accept process on behalf of “Charlette” or State Student Aid Commission.  
21 See Fed. R. Civ. P. 4(e)(2); Fed. R. Civ. P. 4(h)(1)(B); Cal Code Civ Proc § 416.10(a).  
22 Alternatively, with respect to State Student Aid Commission, Plaintiff has not shown that Ms.  
23 McDuffie is “apparently in charge of the office” where summons was served or that the  
24 additional requirements of Cal Code Civ Proc § 415.95 were met. Therefore, Plaintiff’s  
25 motion for default judgment is **DENIED** without prejudice. Plaintiff may refile his motion for  
26 default judgment to cure these deficiencies within twenty days of entry of this order or the  
27 defaults will be vacated.

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**III. ADDITIONAL REQUESTS FOR ENTRY OF DEFAULT**

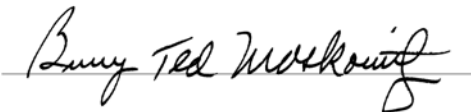
Finally, after Plaintiff filed his amended complaint, he requested entry of default against three additional Defendants for purported failure to respond to the original complaint. [Docks. # 93-95.] Because “[t]he amended complaint supersedes the original, the latter being treated thereafter as non-existent,” *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967), the Clerk was instructed to deny these requests and not enter default. Going forward, if Plaintiff seeks to enter default against any Defendant for failure to respond to the First Amended Complaint, the Clerk shall forward the request to the Court for determination of whether proper service was made.

**IV. CONCLUSION**

Defendants JPMorgan’s and Kathleen Barnhill’s motions to set aside default are **GRANTED**. Plaintiff’s motion for default judgment against Defendants is **DENIED**. Plaintiff shall effect proper service on Defendants JPMorgan, Kathleen Barnhill, “Charlette,” State Student Aid Commission, and any other Defendant within sixty days of the filing of this order or his case against any Defendant not properly served shall be dismissed without prejudice.

**IT IS SO ORDERED.**

DATED: March 2, 2011

  
Honorable Barry Ted Moskowitz  
United States District Judge