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and AXS Charge Ltd.

**UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

WILLIAM SILVERSTEIN, an
individual,

Plaintiff,

v.

LIQUID MINDS LLC, TECHIE
GROUP LLC, EAST GROUP LLC,
AXS CHARGE LTD, DEV8
ENTERTAINMENT LIMITED,
DATATIME IDEAS LIMITED, and
DOES 1-50;

Defendants.

Case No. CV08-02433-SJO (RCx)

Hon. S. James Otero

**DEV8 ENTERTAINMENT
LIMITED AND AXS CHARGE
LTD.'S NOTICE OF MOTION
AND MOTION TO SET ASIDE
DEFAULT ORDER AND
JUDGMENT; AND
MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT THEREOF**

DATE: June 9, 2008

TIME: 10:00am

COURTROOM: 880

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1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 PLEASE TAKE NOTICE that, on June 9, 2008, at 10:00 a.m., or as soon
3 thereafter as the matter may be heard, at the courtroom of the Honorable S. James
4 Otero, located at Room 880, Los Angeles - Roybal, Los Angeles, California,
5 specially appearing entities AXS Charge Ltd., a Cyprus limited company (“AXS”)
6 and Dev8 Entertainment Limited, a British Virgin Islands limited company
7 (“Dev8”) (together with AXS, the “Moving Defendants”)¹ will, and hereby do,
8 move this Court to set aside the default order and judgment (the “Defaults”)
9 previously entered in Silverstein v. Liquid Minds LLC et al., California Superior
10 Court for the County of Los Angeles Case No. BC375173 (now removed to this
11 Court) with respect to the Moving Defendants, for the following reasons:

12 The Moving Defendants satisfy the requisite Fed.R.Civ.P. 60(b) standards to
13 vacate a default order and judgment. They have meritorious defenses, Plaintiff will
14 not suffer prejudice from the requested relief, and the Moving Defendants did not
15 engage in any culpable conduct which resulted in the Defaults. Accordingly, this
16 Court should set aside the Defaults.

17 This motion will be based on this Notice of Motion and Motion and the
18 accompanying Memorandum of Points and Authorities, Plaintiff’s above
19 referenced Defaults and such other and further evidence as may be presented to the
20 Court at the time of hearing. This motion is made following the conference of
21 counsel pursuant to L.R. 7-3 which took place on May 2, 2008.

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25 ¹ The Moving Defendants believe there is no personal jurisdiction over them
26 in the State of California and they do not waive that contention by specially
27 appearing and filing this Motion to Set Aside Default Order and Judgment, nor do
28 they waive any other defense available to them including but not limited to
Plaintiff’s failure to serve process.

1 DATED this 13th day of May, 2008.

2 Respectfully submitted,

3 **NEWMAN & NEWMAN,**
4 **ATTORNEYS AT LAW, LLP**

5 By: s/ John Du Wors
6 Derek A. Newman (SBN 190467)
7 John Du Wors (SBN 233913)
8 Attorneys for AXS Charge Ltd. and
9 Dev8 Entertainment Limited
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1 **MEMORANDUM AND POINTS OF AUTHORITY**

2
3 **I. INTRODUCTION**

4 AXS Charge Ltd. (“AXS”) and Dev8 Entertainment Limited (“Dev8”)
5 (together with AXS, the “Moving Defendants”) respectfully request that the Court
6 set aside the default order and judgment (the “Defaults”) previously entered in
7 Silverstein v. Liquid Minds LLC et al., California Superior Court for the County of
8 Los Angeles Case No. BC375173 (now removed to this Court) with respect to the
9 Moving Defendants. The Moving Defendants more than satisfy each of the factors
10 for setting aside a default judgment pursuant to Fed.R.Civ.P. 60(b).The Moving
11 Defendants have meritorious defenses against Plaintiff’s claims and Plaintiff will
12 not be prejudiced by vacating the Defaults. The Moving Defendants did not
13 engage in “culpable conduct”. Rather, both Moving Defendants are located
14 outside California and have no connection with this forum.

15 Further, the Moving Defendants had no notice of this lawsuit prior to March
16 19, 2008, well after entry of the default order against them, and were in the process
17 of filing their notice of removal to this Court when the default judgment was
18 entered on April 10, 2008. Accordingly, the Moving Defendants were unable to
19 defend this action prior to entry of the Defaults. The Moving Defendants have
20 now obtained representation by the undersigned counsel and are prepared to file a
21 Motion to Dismiss if the Court permits.

22 The Moving Defendants respectfully request that the Defaults be set aside
23 for good cause shown and that the Moving Defendants be granted ten (10) days
24 from the date of vacating the Defaults to respond to plaintiffs’ complaint, either by
25 way of an answer or Fed. R. Civ. P. 12 motion.

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2 **II. APPLICABLE LEGAL STANDARDS**

3 Vacation of defaults is favored by the Ninth Circuit Court of Appeals.
4 Courts in the Ninth Circuit look to three factors in determining whether good cause
5 exists under Fed. R. Civ. P. 60(b) to grant relief from a default order and judgment.
6 Those factors are:

- 7 (i) whether the defendant has a meritorious defense;
8 (ii) whether reopening the default would prejudice the plaintiff; and
9 (iii) whether the defendant’s culpable conduct led to the default.

10 *See Falk v. Allen*, 739 F.2d 461, 463 (9th Cir. 1984); *Alan Neuman Prods., Inc. v.*
11 *Albright*, 862 F.2d 1388, 1392 (9th Cir. 1988). Courts generally favor resolutions
12 of disputes on the merits – default judgments are appropriate only “in extreme
13 circumstances.” *Falk, supra*, 739 F.2d at 463. “Where timely relief is sought from
14 a default . . . and the movant has a meritorious defense, doubt, if any, should be
15 resolved in favor of the motion to set aside the default so that cases may be decided
16 on their merits.” *Mendoza v. Wight Vineyard Management*, 783 F.2d 941, 945 (9th
17 Cir. 1986).

18 **III. THE MOVING DEFENDANTS SATISFY THE STANDARD FOR**
19 **SETTING ASIDE A DEFAULT ORDER AND JUDGMENT**

20 The Moving Defendants satisfy the requisite Rule 60(b) standards to vacate
21 a default order and judgment. They have meritorious defenses, Plaintiff will not
22 suffer prejudice from the requested relief, and the Moving Defendants did not
23 engage in any culpable conduct which resulted in the Defaults. Accordingly,
24 setting aside the Defaults is appropriate.

25 **A. THE MOVING DEFENDANTS HAVE MERITORIOUS**
26 **DEFENSES**

27 In considering whether a defendant has a meritorious defense, the Court
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1 must determine “whether there is some possibility that the outcome of the suit after
2 a full trial will be contrary to the result achieved by the default.” Hawaii
3 Carpenters’ Trust Funds v. Stone, 794 F.2d 508, 513 (9th Cir. 1986) (emphasis
4 added). A meritorious defense is not necessarily an ironclad one or one that is
5 likely to prevail. Rather, it must only raise serious questions regarding the
6 propriety of default. Id.

7 In the present matter, the Moving Defendants have numerous meritorious
8 defenses. As a threshold matter, they are not subject to the jurisdiction of this
9 Court². As such, any default judgment would be void:

10 [a] default judgment rendered by a court which lacked personal
11 jurisdiction over the defendant is void and may be attacked either
12 directly in the rendering court or through collateral attack upon
enforcement of the judgment.

13 Iowa State Univ. Research Found., Inc. v. Greater Continents, Inc., 81 Fed. Appx.
14 344, 348-349 (Fed. Cir. 2003) (citations omitted); *see also* Wolf-Tec, Inc. v.
15 Miller’s Sausage Co., 899 F.2d 727, 728 (8th Cir. 1990) (default judgment
16 unenforceable where the district court lacked personal jurisdiction over the
17 defendant).

18 The basic rule concerning the exercise of jurisdiction over a nonresident
19 defendant is that the defendant must have certain minimal contacts with the forum
20 such that the maintenance of the suit does not offend traditional notions of fair play
21 and substantial justice. International Shoe Co. v. Washington, 326 U.S. 310, 316,
22 66 S. Ct. 154, 90 L. Ed. 95 (1945). No such minimal contacts exist in this case.
23 Both Moving Defendants are foreign entities. (Declaration of John Du Wors in

24 _____
25 ²The Moving Defendants advance the lack of personal jurisdiction over
26 them as a threshold defense that provides grounds to vacate the default against
27 them. The Moving Defendants deny the substantive legal claims made by
28 Plaintiff in this action and reserve all affirmative defenses and arguments in that
regard.

1 Support of Motion to Set Aside Default (“Du Wors Decl.”) ¶ 2.) The jurisdictional
2 allegations in Plaintiff’s complaint are based on the assumptions that the Moving
3 Defendants (i) sent unsolicited commercial email to Plaintiff in California, (ii)
4 solicit business from California residents, and (iii) regularly conduct business with
5 California residents. (Complaint ¶¶ 31-36.) The Moving Defendants dispute these
6 allegations – they did not send the emails in question or cause them to be sent, and
7 they neither solicit business from California residents nor conduct business
8 regularly with California residents. (Du Wors Decl. ¶ 3.) Since there are factual
9 disputes concerning jurisdiction, Plaintiff must prove his alleged jurisdictional
10 facts by a preponderance of the evidence. Wells Fargo & Co. v. Wells Fargo
11 Express Co., 556 F.2d 406, at 430 n. 24 (9th Cir. 1977)(“It is clear that plaintiffs
12 bear the burden both of making an initial, prima facie showing of jurisdictional
13 facts at the pleading stage and of proving those facts by a preponderance at trial”).

14 Moreover, the Moving Defendants were not validly served. “[O]ne becomes
15 a party officially, and is required to take action in that capacity, only upon service
16 of a summons or other authority-asserting measure stating the time within which
17 the party served must appear and defend.” Murphy Bros., Inc. v. Michetti Pipe
18 Stringing, Inc., 526 U.S. 344, 350, 119 S.Ct. 1322 (1999). The Moving
19 Defendants should be given the opportunity to establish the invalidity of service.

20 Plaintiff’s Proof of Service of Summons indicates Plaintiff’s only effort to
21 serve the defendants was to mail a copy of the summons and complaint to Liquid
22 Minds LLC’s “agent for service of process” on August 6, 2007. (Du Wors Decl.
23 ¶4 Ex. A.) However, Liquid Minds LLC’s company status was revoked one month
24 before the alleged service, on July 1, 2007. (Id. ¶ 5 Ex. B.) As foreign entities, the
25 Moving Defendants do not have agents for service of process within the U.S. (Id.
26 ¶ 6.) The remaining defendants, Techie Group LLC and East Group LLC, have
27 registered agents in Delaware, not Nevada. (Id. ¶ 7 Ex. C.) Accordingly, Plaintiff’s

1 entire basis for claiming valid service is the mailing of documents to a defunct
2 entity. This is a plainly inadequate basis for a default order and judgment against
3 the Moving Defendants.

4 Plaintiff alleges the Los Angeles County Superior Court has previously
5 determined the Moving Defendants are “alter egos” of the other defendants.
6 (Complaint ¶¶ 6,7.) However, it is unclear what alleged facts Plaintiff previously
7 presented to the state court. The Moving Defendants deny they are “alter egos” of
8 any other defendant – rather, they are separate entities with separate assets and
9 different business purposes, and if this Court grants the the opportunity, they will
10 provide evidence of that. (Du Wors Decl. ¶ 8.) Given the extreme remedy of a
11 default judgment, the Moving Defendants should be granted relief and an
12 opportunity to present live testimony regarding the documentary evidence.

13 The Moving Defendants had no notice of this lawsuit prior to March 19,
14 2008, well after entry of the default order against them, and were in the process of
15 filing their notice of removal to this Court when the default judgment was entered
16 on April 10, 2008. (Du Wors Decl. ¶ 9.) Accordingly, the Moving Defendants
17 were unable to defend this action prior to entry of the Defaults. (*Id.*) The Moving
18 Defendants have now obtained representation by the undersigned counsel and are
19 prepared to file a Motion to Dismiss if the Court permits. (*Id.*)

20 Judgment by default is a drastic step appropriate only in extreme
21 circumstances; a case should, whenever possible, be decided on the merits.
22 Schwab v. Bullock's, Inc., 508 F.2d 353, 355 (9th Cir. 1974). Even if the record
23 evidence is viewed in the light most favorable to Plaintiff – which it should not be,
24 given the extraordinary relief of a default order and judgment – the evidence is at
25 best ambiguous. Through discovery, the Moving Defendants should have the
26 opportunity to obtain and present further evidence relating to Plaintiff’s spurious
27 claims. The Moving Defendants satisfy the meritorious defense prong and the
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1 Defaults should be vacated.

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3 **B. PLAINTIFF WILL NOT SUFFER PREJUDICE AS A RESULT**
4 **OF SETTING ASIDE THE DEFAULTS**

5 Prejudice turns on whether a plaintiff's ability to pursue his/her claims will
6 be hindered if default is set aside. Falk, 739 F.2d at 463. Delay alone does not
7 constitute prejudice unless it "will result in the loss of evidence, create increased
8 difficulties of discovery, or provide greater opportunity for fraud and collusion."
9 10 C. Wright, A. Miller and M. Kane, Federal Practice and Procedure, § 2699, at
10 pp. 536-37 (1983).

11 Here, there is no conceivable prejudice to Plaintiff. Once the case is re-
12 opened, there should be ample opportunity for the Plaintiff to seek discovery.
13 Further, there is no indication that vacation of the default will "provide greater
14 opportunity for fraud and collusion." The Moving Defendants are located in
15 Cyprus and the British Virgin Islands, and it is entirely reasonable for them to
16 request due process and for this Court to provide their counsel with the opportunity
17 to file a responsive pleading. The brief delay in the Moving Defendants'
18 appearance simply does not rise to the level of prejudice sufficient to outweigh the
19 strong interest in adjudicating disputes on their merits. *See Dow v. Jones*, 232 F.
20 Supp. 2d. 491 (D.C. Md. 2002) (no substantial prejudice by brief delay).

21 **C. THE MOVING DEFENDANTS DID NOT ENGAGE IN**
22 **CULPABLE CONDUCT THAT RESULTED IN THE**
23 **DEFAULTS**

24 The Ninth Circuit defines "culpable conduct" narrowly. Plan v. Knoebber,
25 244 F.3d 691 (9th Cir. 2001). In TCI, the Ninth Circuit relied heavily on the
26 Supreme Court's broad definition of excusable neglect in Pioneer Inv. Servs. Co. v.
27 Brunswick Assocs. Ltd. P'ship, 507 U.S. 380 (1993) to find that even where a
28 defendant had "receive[d] a pleading, read[] and underst[ood] it, and t[ook] no

1 steps to meet the deadline for filing a responsive pleading,” the conduct would not
2 necessarily be considered culpable. Plan, 244 F.3d at 697. In order to be
3 considered culpable, the court held that a defendant’s conduct must be “willful,
4 deliberate, or evidence of bad faith.” Id. (*quoting American Alliance Inc. Co. v.*
5 Eagle Ins. Co., 92 F.3d 57, 61 (2d Cir. 1996)).

6 Neglectful failure to answer as to which the defendant offers a credible,
7 good faith explanation negating any intention to take advantage of the
8 opposing party, interfere with judicial decision making, or otherwise
manipulate the legal process is not intentional under our default cases,
and is therefore not . . . culpable or inexcusable.

9 TCI, 244 F.3d at 698.

10 Here, the Moving Defendants offer credible reasons for why they did not
11 timely file a responsive pleading. The Moving Defendants are based in Cyprus
12 and the British Virgin Islands, and they have essentially no relationship with the
13 State of California. The Moving Defendants are not subject to jurisdiction in this
14 forum, and obtained representation in California as promptly as they could
15 reasonably do so. They had no notice of this lawsuit prior to March 19, 2008, well
16 after entry of the default order against them, and were in the process of filing their
17 notice of removal to this Court when the default judgment was entered on April 10,
18 2008. Under these circumstances, a defendant’s failure to timely answer or
19 otherwise plead is neither culpable nor inexcusable.

20 21 **IV. CONCLUSION**

22 Vacating defaults is favored under the Civil Rules and Ninth Circuit
23 precedent. The Moving Defendants satisfy the good cause requirements of Rule
24 60: (1) they have potentially meritorious defenses; (2) Plaintiff will not be
25 prejudiced by vacating the default; and (3) the Moving Defendants did not engage
26 in “culpable” conduct. Under these circumstances, vacating the Defaults is
27 appropriate.

1 The Moving Defendants respectfully request that they be granted ten (10)
2 days after the Court's order on the instant motion to file a responsive pleading.
3 Furthermore, the Moving Defendants request that they have a full and fair
4 opportunity to conduct discovery in this case and raise any and all defenses against
5 Plaintiff's claims.

6
7 DATED this 13th day of May, 2008.

8 Respectfully submitted,

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10 **NEWMAN & NEWMAN,**
ATTORNEYS AT LAW, LLP

11
12 By: s/ John Du Wors
13 Derek A. Newman (SBN 190467)
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14 Attorneys for AXS Charge Ltd. and
15 Dev8 Entertainment Limited