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8 UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
9 AT SEATTLE

10 MICROSOFT CORPORATION, a  
Washington Corporation,

11 Plaintiff,

12 v.

13 ALF TEMME, individually and d/b/a  
14 ROMFAB, LARS TEMME, individually  
and d/b/a ROMFAB, METALFAB  
15 OPERATIONS, INC. d/b/a ROMFAB and  
f/k/a ROMFAB OPERATIONS, INC.,

16 Defendant.

CASE NO. C10-408 MJP

ORDER

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18 This comes before the Court on Defendants' motion to set aside default. (Dkt. No. 25.)  
19 Having reviewed the motion, the response (Dkt. No. 26.), the reply (Dkt. No. 27.), and all related  
20 filings, the Court GRANTS Defendants' motion.

21 **Background**

22 Plaintiff Microsoft Corp. ("Microsoft") is suing Defendants for violations of the Anti-  
23 Cybersquatting Consumer Protection Act, trademark infringement, and state laws. (Compl. ¶ 1.)  
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1 Specifically, Microsoft alleges Defendants registered internet domain names that are confusingly  
2 similar to Microsoft's trademarks. (Id.)

3 Microsoft served the Summons and Complaint on Defendant Lars Temme on March 18,  
4 2010 and on Defendants Alan Temme and Metalfab Operations, Inc. on April 9, 2010. (Dkt No.  
5 13, 14, 15 and 16.) Pursuant to Federal Rule of Civil Procedure 12(a)(1)(A), Defendants'  
6 responses were due before April 30, 2010.

7 On June 10, 2010, Microsoft notified Defendants that Microsoft would seek entry of  
8 default if they did not respond to the Complaint by June 25, 2010. (Dkt. No. 28, Zellerbach  
9 Decl., Exhibits O, P.) Microsoft filed its motion for default on June 28, 2010 and default was  
10 entered on July 1, 2010. (Dkt. No. 20 and 23.) On July 23, 2010, Defendants filed this motion  
11 to set aside the clerk's entry of default. (Dkt. No. 25.)

## 12 Analysis

### 13 I. Motion to Set Aside Default

14 F.R.C.P. 55(c) allows the Court to "set aside an entry of default for good cause." When  
15 possible, courts should attempt to resolve suits on the merits. Pena v. Seguros La Comercial,  
16 S.A., 770 F.2d 811, 814 (9th Cir. 1985).

17 In the Ninth Circuit, the Court assesses (1) whether the defendant's culpable conduct led  
18 to the default; (2) whether the defendant has a meritorious defense; and (3) whether reopening  
19 the default would prejudice the plaintiff. TCI Group Life Ins. Plan v. Knowebber, 244 F.3d 691,  
20 696 (9th Cir. 2001). The decision to set aside default rests squarely within the discretion of the  
21 trial court. Mendoza v. Wight Vineyard Mgmt., 783 F.2d 941, 945 (9th Cir. 1986). "[A] finding  
22 that any one of these factors is true is sufficient reason for the district court to refuse to set aside  
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1 the default.” Franchise Holding II v. Huntington Rest. Group, Inc., 375 F.3d 922, 925-26 (9<sup>th</sup>  
2 Cir. 2004).

3 a. Defendants’ Culpable Conduct

4 A defendant’s failure to respond to the complaint is culpable if he “has received actual or  
5 constructive notice of the filing of the action and intentionally failed to answer.” TCI Group,  
6 244 F.3d at 697. If a party receives notice and fails to appear, it is not necessarily engaging in  
7 culpable conduct. The failure to answer after receiving notice must be “willful, deliberate or  
8 [there must be] evidence of bad faith.” Id. (quoting Am. Alliance Ins. Co., Ltd. v. Eagle Ins. Co.,  
9 92 F.3d 57, 61 (2nd Cir. 1996)). The Ninth Circuit has held conduct is not culpable when a  
10 defendant’s failure to answer in no way amounts to an attempt to gain strategic advantage in the  
11 litigation. See Bateman v. U.S. Postal Serv., 231 F.3d 1220, 1225 (9th Cir. 2000).

12 Here, Defendants assert their failure to answer was due to Defendant Temme’s  
13 depression, legal ineptness, limited financial resources, as well as Defendants’ inability to retain  
14 local counsel. (Dkt. No. 25, Pg. 3; Temme Decl. at ¶¶ 2, 17). In response, Microsoft argues  
15 Defendants’ claims of being “too depressed” to participate in the case are not credible because, at  
16 the time this action was brought, Defendants were litigating an unrelated case in the Middle  
17 District of North Carolina. (Liner v. Temme, Case No. 10-00016; Dkt. No. 28, Zellerbach Decl.,  
18 Exhibit Q.) In addition, Microsoft contends Defendants are experienced litigators given their  
19 routine participation in ICANN proceedings and the fact that they have been sued previously for  
20 cyber-squatting in other federal courts. (Dkt. No. 26, Pg. 7; Dell Inc. v. Alf Temme et al., Case  
21 No. 07-7798-AHS-JTL; Zellerbach Decl., Exhibits A-H; R.)

22 Microsoft’s arguments are not persuasive. The Court does not find Defendants’ failure to  
23 answer was an attempt to gain strategic advantage. While Defendants may have been sued  
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1 several times in other courts, this does not suggest Defendants are experienced litigators who  
2 willfully or in bad faith failed to answer here. Likewise, Defendants are not experienced  
3 litigators by virtue of their activities in ICANN proceedings. Litigating in federal court is  
4 distinct from appearing in arbitration proceedings that govern domain names. Finally, the fact  
5 that Defendants' attorneys were actively defending them in a personal injury action in North  
6 Carolina does not preclude Defendant Temme's assertions that he was suffering depression at the  
7 time this suit was brought. Because Defendants were plausibly overwhelmed by litigating in a  
8 district in which they do not reside, the Court finds their failure to answer was not deliberate or  
9 due to culpable conduct.

10 Defendants have met their burden in showing they did not act willfully attempt to gain  
11 strategic advantage in the litigation by failing to answer Microsoft's complaint.

12 b. Meritorious Defense

13 Defendants' burden to demonstrate a meritorious defense "is not extraordinarily heavy."  
14 TCI Group, 244 F.3d at 700. Defendants must supply a minimum of specific facts that would  
15 constitute a defense. Madsen v. Bumb, 419 F.2d 4, 6 (9th Cir. 1969)(upholding district court's  
16 decision not to set aside a default judgment when defendant only supplied an "answer  
17 consist[ing] of a mere general denial without facts to support it"). Defendants need only  
18 demonstrate facts or law showing the court that "a sufficient defense is assertible." In re Stone,  
19 588 F. 2d 1316, 1319 n.2 (10th Cir. 1978). The defense must be strong enough such that  
20 continued litigation "would not be a wholly empty exercise." TCI Group, 244 F.3d at 700.

21 Under this standard, Defendants have met their burden of showing a meritorious defense.  
22 Defendants contend that (1) a settlement agreement existed with respect to the alleged dispute,  
23 (2) the court lacks personal jurisdiction, and (3) Microsoft's claim fails on the merits. Microsoft  
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1 disputes each of these defenses. Specifically, the parties dispute whether Defendants credibly  
2 believed a settlement agreement was reached. Defendants argue Temme believed the dispute  
3 was resolved because he re-directed the cyber-squatting domain names to Microsoft's websites.  
4 (Dkt. No. 25-2, Temme Decl. ¶ 14.) Microsoft responds there was no settlement agreement and  
5 Defendants remain in control of the infringing websites. (Dkt. No. 27, Kern Decl. ¶ 4.)

6 The Court declines to consider whether a settlement agreement existed at this time. The  
7 ultimate success of Defendants' arguments is not presently before the Court. At this stage, the  
8 issue is simply whether further litigation "would not be a wholly empty exercise." TCI Group,  
9 244 F.3d at 700. Because Defendants have shown they were engaged in settlement negotiations  
10 and that there may have been a misunderstanding, Defendants have met their burden of showing  
11 a meritorious defense.

12 c. Prejudice to Microsoft

13 The final factor is whether vacating the default will prejudice Plaintiff. Prejudice has to  
14 "result in greater harm than simply delaying the resolution of the case." TCI Group, 244 F.3d at  
15 701. "The standard is whether [Plaintiff's] ability to pursue [its] claim will be hindered." Falk v.  
16 Allen, 739 F.2d 461, 463 (9th Cir. 1984).

17 Here, the total time between entry of the default order and the filing of the motion to set  
18 aside default was less than one month (Dkt. No. 23 and 25.) Microsoft has not asserted any loss  
19 of evidence or any inability to go forward on their claims due to the delay. The Court finds  
20 vacating the default entry does not prejudice Microsoft.

21 **Conclusion**

22 The Court GRANTS Defendants' motion because Defendants have met their burden in  
23 demonstrating good cause sufficient to set aside default.  
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The clerk is ordered to provide copies of this order to all counsel.

Dated this 5th day of November, 2010.



Marsha J. Pechman  
United States District Judge