

IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF OKLAHOMA

ROBERT H. BRAVER, an individual, )  
 )  
 Plaintiff, )  
 )  
 vs. ) Case No. CIV-05-210-T  
 )  
 (1) NEWPORT INTERNET MARKETING )  
 CORPORATION, a California corpora- )  
 tion, and (2) ROBERT ALAN SOLOWAY, )  
 an individual, )  
 )  
 Defendants. )

DEFENDANTS' MOTION TO SET ASIDE DEFAULT JUDGMENT

COME NOW the Defendants, Newport Internet Marketing Corporation and Robert Alan Soloway ("Defendants"), and pursuant to Rule 55(c), Fed.R.Civ.P., move to set aside the Default Judgment and Permanent Injunction (Doc. No. 19) entered herein, and in support thereof, would state:

1. On March 7, 2005, Plaintiff Robert H. Braver herein, filed his Amended Complaint (Doc. No. 7). Therein he requests monetary judgment against Defendants for an unspecified amount "in excess of \$10,000.00", and further requested unspecified and unidentified injunctive relief.

2. On May 23, 2005, counsel for Defendants, Michael D. McClintock of the law firm of McAfee & Taft, was allowed to withdraw, but ordered to continue to forward any pleadings to Defendants until such time as new counsel filed an entry of appearance (Doc. No. 11).

3. On September 12, 2005, Plaintiff's Motion for Default Judgment was filed pursuant to Rule 55(b), Fed.R.Civ.P., seeking, *inter alia*, damages against

Defendants in the astronomical amount of \$10,075,000.00, and extremely broad injunctions (Doc. No. 14).

4. On September 14, 2005, the Court entered an order for a hearing to be held pursuant to Rule 55(b)(2), Fed.R.Civ.P., on September 22, 2005, and Mr. McClintock, former counsel of Defendants, was ordered to provide a copy of that order to Defendants, and thereafter, notify the Court that written notice had been accomplished (Doc. No. 16).

5. On September 21, 2005, Mr. McClintock filed a Notice of Transmittal of Default Papers to Defendants (Doc. No. 17), indicating that he forwarded the Plaintiff's Motion for Default Judgment (Doc. No. 14), Clerk's Entry of Default (Doc. No. 15), and Order setting the Plaintiff's Motion for Default for hearing (Doc. No. 16), via email (at [nim@cyberservices.com](mailto:nim@cyberservices.com)), via facsimile (at 503-213-6416) and to Defendants address via Federal Express and via certified mail.

6. Unfortunately, none of the foregoing actually gave notice to Defendants of the default proceedings until after the hearing, and the default judgment had been entered. The email utilized by Mr. McClintock was no longer in use by Defendants, and was obsolete. The facsimile number utilized by Mr. McClintock was likewise outdated, and all correspondence thereto would have been directed to the foregoing obsolete email address. In addition, neither the Federal Express package nor the certified mailing, were ever received by Defendants. Defendants initially became aware of the default proceedings the day after the hearing when they received a message on line from another person who had read about it on an internet message board, upon which they conducted an internet search and discovered the Plaintiff's personal web site referencing the case and what had transpired at the hearing. Upon discovery of the default proceedings, Defendants contacted Mr. McClintock, who thereafter forwarded the default pleadings via certified mail, which were received several days after the hearing. ~~See~~ Affidavit of Robert Alan Soloway, attached hereto as Exhibit "A".

7. Consequently, Defendants were never served, and did not otherwise received notice of the default proceedings, until after the hearing set by the Court. Pursuant to Rule 55(b)(2), written notice of an application for default judgment under Rule 55(b) – as specifically relied upon by Plaintiff herein – makes a mandatory requirement that written notice of the application ~~shall~~ be served upon Defendants at least 3 days prior to the hearing on such application.<sup>1</sup>

8. Because Defendants were never served as required by Rule 55(b)(2), nor did they ever have actual notice of the default proceedings (and the extreme relief requested therein) prior to the hearing, the Court should set aside the default judgment, pursuant to Rule 55(c), Fed.R.Civ.P.

WHEREFORE, premises considered, Defendants respectfully request that this Court set aside the default judgment entered herein, and for such other relief as this Court deems appropriate.

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<sup>1</sup> The requirement of the Federal Rules of Civil Procedure for a sum certain to be pled or alternatively to require a hearing, is not merely a technicality, but rather stands as a constitutional safeguard. It protects minimum due process standards by ensuring that the opposing party receives fair notice of the pleader's claim, the grounds upon which it rests, and the nature of any relief sought. *Conley v. Gibson*, 355 U.S. 41, 47-48, 78 S.Ct. 99, 103, 2 L.Ed.2d 80, 85 (1957); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950); U.S. Const. Amend. XIV, § 1.

Dated this 20th day of October, 2005.

Respectfully submitted,

\_\_\_\_\_/s/JAMES A. CHOATE /s/\_\_\_\_\_  
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Attorney for Defendants  
Newport Internet Marketing Corporation  
and Robert A. Soloway

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing instrument was electronically transmitted this 20th day of October, 2005, to the following:

Clerk of the Court  
United States District Court for the Western District

Michael R. McKee  
330 W. Gray Street, Suite 180  
P.O. Box 1351  
Norman, Oklahoma 73072  
[mike@mckeelawfirm.com](mailto:mike@mckeelawfirm.com)  
Attorney for Plaintiff Robert H. Braver

\_\_\_\_\_/s/JAMES A. CHOATE /s/\_\_\_\_\_  
JAMES A. CHOATE