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UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

ORACLE USA, INC., a Colorado corporation,  
and ORACLE INTERNATIONAL  
CORPORATION, a California corporation,

Plaintiffs,

vs.

QTRAX, INC., a Delaware corporation, and  
DOES 1 through 10 inclusive,

Defendants.

Case No: C 09-3334 SBA

**ORDER DENYING DEFENDANT'S  
MOTION TO SET ASIDE DEFAULT**

Docket 36, 41

This is a collections action in which Plaintiffs Oracle USA and Oracle International Corporation (collectively, "Oracle") seek to recover approximately \$1.9 million for software licenses that Defendant Qtrax Inc. ("Defendant" or "Qtrax") failed to pay. The parties are presently before the Court on Defendant's Motion to Set Aside Default. Having read and considered the papers filed in connection with this matter and being fully informed, the Court hereby DENIES the motion for the reasons set forth below. The Court, in its discretion, finds this matter suitable for resolution without oral argument. See Fed.R.Civ.P. 78(b); Civ. L.R. 7-1(b).

**I. BACKGROUND**

**A. FACTUAL SUMMARY**

In December 2007, Oracle and Qtrax entered into an Oracle Services and Licensing Agreement and Ordering Document (collectively, "2007 Order") with Qtrax, allowing it to use

1 Oracle's database applications and related services. (McKague Decl. ¶ 7.) These licenses  
2 permitted Qtrax to deploy each application only to a limited number of "users" and computer  
3 "processors."

4 In November 29, 2008, Qtrax and Oracle executed another Ordering Document ("2008  
5 Order") which converted and replaced the existing limited licenses that were purchased under  
6 the 2007 Order with "unlimited deployment" licenses for the same software programs.

7 (McKague Decl. ¶ 10, Ex. A § F.1.) This change removed the restriction on the number of  
8 users who could use the software program at a given time. The 2008 Order superseded the  
9 2007 Order and Qtrax had no right to obtain refunds or reinstate terms in relation to the  
10 licenses and fees of the 2007 Order. The 2008 Order stated, in relevant part:

11 In connection with the Unlimited Deployment Right granted under this  
12 ordering document, all licenses of any versions or releases of the  
13 Unlimited Deployment Programs that were acquired by you prior to the  
14 effective date of this ordering document shall be converted and replaced  
15 as of the effective date of this ordering document ("The Converted and  
16 Replaced Licenses"). *You will no longer have any right to use the  
Converted and Replaced Licenses, nor will you be permitted to reinstate  
the Converted and Replaced Licenses.* You shall not be entitled to a credit  
or refund of license fees for the Converted and Replaced Licenses.

17 (McKague Decl. Ex. A § F.1 (emphasis added).)

18 Qtrax did not pay for the 2008 Order and currently owes Oracle \$1,883,591.55 in  
19 unpaid license and consulting fees. Since early 2009, Oracle has been attempting to collect this  
20 debt from Qtrax. (McKague Decl. ¶ 12.) Prior to the filing of this action, Robert L. McKague,  
21 Senior Corporate Counsel for Oracle, had numerous conversations and email exchanges with  
22 Allan Klepfisz, Chief Executive Officer of Qtrax, and Chief Technology Officer Chris Roe,  
23 regarding the past due amount. Oracle's goal was to obtain payment without litigation. During  
24 the course of these communications, Messrs. Klepfisz and Roe acknowledged that Qtrax owed  
25 Oracle \$1,883,591.55 in license and support fees. (*Id.*) During March 2009 and July 2009, Mr.  
26 Klepfisz represented to Oracle that Qtrax was in the process of obtaining additional funding  
27 and it would pay its debt. (*Id.* ¶ 13.) These promises were contained in emails sent by Mr.  
28 Klepfisz to Oracle, dated April 17, 2009, May 5, 2009, and May 29, 2009. (McKague Decl. Ex.

1 B.) In these emails, Qtrax never denied nor disclaimed responsibility for its obligation to pay  
2 Oracle these fees. Additionally, Qtrax never suggested that Oracle had misrepresented the  
3 terms of the 2008 Order, which Mr. Klepfisz had signed on behalf of Qtrax.

4 **B. PROCEDURAL HISTORY**

5 After numerous efforts by Oracle to negotiate with Qtrax, and many failed promises by  
6 Qtrax to pay, Oracle filed this action for injunctive relief and damages on July 21, 2009, and  
7 served Qtrax on August 17, 2009. Qtrax's responsive pleading was originally due on  
8 September 8, 2009. On September 21, 2009, Mr. Klepfisz, as CEO of Qtrax, submitted a letter  
9 to the Court requesting a forty-five day extension of time to respond to Oracle's Complaint.  
10 (Docket 6.) The next day, Oracle filed a request for entry of default with the Court, which was  
11 declined. (Docket 8.) The Court granted Qtrax's request for an extension of time to respond to  
12 the complaint and expressly advised Qtrax that as a corporation, it may appear in Court only  
13 through counsel. (Docket 9.) Qtrax obtained counsel "soon thereafter." (Klepfisz Decl. ¶ 4.)

14 Despite the extension and retention of counsel, Qtrax failed to file a responsive pleading  
15 by the October 23, 2009 deadline. Oracle again requested entry of default, but was denied  
16 because the Clerk of the Court interpreted the forty-five day extension to begin running on  
17 September 21, 2009 (the date Qtrax had submitted its request for extension). (McKague Decl.  
18 ¶ 20.) By November 5, 2009 (forty-five days after the Court's September 21, 2009 Order),  
19 Qtrax still had not filed a responsive pleading. On November 6, 2009, Oracle filed its third  
20 request for default. On November 9, 2009, the Clerk entered the default against Qtrax.  
21 (Docket 14.)

22 On February 3, 2010, Oracle filed a separate case management statement in anticipation  
23 of the case management conference scheduled for February 11, 2010. (Docket 17.) In its  
24 statement, Oracle indicated that as of December 2009, it appeared that a settlement had been  
25 reached, and that in early January 2010, Oracle sent Qtrax a proposed settlement agreement.  
26 However, Qtrax did not follow up with Oracle. Oracle indicated that if it did not hear from  
27 Qtrax by February 5, 2010, it would seek a default judgment. On February 10, 2010, the Court,  
28 after reviewing Oracle's case management statement, issued an order directing Oracle to file a

1 motion for default judgment within thirty days, and referred said motion to a magistrate judge  
2 for a report and recommendation. (Docket 18.)

3 Oracle filed its motion for default judgment on March 12, 2010. The motion was  
4 referred to Magistrate Judge Zimmerman, who scheduled the motion hearing for May 5, 2010.  
5 On April 14, 2010, months after Qtrax had failed repeatedly to take the steps necessary to settle  
6 the dispute, and one month after Oracle had filed its motion for default judgment, Mr. Bruce  
7 Bieber, an attorney representing Qtrax stated, “if you [Oracle] enter the judgment, so be it, you  
8 certainly can.” In this message, Mr. Bieber indicated no objection to entry of the original  
9 default. (McKague Decl. ¶ 28.)

10 On May 4, 2010, Qtrax filed a motion to set aside the default. (Docket 36.) The next  
11 day, Qtrax filed a motion to stay the default judgment hearing in order to allow the Court to  
12 consider its motion to set aside default. (Docket 35.) As a result, Magistrate Judge Zimmerman  
13 did not proceed with the default judgment hearing. (Docket 40.)

## 14 **II. LEGAL STANDARD**

15 Federal Rule of Civil Procedure 55(c) provides that a court may set aside a default for  
16 “good cause shown.” The requisite good cause for setting aside a default under Rule 55(b) is  
17 the same standard that applies for vacating a default judgment under Rule 60(b). Franchise  
18 Holding II, LLC. v. Huntington Restaurants Groups, Inc. 375 F.3d 922, 925 (9th Cir. 2004).  
19 The Ninth Circuit has stated that a district court may deny a motion to vacate a default  
20 judgment if: “(1) the plaintiff would be prejudiced if the judgment is set aside, (2) defendant  
21 has no meritorious defense, or (3) the defendant’s culpable conduct led to the default.” Am.  
22 Ass’n of Naturopathic Physicians v. Hayhurst, 227 F.3d 1104, 1108 (9th Cir. 2000). “This  
23 tripartite test is disjunctive,” meaning that the district court may deny a motion to set aside a  
24 default if any of these three factors are true. In re Hammer, 940 F.2d 524, 526 (9th Cir. 1991).  
25 The burden of demonstrating good cause rests with the party seeking to set aside the default.  
26 See TCI Group Life Ins. Plan v. Knoebber, 244 F.3d 691, 696 (9th Cir. 2001).

27 The parties have differing interpretations of the above test. In particular, Qtrax flips the  
28 test and argues that good cause to set aside a default is shown if (1) its culpable conduct did not

1 lead to the default, or (2) it has a meritorious defense, or (3) plaintiff will not be prejudiced if  
2 the default is set aside. (Def.’s Mot. at 4.) In other words, in Qtrax’s view, it need only show  
3 that one of the foregoing factors is true to set aside default. In support of its argument, Qtrax  
4 cites the following quote from Judge Patels’s decision in BMW Fin. Serv. v. Wexler:

5 A court may deny a Rule 55(c) motion “if (1) the defendant’s culpable  
6 conduct led to the default; (2) the defendant has no meritorious defense;  
7 or (3) the plaintiff would be prejudiced if the judgment is set aside.” See  
8 Meadows v. Dominican Republic, 817 F.2d 517, 521 (9th Cir. 1987). *A*  
9 *court may vacate an entry of default “if any of the three factors is true.”*  
10 Franchise Holding II, LLC. v. Huntington Rest.’s Group, Inc., 375 F.3d  
11 922, 926 (9th Cir. 2004).

12 2010 WL 668292 at \*2 (N.D. Cal. Feb. 24, 2010) (emphasis added).

13 Qtrax points to the highlighted portion of the above quotation and asserts that a showing  
14 under any one of these three factors is sufficient to demonstrate good cause. However, it is  
15 readily apparent that the court in BMW inadvertently misstated the law.<sup>1</sup> The actual quote  
16 from Franchise Holding (following the recitation of the three factors) states: “As these factors  
17 are disjunctive, the district court was *free to deny the motion* ‘if any of the three factors was  
18 true.’” 375 F.3d at 926 (quoting in part Am. Ass’n of Naturopathic Physicians, 227 F.3d at  
19 1108) (emphasis added). The suggestion by Qtrax that Judge Patel intended to state that a  
20 showing of any one of the factors justifies *vacating a default* (as opposed to *denying a motion*  
21 *to set aside a default*) is undermined by Judge Patel’s subsequent observation that “where the  
22 default was the result of the defendant’s culpable conduct, a district court may refuse to set  
23 aside the default on that basis alone.” BMW Fin. Serv., 2010 WL 668292 \*2 n.1. Thus, it is  
24 clear that the party seeking to set aside a default must show that it was not culpable, that is has  
25 a meritorious defense, *and* that plaintiff will not be prejudice as a prerequisite to showing good  
26 cause—and the failure to show *any one of these three factors* is grounds for denying a motion  
27 to set aside the default.

28 <sup>1</sup> The quote is illogical, since it provides that a default may be set aside if the defendant was culpable, lacked a meritorious defense, or will prejudice the plaintiff.

1 **III. DISCUSSION**

2 **A. CULPABLE CONDUCT**

3 “If a defendant has received actual or constructive notice of the filing of the action and  
4 failed to answer, its conduct is culpable.” Franchise Holding, 375 F.3d at 926 (internal  
5 quotations omitted). There is no dispute between the parties that Qtrax had actual notice of the  
6 action. Qtrax obviously knew about the action when its CEO personally wrote to the Court  
7 asking for a forty-day extension of time to respond to the Complaint. (Docket 6.)<sup>2</sup> In addition,  
8 Qtrax was aware that Oracle was actively seeking to have a default entered against it. That  
9 notwithstanding, Qtrax argues that its failure to answer the Complaint is excusable because of  
10 its CEO’s travel schedule, the company’s limited resources, and its belief that the parties had  
11 reached a settlement. (Def.’s Mot. at 5.)

12 Qtrax’s attempt to excuse its default on its CEO’s travel schedule is not compelling.  
13 Oracle served its Complaint on August 17, 2009. Qtrax’s CEO, Mr. Klepfisz, was out of the  
14 country from August 21, 2009 to September 21, 2009. (Klepfisz Decl. ¶ 2.) The day after he  
15 returned from his trip, he personally wrote to the Court on behalf of Qtrax for an extension of  
16 time to answer the Complaint, *which the Court granted*. Although Qtrax had until *November*  
17 *5, 2009*, to file its responsive pleading, it failed to do so, even though it had retained counsel  
18 shortly after obtaining the extension of time from the Court. (Klepfisz Decl. ¶ 4.) In addition,  
19 Mr. Klepfisz admits that he was in the country from September 21 through October 1, and later  
20 from October 15 through November 11 (*id.* ¶ 4), but never explains why Qtrax could not have  
21 responded to the Complaint during those time-frames and before the default was entered on  
22 November 9, 2009. Thus, Qtrax’s attempt to excuse its default on its CEO’s travel schedule is  
23 not persuasive.<sup>3</sup>

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24  
25 <sup>2</sup> In granting the requested extension, the Court delayed the proceedings to enable  
Qtrax to participate in the action and dispute the allegations made by Oracle.

26 <sup>3</sup> Qtrax’s claim that it did not respond to the Complaint due to its limited financial  
27 resources also is unconvincing. Obviously, Qtrax had sufficient funds to retain counsel, but  
28 never explains why counsel never filed an answer. In any event, Qtrax cites no authority for  
the proposition that its financial limitations constitute excusable neglect.

1 Likewise, Qtrax’s claim that it did not respond to the Complaint because it believed the  
2 parties were going to settle the case is not supported by the record. In his declaration, Mr.  
3 Klepfisz states that he thought that the parties had settled and that the case would be dismissed.  
4 (Klepfisz Decl. ¶ 4.) However, he also admits that Qtrax could not come up with the funds  
5 necessary to consummate the settlement, which then “fell through” as a result. (*Id.*) Nowhere  
6 in his declaration does Mr. Klepfisz state that Oracle had agreed to forego seeking a default as  
7 a result of the parties’ tentative settlement.<sup>4</sup> To the contrary, Qtrax knew that during the course  
8 of their discussions, Oracle was actively attempting to have a default entered against Qtrax—  
9 yet, it did nothing. Thus, even if Qtrax believed that a settlement was imminent, it was  
10 incumbent upon Qtrax to take appropriate measures (such as a standstill agreement) to ensure  
11 that its default would not be taken. He did not do so. In fact, he did not even file his motion to  
12 set aside the default until the day before the hearing on Oracle’s motion for default judgment  
13 was about to take place, *eight months after the Court had granted his requested extension to*  
14 *enable Qtrax to file a responsive pleading.* Given these circumstances, Qtrax’s failure to  
15 respond to the Complaint cannot be excused.

16 **B. MERITORIOUS DEFENSE**

17 “A defendant seeking to vacate a default judgment must present specific facts that  
18 would constitute a defense.” *TCI*, 244 F.3d at 700. This burden is “not extraordinarily heavy.”  
19 *Id.* Rather, the defendant need only allege facts showing that “a sufficient defense is  
20 assertible.” *Id.* (internal quotations and citation omitted). Failure to present such facts is  
21 grounds for denial of a motion to set aside a default. *Franchise Holding II, LLC*, 375 F 3d at  
22 926.

23 Qtrax argues that Oracle will be estopped from enforcing the 2008 Order because it was  
24 induced to enter into the agreement by Oracle’s alleged “misrepresentations and/or omissions  
25 of facts . . . .” (Def.’s Mot. at 5.) In addition, Qtrax contends that its defense will include  
26 Oracle’s “failure to provide software under the 2008 Order” and alleged failure to provide

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27 <sup>4</sup> Oracle represents that its settlement proposal that has been “on the table” both prior  
28 and subsequent to the filing of the Complaint. (McKague Decl.¶¶ 12, 17, 22, 27, Docket 47.)

1 “certain credit to be given under the 2008 Order.” (Def.’s Mot. at 5.) As will be discussed  
2 below, these defenses are without merit.

3 **1. Qtrax’s Alleged “Misunderstanding”**

4 As an initial matter, Qtrax fails to specify what the alleged misrepresentations were or  
5 provide any evidentiary support to establish that any misrepresentations were, in fact, made.  
6 Rather, Mr. Klepfisz’s supporting declaration states only that “[he] was never informed that the  
7 2008 Order for the unlimited deployment programs would terminate the license rights Qtrax  
8 had already paid for. Had Qtrax known that such was the case, it would not have entered into  
9 the 2008 Order.” (Klepfisz Decl. ¶ 7.) Yet, the agreement for the 2008 Order clearly states  
10 that the new licenses containing the “Unlimited Deployment Right” replaced all prior licenses,  
11 and that “You will no longer have any right to use the Converted and Replaced Licenses, nor  
12 will you be permitted to reinstate the Converted and Replaced Licenses.” (McKague Decl.  
13 ¶ 10, Ex. A § F.1.) The agreement also states that Qtrax was not entitled to any credits or  
14 refunds for the prior licenses. (*Id.*)

15 In its reply, Qtrax argues for the first time that “[Oracle] led Qtrax to believe that the  
16 2008 Order would allow it to obtain some new programs for unlimited deployment and  
17 enhance, not replace, the licenses it had already purchased via the 2007 Order.” (Def.’s Reply  
18 at 5 (emphasis in original.) This argument was not raised in Qtrax’s moving papers and thus is  
19 not properly before the Court. *See Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) (“[a]  
20 district court need not consider arguments raised for the first time in a reply brief.”). That  
21 aside, Qtrax fails to provide any factual or evidentiary support for this assertion. Nowhere in  
22 his declaration does Mr. Klepfisz make any claim that he believed that Oracle was obligated to  
23 “enhance” the existing licenses. But even if he did, the 2008 Order makes no mention of  
24 enhancing existing licenses. To the extent that Qtrax misunderstood the terms of the contract,  
25 such misinterpretation is not a meritorious defense. *See Kucharczyk v. Regents of Univ. of*  
26 *Cal.*, 946 F. Supp. 1419, 1433 (N.D. Cal. 1996) (“under California law, a party is bound, even  
27 if he misunderstood the terms of a contract and actually had a different, undisclosed intention”)  
28

1 (citing Blumenfeld v. R.H. Macy & Co., 92 Cal.App.3d 38, 46 (1979) (internal quotations and  
2 alterations omitted)).

### 3 2. Emails

4 Oracle argues that its email exchanges with Qtrax show that Qtrax has acknowledged its  
5 liability for the \$1.9 million debt under the 2008 Order. (Pl.’s Opp’n at 15-16.) Qtrax  
6 responds that the emails are not probative of the \$1.9 million claimed by Oracle because these  
7 communications only concern outstanding consulting fees, which now amount to only  
8 \$71,841.43. (Def.’s Reply at 5.) In addition, Qtrax emphasizes that there is no email in which  
9 it expressly acknowledges “owing Plaintiffs \$1,883,591.55 or the validity of Plaintiff’s claim.”  
10 (Id.)

11 Qtrax is correct that there is no email in which it expressly concedes owing \$1.9 million  
12 to Oracle. However, Oracle’s counsel represents in his declaration that Mr. Klepfisz made that  
13 statement during one of their conversations. (McKeague Decl. ¶ 12.) Qtrax does not dispute  
14 this. In addition, Qtrax is incorrect that the emails address only the service fees issue. In fact,  
15 several of the emails discuss Qtrax’s debt as “referenced in [the] complaint.” (McKague Decl.  
16 Ex. C.) In addition, it is notable that in none of the emails does Qtrax take exception to its  
17 contractual obligation to Oracle nor does it complain about not receiving the appropriate  
18 software under the 2008 Order. While perhaps not an express concession, the lack of such  
19 objection supports Oracle’s contention that these defenses are without foundation.

20 Alternatively, Qtrax argues in its reply that the emails are inadmissible under California  
21 Evidence Code section 1152(a), which precludes the use of offers to compromise as proof of  
22 liability. (Def.’s Reply at 3.) Because Qtrax has raised this argument in its reply, Oracle has  
23 not had an opportunity to respond to this particular argument. Nevertheless, Qtrax’s contention  
24 is misplaced to the extent that it relies on the California Evidence Code. Since this case is  
25 pending in federal court, the Federal Rules of Evidence are controlling. See Feldman v.  
26 Allstate Ins. Co., 322 F.3d 660, 666 (9th Cir. 2003).

1 Federal Rule of Evidence 408 bars admission of offers to compromise “when offered to  
2 prove liability for, invalidity of, or amount of a claim that was *disputed as to validity or*  
3 *amount.*” Fed.R.Evid. 408 (emphasis added); Dallis v. Aetna Life Ins. Co., 768 F.2d 1303,  
4 1307 (11th Cir. 1985) (holding that there was no compromise under 408 because “[t]here [was]  
5 no evidence in the record that either the validity or the amount of the payment was ever the  
6 subject of dispute”). Here, there was no such dispute. Rather, the emails chronicle the parties’  
7 efforts to develop a payment plan for Qtrax to pay its acknowledged obligation to Oracle.  
8 Qtrax never challenged the validity or amount of its debt. Rather, Qtrax simply expressed that  
9 it was experiencing cash flow problems, and that it was hoping for an infusion of cash from an  
10 outside source which would allow it to pay the amount owed to Oracle. Moreover, there was  
11 no compromise. As succinctly stated by Oracle in its May 28, 2009 email: “we are not willing  
12 to allow Qtrax to use Oracle’s intellectual property *without full payment.*” (McKeague Decl.  
13 Ex. B (emphasis added).

#### 14 C. PREJUDICE TO ORACLE

15 “To be prejudicial, the setting aside of a judgment must result in greater harm than  
16 simply delaying the resolution of a case.” TCI, 244 F.3d at 701. Instead, the standard is  
17 whether plaintiff’s ability to pursue his claim will be hindered. Id. (quoting Falk v. Allen, 739  
18 F.2d 461, 463 (9th Cir. 1984)). For a delay to be prejudicial, it must “result in tangible harm  
19 such as loss of evidence, increased difficulties of discovery, or greater opportunity for fraud or  
20 collusion.” Id. (internal citations omitted). Being forced to litigate on the merits cannot be  
21 considered prejudicial because the plaintiff would have had to litigate the merits of the case had  
22 there been no default. Id.

23 Oracle contends that setting aside the default at this juncture will be prejudicial because  
24 the alleged “misrepresentations” underlying Qtrax’s newly-asserted estoppel defense occurred  
25 over two years ago, and that the passage of time has led to the loss of witnesses as “memories  
26 have faded and employees have moved on from [Oracle].” (Pl.’s Opp’n at 15.) As a general  
27 matter, it is true that “[u]nnecessary delay inherently increases the risk that witnesses’  
28 memories will fade and evidence will become stale.” Pagtalunan v. Galaza 291 F.3d 639, 643

1 (9th Cir. 2002). Qtrax does not directly dispute this, but nevertheless asserts that the delay  
2 cannot be deemed prejudicial because Oracle already possesses the evidence in support of its  
3 claims. (Def.'s Reply at 6.) While that may be true of documentary evidence, that reasoning  
4 does not apply to the loss of evidence resulting from faded memories. In addition, to the extent  
5 that Qtrax is now claiming that it was misled as to what the 2008 Order provided, such  
6 information logically would reside in both Oracle and Qtrax's possession.

7 In sum, although perhaps not as compelling as the other factors, on balance, the issue of  
8 prejudice weighs in favor of denying Qtrax's motion to set aside default.


9 **IV. CONCLUSION**

10 For the reasons stated above,

11 IT IS HEREBY ORDERED THAT Defendant's Motion to Set Aside Default is  
12 DENIED. Plaintiff Oracle shall re-file and/or renote its motion for default judgment, the  
13 referral of which was previously made to Magistrate Judge Zimmerman for a Report and  
14 Recommendation.

15 IT IS SO ORDERED.

16 Dated: September 3, 2010

  
SAUNDRA BROWN ARMSTRONG  
United States District Judge