Cause No. 2007-06182

ALLSTATE TRAVEL & TOURS, INC.	§	IN THE DISTRICT COURT OF
	§	
vs.	§	HARRIS COUNTY, TEXAS
	§	
DISCOUNT TRAVEL, INC.	§	80th DISTRICT COURT

Defendant's Motion for New Trial

This Motion is not for purposes of delay only but so that justice may be done. Defendant timely filed this Motion and has shown that the Court does not have jurisdiction over Defendant and Plaintiff failed to properly serve Defendant. In the alternative, Defendant satisfied the three elements of the *Craddock* test. Specifically, Defendant's failure to file an answer was due to accident or mistake, not intentional or due to conscious indifference. Defendant's counsel was in contact and settlement negotiations with Plaintiff's counsel, and Defendant's counsel had contacted the Court, through which conversations gave Defendant's counsel a mistaken impression of the facts that allegedly existed to support the default judgment. Defendant also has a meritorious defense in that it could not breach a contract that did not exist and also had a third-party claim in defense. Finally, Plaintiff will not suffer undue delay or injury because the case is still new and Defendant has offered to pay Plaintiff's reasonable expenses in obtaining the default judgment herein, assuming the Court overrules Defendant's objection to jurisdiction and service.

TO THE HONORABLE JUDGE LYNN BRADSHAW-HULL:

Defendant DISCOUNT TRAVEL, INC. requests the Court to set aside the Default Judgment granted in favor of Plaintiff ALLSTATE TRAVEL & TOURS, INC. on August 24, 2007 and grant a new trial in the interest of justice and fairness.

I. Procedural Background

1. On February 1, 2007, Plaintiff filed its *Plaintiff's Original Petition Request for Equitable Relief, and Request for Disclosure*, therein suing Defendant for breach of verbal contract, quantum meruit, unjust enrichment, promissory estoppel, tortuous interference with

contract/prospective business relations, fraud, fraudulent inducement, and fraudulent non-disclosure. Plaintiff, requesting that service be completed through Defendant's attorney (rather than personal service), requested citation for service on Defendant's attorney. The Court's online JIMS file ("JIMS") shows that citation was issued on February 1, 2007. As Plaintiff admitted in *Plaintiff Allstate Travel & Tours, Inc.'s Verified Motion to Retain* filed on June 21, 2007, Defendant's attorney did not accept service and therefore Defendant was not served through its attorney.

2. On March 5, 2007, Plaintiff filed its *Plaintiff's First Amended Original Petition, Request for Equitable Relief, and Request for Disclosure*, suing for the same causes of action found in the Original Petition. On that day, Plaintiff requested citation for service on Defendant's President and Registered Agent, Mr. Sadiq Hussain. Plaintiff requested two citations, one for the business address and one for the home address. As Plaintiff admitted in *Plaintiff Allstate Travel & Tours, Inc.'s Verified Motion to Retain* filed on June 21, 2007, Plaintiff failed to serve Mr. Hussain at either address and therefore Defendant was not served through its President and Registered Agent.

3. On May 1, 2007, Plaintiff requested citation for service on Defendant via the Texas Secretary of State, even though Plaintiff failed to make the proper allegations in its pleading to support service on the Texas Secretary of State. Plaintiff failed to state in its *Plaintiff's First Amended Original Petition, Request for Equitable Relief, and Request for Disclosure* that the Secretary of State is the agent for service on Defendant and Defendant does not have a designated registered agent for service of process. A return of service was filed on June 5, 2007, showing that an alleged agent of Defendant's Registered Agent signed for the certified mail used for service of the pleading on May 19, 2007. It is important to note that the Secretary of State's

certified mail was addressed to Mr. Sadiq Hussain as Registered Agent for Discount Travel Inc., but yet the return receipt showed only the signature of Mr. Hussain's alleged agent.

4. On May 7, 2007, the Court signed a *Notice of Intent to Dismiss – No Answer Filed*, setting a DWOP deadline of June 25, 2007.

5. The Court noted in its signed *Final Default Judgment* that "Defendant was properly served with citation and a copy of plaintiff's petition upon which this default judgment is granted on May 19, 2007."

6. Assuming Defendant had been served on May 19, 2007 as noted in the signed *Final Default Judgment*, the deadline for Defendant to answer was June 11, 2007.

7. On June 21, 2007, Plaintiff filed its *Agreed Motion for Substitution of Counsel* and *Motion to Retain*. On June 22, 2007, Plaintiff filed its *Motion to Substitute Counsel*. The Court granted the June 21st Motion to Retain and June 22nd Motion to Substitute Counsel at the DWOP hearing held on June 25, 2007.

8. On June 26, 2007, the Court signed another *Notice of Intent to Dismiss – No Answer Filed*, setting a DWOP deadline of August 27, 2007.

9. On August 21, 2007, Plaintiff filed its *Motion for Default Judgment*. Defendant failed to file an answer before the *Final Default Judgment* was rendered in Plaintiff's favor on August 24, 2007. The Court thereafter passed the DWOP hearing set for August 27, 2007.

10. Defendant timely files this Motion for New Trial on Monday, September 24, 2007. A motion for new trial must be filed within 30 days after the judgment that is the subject of the motion is signed. Tex. R. Civ. P. 329b(a). If the 30th day falls on a Saturday, Sunday, or legal holiday, the deadline is the next day that is not a Saturday, Sunday, or legal holiday. Tex. Gov't Code § 311.014(b); Tex. R. Civ. P. 4; *Melendez v. Exxon Corp.*, 998 S.W.2d 266, 275

(Tex.App.—Houston [14th Dist.] 1999, no pet.); *e.g.*, *Williams v. Flores*, 88 S.W.3d 631, 632 (Tex. 2002) (motion for new trial timely filed on 32nd day after judgment because 30th day was Sunday and 31st day was legal holiday). Although Defendant is filing this Motion on the 31st day after the *Final Default Judgment* signed on August 24, 2007, the filing of this Motion falls on the first day after the 30th day, which fell on Sunday, September 23, 2007, that is not a Saturday, Sunday, or legal holiday.

II. Facts

11. The facts recited herein on based on the *Affidavit of Azam Nizamuddin in Support of Motion for New Trial* attached to this Motion. Defendant also requests the Court to take judicial notice of its file of this case, including all pleadings, notices, citations, and returns.

12. Shortly after this suit was filed, Plaintiff's former counsel, Mrs. Sandra B. Jacobson ("Jacobson"), Senior Counsel with Gordon & Rees LLP located in Houston, Texas, contacted Defendant's counsel, Mr. Azam Nizamuddin ("Nizamuddin"), Owner of The Law Offices of Azam Nizamuddin, P.C. located in Des Plaines, Illinois. The two attorneys connected by telephone on or about February 8, 2007, even though Defendant had yet to be served.

13. On March 1, 2007, Jacobson wrote to Nizamuddin regarding the case. The correspondence included a reference to the lawsuit, a settlement proposal, and an evaluation of Plaintiff's claims and damages. Nizamuddin responded to the letter by telephone and then followed up in writing on March 31, 2007. It is important to note that after two months, Plaintiff still had not obtained service on Defendant, and Nizamuddin had not accepted service on behalf of Defendant.

14. Thereafter, Nizamuddin made several telephone calls to Jacobson's office to discuss the merits of the case and to check the status of service. Nizamuddin was told that Jacobson was

out of the office. Nizamuddin did not receive any more information or communication from Jacobson or her firm.

15. In early May 2007, Nizamuddin discussed this matter with attorneys in Houston, Texas, including Mr. Robert L. Collins and Mr. John R. Craddock. Having not heard from Jacobson in awhile, Nizamuddin tried to contact Mrs. Jacobson by telephone but was told by her office that she had been out of the office.

16. On June 13, 2007, Nizamuddin wrote to Jacobson requesting a status update regarding the case and following up on the settlement negotiations. Neither Jacobson nor Ms. Heidi J. Gumienny ("Gumienny"), another attorney within the law firm of Gordon & Rees LLP who signed Plaintiff's *Agreed Motion for Substitution of Counsel*, responded to Mr. Nizamuddin's correspondence or served Nizamuddin with Plaintiff's *Agreed Motion for Substitution of Counsel* filed on June 21, 2007 or Plaintiff's *Motion to Substitute Counsel* filed on June 22, 2007.

17. On or about July 26, 2007, after not hearing any sort of response from Plaintiff's counsel, Nizamuddin contacted the Court in order to get an update on the case. In speaking with the Court Clerk, Nizamuddin learned for the first time that Plaintiff had substituted counsel in this case. Unfortunately, Nizamuddin was unable to obtain the new counsel's contact information at that time. The Court Clerk also informed Nizamuddin that Plaintiff had not yet filed a return of service and thus the case was set to be dismissed for want of prosecution.

18. Soon thereafter, Nizamuddin looked to retain local counsel to represent Defendant in this case, pending service on Defendant, and decided to retain Mr. Collins, with whom he had spoken three months earlier. Mr. Collins' assistant, Greta, told Nizamuddin that she would check the status of the case and get back with Nizamuddin. After not hearing any response from

Mr. Collins or his assistant, Nizamuddin again contacted the Court on August 16, 2007 to get an update on the case. The Court Clerk told Nizamuddin that no return of service had yet to be filed by Plaintiff and that the Court was going to hold a DWOP hearing on August 27, 2007.

19. On August 27, 2007, Nizamuddin called the Court to get another update and was told by the Court Clerk that a default judgment against Defendant had been granted by the Court on August 24, 2007. Neither Defendant nor Nizamuddin had been informed that a motion for default judgment had been filed or that a hearing was to take place on such motion. There also had not been an entry on the Court's docket that a default judgment hearing was to take place on August 24, 2007.

20. Immediately upon learning of the default judgment herein, Nizamuddin contacted Mr. Collins' office regarding the default judgment and instead was given names of other counsel to consider hiring to represent Defendant. Nizamuddin eventually retained Mr. Benjamin K. Sanchez, Owner of Sanchez Law Firm located in Houston, Texas, to be local counsel for Defendant in this case. Mr. Sanchez hereby timely files this Motion for New Trial.

III. Argument & Authorities

A. Failure to Allege Long-Arm Allegations in Pleading

21. When serving a nonresident defendant by service on the Secretary of State, the face of the plaintiff's petition must support long-arm service. *McKanna v. Edgar*, 388 S.W.2d 927, 929 (Tex. 1965). The petition therefore must allege (a) the Secretary of State is the agent for service on the nonresident, (b) the nonresident engaged in business in Texas, (c) the nonresident does not maintain a regular place of business in Texas, (d) the nonresident does not have a designated registered agent for service of process, and (e) the lawsuit arises from the nonresident's business in Texas. Tex. Civ. Prac. & Rem. Code § 17.044(b); *Lozano v. Hayes*

Wheel Int'l, 933 S.W.2d 245, 247-48 (Tex.App.—Corpus Christi 1996, no writ); *South Mill Mushrooms Sales, Inc. v. Weenick*, 851 S.W.2d 346, 350 (Tex.App.—Dallas 1993, writ denied).

22. Without admitting that Plaintiff satisfied three of the five required allegations, Defendant asserts that Plaintiff failed to allege that the Secretary of State is the agent for service on Defendant and that Defendant does not have a designated registered agent for service of process.

23. To show jurisdiction necessary to support a default judgment when service under the long-arm statute is used, the plaintiff's pleadings must allege facts that, if true, would make the defendant amenable to process by the use of the statute. *Allodial Ltd. v. Susan Barilich P.C.*, 184 S.W.3d 405, 408-409 (Tex. App.-Dallas 2006, no pet.). Being that Plaintiff failed to make the proper allegations in its pleadings to make Defendant amenable to service via long-arm jurisdiction, Plaintiff had no authority to attempt service on Defendant through the Texas Secretary of State. As such, the Court lacks jurisdiction over the Defendant, thus invalidating the default judgment rendered herein.

B. Plaintiff filed improper return of service

24. Even should the Court determine that Plaintiff satisfied the long-arm statute and thus giving the Court jurisdiction over Defendant, Plaintiff failed to properly serve Defendant, which is another fatal defect in and of itself requiring setting aside the default judgment rendered herein.

25. Unless a plaintiff strictly complies with the rules relating to proper service, the service is invalid. *Primate Constr., Inc. v. Silver*, 884 S.W.2d 151, 152 (Tex. 1994). Strict compliance is determined by whether the exact procedural requirements have been met, not

whether the intended party received notice of the lawsuit. *Union Pac. Corp. v. Legg*, 49 S.W.3d 72, 77 (Tex.App.—Austin 2001, no pet.).

26. Plaintiff did not effect proper service on Defendant and therefore service was invalid to support default judgment herein.

27. Not only did Plaintiff not make the proper allegations in the pleading served so as to support long-arm jurisdiction, but the citation served named one person as agent for service on Defendant whereas the return showed service on another person. Such a mistake makes the return invalid. *See All Commercial Floors, Inc. v. Barton & Rasor*, 97 S.W.3d 723, 726-27 (Tex.App.—Fort Worth 2003, no pet.). Where a return receipt was signed by a person other than the addressee, such mistake made the return invalid. *Keeton v. Carrasco*, 53 S.W.3d 13 (Tex.App.—San Antonio 2001, pet. denied). When a defendant is a corporation, the return receipt must be signed by the corporation's president, vice-president, or registered agent. *See* Tex. Bus. Orgs. Code §§ 5.201(a)-(b), 5.255(1); *Cox Mktg. v. Adams*, 688 S.W.2d 215, 217 (Tex.App.—El Paso 1985 no writ). The return of service filed by Plaintiff on June 5, 2007 clearly shows that Mr. Sadiq Hussain as Registered Agent of Discount Travel Inc. was the addressee and that "Addressee's Agent" signed the return receipt. *See Southwestern Security Services, Inc. v. Gamboa*, 172 S.W.3d 90, 92 (Tex. App.-El Paso 2005, no pet.) (return receipt signed by one other than the addressee is fatally defective requiring reversal of default judgment). Under the cases noted above, such return was fatally defective, thus requiring reversal of default judgment herein.

28. When a no-answer default judgment is rendered against a defendant after improper service, the defendant is not required to prove a meritorious defense to be entitled to a new trial. *See Peralta v. Heights Med. Ctr.*, 485 U.S. 80, 85 (1988). Being that service was defective

herein, Defendant does not need to prove anything else. Defendant is entitled to a new trial herein simply on the fatal service defect alone.

C. In the Alternative, Defendant satisfies the *Craddock* Factors

29. In the alternative and without admitting jurisdiction or proper service, Defendant satisfies the three-part *Craddock* test. A default judgment should be set aside and a new trial ordered in any case in which the failure of the defendant to answer before judgment was not intentional, or the result of conscious indifference on his part, but was due to a mistake or an accident; provided the motion for new trial sets up a meritorious defense and is filed at a time when the granting thereof will occasion no delay or otherwise work an injury to the plaintiff. *Craddock v. Sunshine Bus Lines, Inc.*, 134 Tex. 388, 133 S.W.2d 124, 126 (1939); *see also Bank One, Texas, N.A. v. Moody*, 830 S.W.2d 81, 85 (Tex. 1992) (historical overview and reexamination of the *Craddock* elements).

D. Failure to File Answer Due to Accident or Mistake

30. The first element of *Craddock* is that the movant must establish that his failure to answer was due to accident or mistake, not intentional or due to conscious indifference.

i. Mistake of law or relevant fact

31. A mistake of law or relevant fact may satisfy this first *Craddock* factor. *Bank One v. Moody*, 830 S.W.2d 81, 85 (Tex. 1992). Nizamuddin did not believe an answer was necessary because he was under the mistaken belief that service had not occurred. He also did not believe that a default would be taken because he was under the mistaken belief that a return of citation wasn't on file. Despite being in contact with Plaintiff's counsel, Plaintiff's counsel never told Nizamuddin that Defendant had been served. Furthermore, Nizamuddin had not been told that a return of citation was on file whenever he contacted the Court Clerk on July 26, 2007 and August 16, 2007. Given that Nizamuddin had been told that a return of citation was not on file and that the Court would hold a DWOP hearing on August 27, 2007, it was reasonable for Nizamuddin to believe that an answer was not necessary and that a default would not be taken against Defendant.

ii. Settlement negotiations is not conscious disregard

32. There is no conscious disregard where there were negotiations attempting to resolve the litigation. *First State Bldg & Loan Ass'n v. B. L. Nelson & Assoc., Inc.*, 735 S.W.2d 287, 290 (Tex. App.—Dallas 1987, no writ). Nizamuddin and Jacobson had clearly been involved in settlement discussions, evidenced by the correspondence between them. Nizamuddin did not intentionally or with conscious disregard ignore the lawsuit or fail to file an answer. He was involved in settlement negotiations with Plaintiff's counsel and did not know that the Defendant had been served or that a return of citation had been filed.

iii. Defendant not required to show "free from negligence"

33. A defendant's or defense counsel's negligence alone will not preclude setting aside a default judgment and, in fact, a "slight excuse" may justify granting a new trial. *See, e.g., Ivy v. Carrell*, 407 S.W.2d 212, 213 (Tex. 1966) (rejecting "free from negligence standard"); *Jackson v. Mares*, 802 S.W.2d 48, 51 (Tex. App.—Corpus Christi 1990, writ denied) (defendant not required to show "free from negligence"); *Ferguson & Co. v. Roll*, 776 S.W.2d 692, 697 (Tex. App.—Dallas 1989, no writ) (analyzing *Grissom v. Watson*, 704 S.W.2d 325, 327 (Tex. 1986) and concluding it did not intend to modify long standing rule that negligence will not preclude the setting aside of a default judgment); *Gotcher*, 757 S.W.2d at 402 (citing cases and stating that it is "settled law in Texas" that negligence alone will not preclude setting aside default judgment); *National Rigging, Inc. v. San Antonio*, 657 S.W.2d 171, 173 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.) (new trial warranted despite fact that excuse concerning confusion over necessity to file answer was "certainly very slight"). For the defaulted defendant's negligence to rise to the level of conscious indifference, it must be shown that the defendant was clearly aware of the situation and acted contrary to what such awareness dictated. *See Guardsman Life Ins. Co. v. Andrade*, 745 S.W.2d 404, 405 (Tex. App.—Houston [1st Dist.] 1987, writ denied) (reversing for new trial and holding defense counsel's admitted negligence did not rise to level of conscious indifference).

34. Although Nizamuddin doesn't admit negligence in handling Defendant's answer, should the Court determine that Nizamuddin was negligent, such negligence cannot uphold the default judgment herein. Nizamuddin clearly was not aware of the facts that allegedly support the default judgment and did in fact make reasonable attempts to apprise himself of relevant facts by contacting Plaintiff's counsel and the Court on multiple occasions. Given what Nizamuddin knew (or didn't know), Nizamuddin acted accordingly and thus did not intentionally or with conscious disregard fail to file an answer.

iv. Defendant relied on Nizamuddin to properly handle defense of suit

35. Defendant should not be held accountable for any mistakes that its counsel made, if any, because it was reasonable for Defendant to assume that its counsel would appropriately handle the lawsuit. Texas courts have not held defendants to have intentionally or with conscious disregard failed to file an answer when their counsel have made the mistakes. *See Hahn v. Whiting Pet. Corp.*, 171 S.W.3d 307, 310 (Tex.App.—Corpus Christi 2005, no pet.) (attorney did not inform defendant that, because of a conflict of interest, he could no longer represent defendant); *Aero Mayflower Transit Co. v. Spoljaric*, 669 S.W.2d 158, 160 (Tex.App.—Fort Worth 1984, writ dism'd) (attorney's secretary made a mistak in getting a new trial setting, and the attorney was in another trial); *Martin v. Allman*, 668 S.W.2d 795, 799 (Tex.App.—Dallas 1984, no writ) (the party changed attorneys; the new attorney believed a bankruptcy stay was in effect). Given that Defendant herein had obviously turned over the matter to Nizamuddin, Defendant did not intentionally or with conscious disregard fail to file an answer.

v. No good excuse is acceptable, therefore Defendant satisfied first *Craddock* element

36. Just last year, the Texas Supreme Court held that "an excuse need not be a good one to suffice." *Fidelity & Guar. Ins. Co. v. Drewery Constr. Co.*, 186 S.W.3d 571, 574 (Tex.2006) ("[T]he Craddock standard is one of intentional or conscious indifference-that the defendant knew it was sued but did not care."). It is clear from the evidence presented with this Motion that Nizamuddin cared about the suit and did not ignore it. Defendant has satisfied the first element of the *Craddock* test.

E. Defendant must have meritorious defense

37. The second element of *Craddock* requires the defendant moving for a new trial after a default judgment to "set up" a meritorious defense — *i.e.,* defendant need not prove a meritorious defense in the usual sense. Defendant merely must allege facts which in law would constitute a defense to the cause of action asserted by the plaintiff and such must be supported by affidavits or other evidence proving such a defense prima facie. *Ivy v. Carrell*, 407 S.W.2d 212, 214 (Tex. 1966); *Ritter v. Wiggins*, 756 S.W.2d 861, 863 (Tex. App.—Austin 1988, no writ). However, the trial court may not try defensive issues in deciding whether to set aside the default and should not consider counter affidavits or conflicting testimony attempting to refute the movant's factual allegations as to a meritorious defense. *Estate of Pollack v. McMurrey*, 858 S.W.2d 388, 392 (Tex. 1993).

38. Defendant has a meritorious defense because a third party to the transaction is responsible and Defendant was merely a middleman. The transaction made the basis of the suit arises out of a joint venture between Plaintiff, Defendant, and Azzazy Travel located in New York. All three travel agencies were involved and cooperated in a joint venture to make travel arrangements for passengers from the United States to Saudi Arabia for a religious pilgrimage.

39. Only certain travel agencies are able to obtain pilgrimage visas from the Saudi Embassy. Ultimately, it was Azzazy Travel's responsibility to obtain visas to Saudi Arabia for Plaintiff's clients. Defendant merely forwarded Plaintiff's clients' passports to Azzazy Travel. Azzazy Travel lost the passports and failed to procure the necessary visas. Defendant has a third-party claim against Azzazy Travel that would relieve Defendant of liability to Plaintiff, or at the very least reduce Defendant's liability to Plaintiff.

40. Furthermore, no written agreement existed between Plaintiff and Defendant. Without a valid, enforceable contract, Defendant cannot be liable for an alleged breach of contract.

41. Between the contractual defense and the third-party claim, Defendant has a meritorious defense. A meritorious defense is one that, if proved, would cause a different result on retrial, although not necessarily the opposite result. *Liepelt v. Oliveira*, 818 S.W.2d 75, 77 (Tex.App.—Corpus Christi

1991, no writ). Defendant doesn't have to show that Plaintiff would lose or Defendant would win, but merely that a different result could occur.

F. Plaintiff will not incur delay or injury if new trial granted

42. The third element of *Craddock* requires a movant to demonstrate that setting aside the default judgment would not cause a delay or otherwise injure the plaintiff. Once a movant makes that representation in its motion, the burden of going forward with proof of injury shifts to the plaintiff because these are matters particularly within his knowledge. *Angelo v. Champion Restaurant Equip. Co.*, 713 S.W.2d 96, 98 (Tex. 1986). If plaintiff fails to do so, defendant has met the third element of *Craddock. Estate of Pollack,* 858 S.W.2d at 393. However, the plaintiff's loss of the economic benefit derived from the entry of the default judgment or the potential bankruptcy by defendant do not constitute hardship or delay that will bar granting a new trial. *Jackson v. Mares*, 802 S.W.2d 48, 52 (Tex. App.—Corpus Christi 1990, writ denied).

i. Reimbursement of Plaintiff's Expenses

43. In applying *Craddock,* courts of appeals have often found it necessary for the defendant to offer to reimburse the plaintiff for costs involved in obtaining the default judgment as a prerequisite to ordering a new trial. *Angelo*, 713 S.W.2d at 98 (citing cases). In addition, to ensure that the party recovering the default judgment is not prejudiced by delay, courts have generally looked more favorably upon defendants ready, willing, and able to go to trial almost immediately. *Id.* In a footnote in *Director, State Employees Workers' Compensation Div. v. Evans*, 889 S.W.2d at 270 n.3, the Texas Supreme Court acknowledged its previous stance that the willingness of a party to go to trial immediately and pay the expenses of the default judgment are important factors for the trial court to consider when deciding whether to grant a new trial, but they are not dispositive. *See also Angelo,* 713 S.W.2d at 98 (such factors not the *sine qua non* of granting the motion for new trial); *Cliff v. Huggins*, 724 S.W.2d 778, 779 (Tex. 1987). More importantly, a conditional grant of a motion for new trial based upon a party's payment of costs, such as attorney's fees or witness and travel expenses, is well within the trial court's discretion. *Allied Rent-All, Inc. v. International Rental Ins.*, 764 S.W.2d 11, 13 (Tex. App.—Houston [14th Dist.]

1988, no writ) (also within trial court's discretion to deny motion in event expenses upon which motion conditioned are not paid). The reimbursable expenses must be reasonable, and an offer by defendant to pay plaintiff's expenses does not give plaintiff license to recover anything other than reasonable expenses actually incurred in obtaining the default. *Stone Resources, Inc. v. Barnett*, 661 S.W.2d 148, 152 (Tex. App.—Houston [1st Dist.] 1983, no writ).

44. Assuming that the Court overrules Defendant's objections to jurisdiction and proper service and thus decides this motion based on the *Craddock* test, Defendant is willing to reimburse Plaintiff for its reasonable expenses in actually obtaining the default judgment. Being that the case is brand new and no discovery has been done, Defendant cannot offer to go to trial immediately. Defendant is willing to proceed with the case, however, and file the appropriate pleadings to get this case moving.

45. Plaintiff has the burden to prove the expenses incurred in obtaining a default judgment since those expenses are within the exclusive knowledge of the plaintiff. *Angelo*, 713 S.W.2d at 98. Should the Court determine that Defendant's reimbursement of Plaintiff's reasonable expenses is a condition for a new trial herein, then Defendant requests the opportunity to review and question whatever expenses Plaintiff requests for reimbursement, after which the Court should decide exactly how much Defendant should reimburse Plaintiff.

ii. No Undue Delay or Injury Caused by New Trial

46. Plaintiff also has the burden of going forward with proof controverting defendant's allegations that a new trial would cause hardship or undue delay. *First State Bldg & Loan Ass'n v. B. L. Nelson & Assoc., Inc.*, 735 S.W.2d 287, 289 (Tex. App.—Dallas 1987, no writ). Obviously, vacating a final default judgment and granting a new trial will invariably delay final resolution of a case and, if it results in an eventual victory for defendant, will operate to injure plaintiff. Consequently, in evaluating whether the delay to plaintiff occasioned by granting a new trial is unacceptably excessive, the trial court must engage in a case-by-case analysis in an attempt to achieve equity. *See Angelo*, 713 S.W.2d at 98. At the very least, plaintiff should be required to show that the granting of the new trial would cause delay

substantially beyond that which plaintiff would have faced had defendant timely answered. As the Corpus Christi Court of Appeals noted in *Jackson v. Mares*:

> The purpose of the final element of the *Craddock* rule, however, is to protect a plaintiff against the sort of undue delay or injury which disadvantages him in presenting the merits of his case at a new trial, such as loss of witnesses or other valuable evidence upon retrial. 802 S.W.2d 48, 52 (Tex. App.—Corpus Christi 1990, writ denied) (emphasis added).

47. When making this determination, the trial court is entitled to look at the conduct of the plaintiff. For example, one court concluded that the plaintiff/insured would not be injured by the granting of a new trial where plaintiff had waited over 20 months to file suit after being informed of the defendant insurer's intent not to pay face value of the policies and plaintiff's suit had been pending only a short time at the time default judgment was rendered. *See Guardsman Life Ins. Co. v. Andrade*, 745 S.W.2d 404, 406 (Tex. App.—Houston [1st Dist.] 1987, writ denied).

48. A new trial herein will not cause Plaintiff to incur undue delay or injury. It has been only four months since Defendant was allegedly served, and no docket control order had been entered by the Court at the time of the default judgment last month. There is nothing unusual about this case that would cause Plaintiff any disadvantage upon retrial, and thus the Defendant has met the third element of the *Craddock* test.

IV. Conclusion

49. This Motion is not for purposes of delay only but so that justice may be done. Defendant timely filed this Motion and has shown that the Court does not have jurisdiction over Defendant and Plaintiff failed to properly serve Defendant. In the alternative, Defendant satisfied the three elements of the *Craddock* test. Specifically, Defendant's failure to file an answer was due to accident or mistake, not intentional or due to conscious indifference. Defendant's counsel was in contact and settlement negotiations with Plaintiff's counsel, and Defendant's counsel had contacted the Court, through which conversations gave Defendant's counsel a mistaken impression of the facts that allegedly existed to support the default judgment.

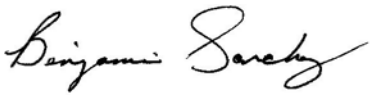
Defendant also has a meritorious defense in that it could not breach a contract that did not exist and also had a third-party claim in defense. Finally, Plaintiff will not suffer undue delay or injury because the case is still new and Defendant has offered to pay Plaintiff's reasonable expenses in obtaining the default judgment herein, assuming the Court overrules Defendant's objection to jurisdiction and service.

V. Prayer

50. For these reasons, Defendant DISCOUNT TRAVEL, INC. requests the Court to set aside the Default Judgment granted in favor of Plaintiff ALLSTATE TRAVEL & TOURS, INC. on August 24, 2007 and grant a new trial in the interest of justice and fairness, and grant such other relief to which Defendant may be entitled.

Respectfully submitted,

SANCHEZ LAW FIRM



By: _____
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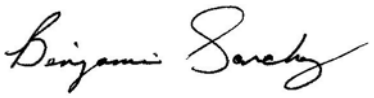
COUNSEL FOR DEFENDANT, DISCOUNT TRAVEL, INC.

Certificate of Conference

I hereby certify that I attempted to contact Mr. Syed N. Izfar, attorney for Plaintiff Allstate Travel & Tours, Inc., by telephone on September 24, 2007. I was informed by the person answering the telephone that he was meeting with a client. I disclosed that I was calling to confer on the issues supporting this Motion for New Trial, which I had to file today. The woman with whom I spoke did not know when Mr. Izfar would be available. I will file an updated Certificate of Conference once I have spoken to Mr. Izfar.

Signed on September 24, 2007.



Benjamin K. Sanchez

Certificate of Service

I hereby certify that a true and correct copy of the foregoing motion was served on all parties pursuant to Texas Rule of Civil Procedure 21a on September 24, 2007, as follows:

Via facsimile 713-467-2424
Mr. Syed N. Izfar
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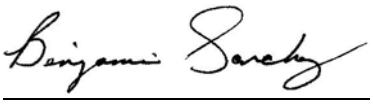
Counsel for Plaintiff,
ALLSTATE TRAVEL & TOURS, INC.



Benjamin K. Sanchez

Cause No. 2007-06182

ALLSTATE TRAVEL & TOURS, INC.	§	IN THE DISTRICT COURT OF
	§	
vs.	§	HARRIS COUNTY, TEXAS
	§	
DISCOUNT TRAVEL, INC.	§	80th DISTRICT COURT

AFFIDAVIT OF AZAM NIZAMUDDIN IN SUPPORT OF MOTION FOR NEW TRIAL

STATE OF ILLINOIS §
§
COUNTY OF COOK §

Before me, the undersigned notary, on this day personally appeared AZAM NIZAMUDDIN, the affiant, a person whose identity is known to me. After I administered an oath to affiant, affiant testified:

"1. My name is Azam Nizamuddin. I am over 18 years of age, of sound mind, and capable of making this affidavit. The facts stated herein are within my personal knowledge and are true and correct.

2. I am an attorney in good standing and duly licensed to practice in the State of Illinois. I maintain my offices at 1400 E. Touhy Ave., Suite 409, Des Plaines, Illinois 60018. I am the custodian of records of the Law Offices of Azam Nizamuddin, P.C. Attached to this affidavit are four pages of records from the Law Offices of Azam Nizamuddin, P.C. I have made a diligent inquiry and examination of the records of the Law Offices of Azam Nizamuddin, P.C. with respect to the lawsuit styled *Allstate Travel & Tours, Inc. v. Discount Travel, Inc.*, cause no. 2007-06182, in the 80th District Court of Harris County, Texas.

3. These records are kept by the Law Offices of Azam Nizamuddin, P.C. in the regular course of business, and it was the regular course of business of the Law Offices of Azam Nizamuddin, P.C. for an employee or representative of the Law Offices of Azam Nizamuddin, P.C., with knowledge of the act, event, condition, opinion, or diagnosis that was recorded, to make these records or to transmit the information to be included in these records. The records were made at or near the time or reasonably soon after the act, event, condition, opinion, or diagnosis that was recorded. The records attached to this affidavit are the originals or exact duplicates of the originals, including redactions for keeping settlement negotiations confidential.

4. I am the attorney for the Defendant Discount Travel, Inc. in this case, having been engaged to represent it.

5. Plaintiff Allstate Travel and Tours, Inc. filed suit against Defendant Discount Travel, Inc. on February 1, 2007. Although Defendant was not initially served in this case, Plaintiff's counsel, Sandra B. Jacobson, was able to obtain my contact information and called me to discuss

this case. On or about February 8, 2007, we briefly discussed the case even though my client had yet to be served.

6. On March 1, 2007, Ms. Jacsobson wrote a letter to me regarding the case. *See* true and correct copy of the letter attached hereto as Exhibit A. The letter included a reference to the lawsuit, a settlement proposal, and an evaluation of Plaintiff's claims and damages. I then contacted Ms. Jacobson to speak about the merits of the case and her settlement offer. Ultimately, after talking to her on the phone, I followed up with a letter to her on March 31, 2007. *See* true and correct copy of the letter attached hereto as Exhibit B. The letter also kept the settlement negotiations going between the parties. As of this time, Defendant still had not been served and I had not accepted service on behalf of Defendant because I did not have authority to accept service on behalf of my client.

7. Subsequently, I made several phone calls to Ms. Jacobson's office to discuss this matter and to check the status of service. However, I was unable to speak to her because her office told me that she was out of the office.

8. Afterward, I did not receive any more information or communication from Plaintiff's counsel. In early May 2007, I spoke to several attorneys in Houston to discuss this case, including Robert L. Collins and John R. Craddock. Having not heard from Ms. Jacobson in awhile, I tried to contact her by telephone but was told by her office that she had been out of the office.

9. On June 13, 2007, I sent a follow up letter to Ms. Jacobson to check the status of the case and follow up on settlement negotiations. *See* true and correct copy of the letter attached hereto as Exhibit C. I never received a response to my letter. Furthermore, I never received a copy of Plaintiff's *Agreed Motion for Substitution of Counsel*, even though Ms. Heidi J. Gumienny certified to the Court that she had served Defendant's counsel with that document.

10. On or about July 26, 2007, I contacted the 80th District Court of Harris County, Texas, in order to get an update on the case. I was told by the clerk at the time that Plaintiff had substituted lawyers, such that Ms. Jacobson was no longer Plaintiff's counsel in this case. I was not able to obtain the new counsel's information. Furthermore, the clerk told me that the court file did not indicate that my client had been served and thus the case set to be dismissed for want of prosecution.

11. In early August, I again began checking to retain local counsel in the Houston area for this case, pending service on my client. I settled on retaining Mr. Collin's firm. I spoke to his assistant Greta who informed me that she would check the status of the case and get back to me.

12. When Greta from Mr. Collins' office did not get back to me, I called the clerk of the 80th District Court of Harris County, Texas, on August 16, 2007 in order to get another update of the case. The clerk informed me that no return of citation had been filed by Plaintiff and that the Court was going to hold a DWOP hearing on August 27, 2007. As a result, I believed that the case would be dismissed on August 27, 2007.

13. On August 27, 2007, I called the clerk of the 80th District Court of Harris County, Texas, in order to get an update, and the clerk informed that a default judgment had been entered in Plaintiff's favor and against my client on August 24, 2007.

14. Neither my client nor my office had been informed that a motion for default judgment had been filed or that a hearing was to take place on such motion. There also had not been an entry on the Court's docket that a default judgment hearing was to take place on August 24, 2007.

15. As soon as I learned of the default judgment granted on August 24, 2007, I contacted Robert Collins' office to inquire what had happened. His office instead gave me the names and contact information of other local counsel in the Houston area. I eventually retained Benjamin Sanchez to litigate this case.

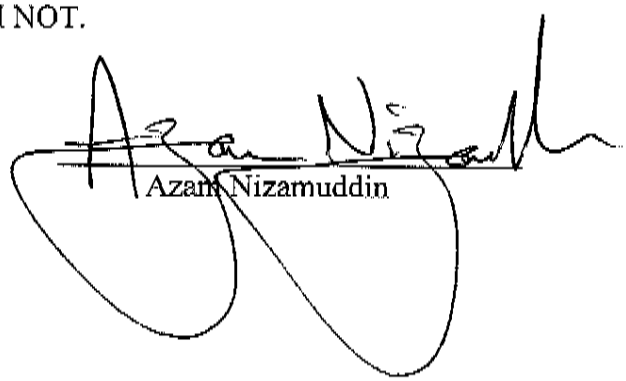
16. But for my settlement negotiations with opposing counsel, my lack of knowledge of service or citation return, and the Court Clerk telling me that the case would be dismissed for want of prosecution on August 27, 2007, I would have retained local counsel earlier to file an appearance on behalf of the Defendant and sought time to file a responsive pleading.

17. My client has a meritorious defense in this case. This transaction arises out of a three-party joint venture between Allstate Travel, Discount Travel, and Azzazy Travel in New York. All three travel agencies were involved and cooperated in a joint venture to make travel arrangements for passengers from the United States to Saudi Arabia for a religious pilgrimage. Only certain travel agencies are able to obtain the pilgrimage visas from the Saudi Embassy. Ultimately, it was Azzazy Travel's responsibility to obtain visas to Saudi Arabia for Allstate's clients. Discount Travel merely forwarded Allstate's client's passports to Azzazy Travel. Azzazy Travel lost the passports and failed to procure the necessary visas in order to travel to Saudi Arabia. My client has a valid third-party claim against Azzazy Travel, a necessary party to this suit. It would be unfair and unjust if Defendant was unable to demonstrate that it is not liable for the alleged damages to the Plaintiff and that a third party is actually liable.

18. Moreover, there was no written agreement between Plaintiff and my client. Therefore, my client has a defense to the alleged breach of contract because no valid, enforceable contract existed.

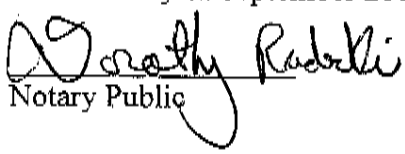
19. Defendant's failure to file an appearance was not intentional and was not intended to delay this matter. Plaintiff has not and will not suffer any injury by having to actually litigate this case on the merits. Discount Travel is able and willing to proceed with the litigation and is also willing to reimburse the Plaintiff for all reasonable expenses incurred in obtaining the default."

FURTHER YOUR AFFIANT SAYETH NOT.



Azam Nizamuddin

Subscribed and sworn to before me
This 19th day of September 2007.



Notary Public

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March 1, 2007

Mr. Azam Nizamuddin, Esq.
Attorney at Law
1400 E. Touhy Ave., Suite 409
Des Plaines, IL 60018

Re: Cause No. 2007-06182; ***Allstate Travel & Tours, Inc. vs. Discount Travel***; In the 80th Judicial District court, Harris County, Texas

Dear Mr. Nizamuddin:

As you are aware from the our recently filed lawsuit in this matter, we represent Allstate Travel in its effort to secure repayment of funds due it as specified in our Original Petition. At the present time, in an effort to settle this matter without further litigation and expense for attorney's fees, we request that Redacted

Redacted

We anticipate that should we need to initiate discovery and undertake further litigation to recover this debt, the attorney's fees are likely to be approximately Fifty Thousand Dollars ($ 50,000.00).

I have enclosed for your review a letter from Dr. Dawood regarding the above matter. Our client's reputation has been damaged through the wrongful acts of Discount Travel. Should this case proceed to trial, we will request that the Court award compensation for all other causes of action as specified in our Petition. We do not believe that a demand for Two Hundred Fifty Thousand Dollars ($ 250,000.00) is unreasonable in this case given that the evidence will demonstrate that your client acted knowingly and with malicious indifference to our client's customers and caused very serious mishandling of their confidential documents. It is very clear that your client intends to blame others for its negligence. However, the facts are that your client received the funds, received the passports, was negligent in the handling of the

Exhibit A

documents, and benefited financially from the process to our client's detriment. We have witnesses ready to testify that the facts are not as your client represents them and I am sure that he knows that. It is quite interesting that your client simultaneously wrongly blames both the Saudi Consulate in New York and Mr. El-Azzazy for the same acts. Regardless, your client cashed the checks and has not refunded our client's money and we intend to pursue our refund vigorously and obtain additional damages as compensation. If your client wishes to then proceed against a third party, that is his choice but we are not going to wait, as you suggest, before proceeding with our own action against Discount. Therefore, it would be in your client's best interests to refund the amount claimed in full at this time.

Very truly yours,

Sandra B. Jacobson

SBJ:pcg

The Law Offices of Azam Nizamuddin, P.C.
1400 E. Touhy Ave.
Suite 409
Des Plaines, IL 60018

Azam Nizamuddin
Attorney at Law

Tel: (847) 297-8200
Fax: (847) 297-8227
e-mail: azamn@anfamlaw.com

March 31, 2007

Sandra Jacobson
Gordon & Rees LLP
3/D International Tower
1900 West Loop South, Suite 1000
Houston. TX 77027

RE: Cause No. 2007-06182; Allstate Travel & Tours, Inc. vs. Discount Travel

Dear Ms. Jacobson,

As you know, I represent Discount Travel with respect to the dispute with Allstate Travels and Tours, Inc.. I had an opportunity to review your settlement letter of March 1st. I had tried contacting you; however you were out of the office for that particular week. Subsequently, my client was out of the country and has just recently returned from his trip abroad. I would like to discuss with you your claims with respect to this case.

The amount that you are seeking a settlement of Redacted is an amount which my client does not have. This is the amount that my client had given to Mr. El-Azzazy who ultimately was responsible for obtaining the visa's for all of Allstate's clients. Because my client gave the money to Mr. El- Azzazy to manage the particular visas, my client will not be able to pay Redacted this amount. We are in the process of negotiating with Mr. El-Azzazy Redacted Please feel free to call me with any questions regarding this matter.

Very Truly Yours,

Azam Nizamuddin

AN/an

Exhibit B

The Law Offices of Azam Nizamuddin, P.C.
1400 E. Touhy Ave.
Suite 409
Des Plaines, IL 60018

Azam Nizamuddin
Attorney at Law

Tel: (847) 297-8200
Fax: (847) 297-8227
e-mail: anfamlaw@sbcglobal.net

June 13, 2007

Sandra Jacobson
Gordon & Rees LLP
3/D International Tower
1900 West Loop South, Suite 1000
Houston, TX 77029

RE: Cause No. 2007-06182; Allstate Travel & Tours, Inc. vs. Discount Travel

Dear Ms. Jacobson,

I was informed by your office that you were out on maternity leave. Congratulations on the new addition to your family. I realize that you have just come back. However, I wanted to get a status from you with respect to the above referenced case.

As I had mentioned to you in my letter dated March 31, 2007, my client is unable to pay the settlement amount you were seeking of Redacted. In the letter I had explained to you that Mr. El- Azzazy was ultimately responsible to obtaining the visa's for all of Allstate's clients. We are still trying to negotiate with Mr. El-Azzazy Redacted Redacted. Please feel free to call me to further discuss this matter.

Very Truly Yours,

Azam Nizamuddin

AN/an

Exhibit C

Cause No. 2007-06182

ALLSTATE TRAVEL & TOURS, INC.	§	IN THE DISTRICT COURT OF
	§	
vs.	§	HARRIS COUNTY, TEXAS
	§	
DISCOUNT TRAVEL, INC.	§	80th DISTRICT COURT

Order Granting New Trial

On this day, the Court heard DISCOUNT TRAVEL, INC.'s *Defendant's Motion for New Trial*. Having considered the pleadings on file, evidence presented, and arguments of counsel, the Court hereby GRANTS the Motion. It is therefore

ORDERED that the trial herein is set for _____, 2008.

SIGNED on _____, 2007.

_____
PRESIDING JUDGE

APPROVED AND ENTRY REQUESTED:

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Toll-free Fax: 888-201-4883
E-mail: law@bksanchez.com

COUNSEL FOR DEFENDANT,
DISCOUNT TRAVEL, INC.