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**BEFORE THE DIVISION OF SECURITIES
OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH**

**IN THE MATTER OF THE LICENSES
OF:**

**JEFFREY LANE MOWEN; and
ELIZABETH MOWEN a.k.a.
ELIZABETH WARD;**

Respondents.

**OPPOSITION TO MOTION TO SET
ASIDE**

**Docket No. SD-06-0037
Docket No. SD-06-0038**

STATEMENT OF RELEVANT FACTS

On June 29, 2006, the Division of Securities (Division) issued an order to show cause (OSC) and notice of agency action against Jeffrey Lane Mowen (Mowen) and Elizabeth Ward (Ward) a.k.a. Elizabeth Mowen. The notice of agency action accompanying the OSC directed Ward and Mowen to file a written response within 30 days, and set a hearing for August 4, 2006. The notice also prescribed how they were to file their answer: "attention Pam Radzinski, P. O. Box 146760, Salt Lake City, Utah 84114-6760." The notice also directed the mailing of a copy

upon the attorney general's office, "160 East 300 South, P. O. Box 140872, Salt Lake City, Utah 84114-0872."

Ward filed her response before the hearing in the manner prescribed. However, Mowen had not filed an answer at the time the hearing was convened, but appeared with an attorney who also did not make an entry of appearance. Under the terms of a scheduling order issued after the hearing, Mowen was granted until August 18, 2006 – an additional 19 days beyond the initial 30-day deadline – to file a response.¹

No response was filed by September 5, 2006, and the Division entered a default order against Mowen. Upon receipt of the default order, Mowen sent a letter dated September 11, 2006, along with a copy of an unsigned answer purportedly served on August 10, 2006. The certificate of mailing accompanying the answer is likewise unsigned and provides no indication whether it was mailed or hand-delivered.

On October 2, 2006, the Division Director issued an order affirming the entry of the default order. However, the Division Director granted Mowen leave to move to set aside the default order on certain terms:

If Respondent Mowen asserts that he did, in fact, mail a Response to the Division and to the Attorney General on August 10, 2006, he shall provide to the Division and the Attorney General a notarized affidavit stating that he did mail the Response and describe the particulars of the mailing such as whether the

¹The additional nineteen days are computed from a due date of Monday July 31, 2006, since July 29, 2006 – 30 days from June 29, 2006 – was a Saturday. Utah Admin. Code R151-46b-5(4)(if time prescribed ends on Saturday, Sunday or legal holiday, period runs to next day).

mailing was sent from his home, a business, or at the post office, how the postage was affixed (*e.g.* whether metered mail or postage stamps were used), and whether the mailings were returned to him by the postal service. Additional information could be included that would corroborate the signature on the Certificate of Mailing such as any receipts from the post office for stamps or an affidavit from Elizabeth Ward attesting to the fact that she received it on August 11 or that she participated in the mailing of the Response.

In lieu of providing an affidavit, Respondent Mowen can file a motion to have the Default set aside. This motion would be under Utah Code Ann. § 63-46b-11(3) and address the factors listed in Utah Rules of Civil Procedure 60(b), describing the mistake or excusable neglect that would justify setting aside the Default.

Any affidavit by Mr. Mowen or motion to set aside the Default must be submitted by October 23, 2006 to be considered. Otherwise, the Default Order will remain in effect.

Order Relating to J. Mowen Claim that Response Was Filed at 2-3.

On October 6, 2006, Mowen filed a motion to set aside. Mowen cites the relevant rule in its entirety, but does not identify a specific subsection. Neither does he identify any factor that would constitute excusable neglect or mistake nor provide proof that would support his claim of an earlier mailing date. For example, although Mowen repeats his earlier contention that he “did send his answer to the O.S.C. document to the Division as per his certificate of mailing on August 10th” and the Attorney General’s Office, *Mowen’s Motion to Set Aside at 3*, ¶¶ 3-4; the statement is unsworn. Likewise, aside from providing a description of the size and color of the paper, folding it in thirds, and “not having it weighed by the USPS,” *id. at 3-4*, ¶¶ 5-6, 17-18; he did not provide a sworn statement, detailing the particulars of the purported mailing, such as whether he even took it to USPS for mailing, where he mailed it from, what address he mailed it

to, how much postage he put on the envelope, or whether it was ever returned. He provided no documents, such as postage receipts or an affidavit from Ward or her attorney, saying that either of them had received a copy of the answer in August either. Instead of providing relevant facts about the mailing or proof, Mowen speculates about what could have happened to his answer, that it could have been misdelivered due to remodeling of the Heber Wells Building or mistaken as something else other than an answer. *Id.* at 4, ¶¶ 7-10, 12-17.

LAW AND ARGUMENT

I Mowen Has Not Presented Sufficient Reason to Set Aside Default Judgment

Setting aside a default judgment is a two-step process. First, the defaulted party must identify grounds under Rule 60(b); and second, the defaulted party must present a meritorious defense.

Step 1: Identifying Grounds Under Rule 60(b)

Entry of default under Rule 55(c) may be set aside for good cause shown, but after default judgment has been entered, it can be set aside only in accordance with Rule 60(b). *Utah Code Ann. § 63-46b-11; see also Calder Bros. Co. v. Anderson, 652 P.2d 922, 926 n.4 (Utah 1982)*. According to Rule 60(b), default judgment may be set aside for reason of “mistake, inadvertence, surprise, or excusable neglect” or “in the furtherance of justice” and “upon such terms as are just.” *Utah R. Civ. P. 60(b)(1), -(6)*. Relief from judgment under subsection (6), however, “should be very cautiously and sparingly invoked by the Court only in unusual and exceptional instances.” *Richins v. Delbert Chipman & Sons Co., 817 P.2d 382, 387 (Utah*

App.1991).

Step 2: Articulating A Meritorious Defense

To obtain relief from judgment, it is not enough to simply identify grounds under Rule 60(b). The moving party must also present evidence of a meritorious defense. The moving party must show that setting aside a judgment would yield a different result if it were tried. *Utah State Dep't of Social Services v. Musselman*, 667 P.2d 1053 (Utah 1983). In order to assess whether the moving party has a meritorious defense, that party must submit a proposed answer that shows what that defense is and explains why that defense is entitled to be tried. *Erickson v. Schenkers Int'l Forwarders, Inc.*, 882 P.2d 1147 (Utah 1994). Although the moving party is not required to prove his defense, he must make a proffer. *Lund v. Brown*, 2000 UT 75, ¶ 29, 11 P.3d 277, 283.

Because the second step goes to the merits, the second step is, perhaps, more critical than the first. Unless setting aside a judgment would yield a different result, and unless there is some merit to the underlying request, it serves no useful purpose to set it aside even if the threshold grounds exist for such a request.

Mowen Has Not Proffered A Meritorious Defense

In this case, Mowen provides a statement of facts, set forth in thirty-three separate subparagraphs numbered (a) through (gg). The paragraphs do precisely correspond to the allegations in the 27 paragraphs of the OSC, but in essence, Mowen denies “approaching” the investors about any investment with him with money from out of an IRA, but says Ward eventually gave in to their “advances” and met with them for the sole purpose of “picking his

brain” about their financial affairs, but never for investment advice. *Answer* ¶¶ (a)-(g). Instead, Mowen claims the investor “approached” him several times and asked him to invest his monies with hers to help her buy specific property next to her primary residence, that he initially refused, but that he eventually gave in, and only to help her form a “real estate partnership.” *Id.* ¶¶ (k)-(o), (t). In a nutshell, Mowen’s defense is simply projection/denial: he did not ask the investor to invest; she asked him to invest with her. Mowen later admits, however, the investor fronted \$200K to the partnership, and says that he disclosed his “non investment advisor status” and an e-mail from Ward up front and within days of receiving the money, and that he managed investments for the partnership. *Id.* ¶¶ (p)-(t).

Mowen presents no facts that would yield a different result. He produces no affidavit, no proof of the existence of a partnership or a limited liability company. His answer is unsigned. Even as explained by him, the investment scheme is a security. Limited liability companies and profit-sharing agreements are securities. Utah Code Ann. § 63-1-13(1)(x)(i)(G), -(Q). So are investment contracts. Utah Admin. Code 164-13-1.

Mowen Has Not Demonstrated Excusable Neglect

To demonstrate that the default was due to excusable neglect, “[t]he movant must show that he has used due diligence and that he was prevented from appearing by circumstances over which he had no control.” *Airkem Intermountain, Inc. v. Parker*, 30 Utah 2d 65, 68, 513 P.2d 429, 431 (1973) (*emphasis omitted*). In this case, Mowen failed to articulate or demonstrate any circumstance beyond his control that prevented him from answering despite due diligence.

Indeed, Mowen contends that he acted with due diligence and timely mailed a response, and that the non receipt by both the Division and the Attorney General's Office can be explained by the remodeling of the Heber Wells Building. By doing so, Mowen suggests he mailed his response directly to the street address for the Heber Wells Building rather than to a post office with a post office box. If Mowen mailed his response to a post office, any remodeling would not have affected delivery. Mowen speculates that remodeling caused delivery problems, but does not say how it did or how he knows it did. Even if remodeling did affect delivery, mailing the response to the street address was a circumstance wholly within his control. The notice of agency action directed him to mail his response to a post office box. However, none of Mowen's statements are supported by an affidavit. Unsworn, unsupported statements are not evidence. State v. Arroyo, 796 P.2d 684, 687 (Utah1990)(citations omitted). They are not facts. They cannot be considered. They should be disregarded.

For these reasons, setting aside the order would not yield a different result.

CONCLUSION

For these reasons, the motion to set aside should be denied.

Respectfully submitted this October 18, 2006.

MARK L. SHURTLEFF
UTAH ATTORNEY GENERAL


Jeffrey Buckner
Assistant Attorney General

MAILING CERTIFICATE

I, Barbara Kindig, hereby certify that I have this day served a copy of the foregoing

Opposition to Motion to Set Aside by mailing a copy, with postage prepaid, to

Jeffrey L. Mowen
125 East Main Street, Suite 411
American Fork, UT 84003

Attorney James L. Driessen
Driessen Law
305 North 1130 East
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Dated at Salt Lake City, Utah this 18th day of October, 2006


SIGNATURE