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

IN THE MATTER OF:

FLAVOR BRANDS, INC.,
J.D. PULVER,
TIM HASKIN, and
DENISE SULLIVAN,

Respondents.

**OPPOSITION TO MOTION TO SET
ASIDE DEFAULT ORDER**

Docket No. SD-06-0057
Docket No. SD-06-0058
Docket No. SD-06-0059
Docket No. SD-06-0060

STATEMENT OF RELEVANT FACTS

In a motion purportedly dated July 3, 2007, notarized July 13, 2007, mailed July 17, 2007, but not received until July 23, 2007, JD Pulver (Pulver) asks the Division Director to set aside the default judgment against him, saying he has valid legal defenses to the Emergency Order, that he has finally prepared the answer he was directed to prepare last year, and that he has evidence that will now prove his innocence. Unfortunately, Pulver produced neither the

promised documents nor the answer and gives no hint as to what his defenses might be.

Moreover, he fails to address the procedural history of the case – all of which the Division Director needs to take into consideration inasmuch as Pulver is already in default. Because these facts and the procedural posture of the case are relevant to a determination of the issues in the motion, the following recitation is in order:

Procedural History

On May 21, 2006, the Division commenced a formal adjudicative proceeding against Flavor Brands, Inc., J. D. Pulver, Tim Haskins, and Denise Sullivan (Respondents) by issuing an Emergency Order to Cease and Desist, and Order to Show Cause (OSC). A Notice of Agency Action (Notice) accompanying the Emergency Order advised Respondents that a default order would be entered if they failed to appear at a hearing set for Monday September 25, 2006, or file a written response to the Emergency Order, “clarifying, refining or narrowing the facts” alleged in the Emergency Order within thirty (30) days of the Notice.

On September 25, 2006, Pulver faxed a cover sheet dated September 24, 2006 and other documents previously sent to the Division on August 2, 2006 and July 30, 2006. On the cover sheet, Pulver said he was being represented by Tim Haskin. On September 26, 2006, Pulver e-mailed a copy of the same documents faxed the day before as a PDF document.

On October 5, 2006, the Presiding Officer, issued a Scheduling Order requiring Pulver and Haskin to notify him and the Division whether they intended to defend themselves, to file responsive Answers in conformity with both the rule and statute, and appear at a scheduling

hearing, either in person, through an attorney or by telephone. All required answers and notices were due on or before November 6, 2006. A hearing was scheduled for Thursday, November 9, 2006 at 9:00 a.m. The Order required each individual defendant (Haskin and Pulver) to notify Pam Radzinski, in writing, with copies to counsel for the Division of any requests to participate telephonically.

On October 20, 2006, Pulver filed a two-page document along with twelve pages of other documents, but still no Answer. On November 9, 2006, Pulver contacted the Division after the previously designated time for the hearing, the Division Director reconvened the hearing, and Pulver was given until November 30, 2006 to file the required response. Instead of filing an Answer, however, Pulver later contacted attorneys George Parnell and Robert Zito of Schiff Hardin in New York. The Division sent New York counsel a stipulation and consent order, but New York counsel never signed the stipulation, never entered an appearance or filed an Answer either and they later terminated their representation of Pulver. *Exhibit A (copying Pulver)*.

On May 30, 2007, counsel for the Division mailed Pulver a letter, directing him to file a response within ten days. On June 7, 2007, Pulver contacted counsel for the Division about settlement. *See Exhibit B*. The Division e-mailed Pulver a copy of the stipulation and consent order previously sent his attorneys, but told him his Answer was due by June 11, 2007. Pulver never signed the stipulation or filed an Answer. On June 29, 2007, Pulver contacted the Division again. *Exhibit C*. The Division sent the stipulation and consent order again, but Pulver never signed.

LAW AND ARGUMENT

I **The Court Should Deny Defendants' Request For An Enlargement For Failure To Show Excusable Neglect.**

The time for taking action set by rule – in this case, the time for filing an answer – may be extended, for good cause shown. *Utah Admin. Code 151-46b-5(4)(b)*. Although it is within the court's discretion to grant an application for an extension of time, unless the Court has a factual basis on which to exercise its discretion, granting Pulver's motion would be an abuse of such discretion. *See BLACK'S LAW DICTIONARY 10 (5th ed. 1979)(abuse of discretion when judgment is "clearly against logic and effect of such facts as are presented in support of the application or against the reasonable and probable deductions to be drawn from the facts disclosed upon the hearing . . .")*(emphasis added).

In this case, Pulver asserts no facts or circumstances that prevented him from filing an answer by November 30, 2006. Filing the instant motion proves the point. In the same amount of time it took to file a motion, and an affidavit, he could have filed an answer. Moreover, the motion is untimely. Pulver has had since November 2006 to file an Answer. Pulver was given every chance to file an answer, but he has not done so. He has constantly frustrated the administrative proceeding below with promises to provide documents, requests for meetings with the investigator and so on. Pulver was told he needed to file an answer by June 11, 2007. He never did. He was given a stip and consent order. He never signed.

For these reasons, the request for an enlargement should be denied.

II Pulver Has Not Presented Sufficient Reason to Set Aside Default

Step 1: Identifying Grounds Under Rule 55(c)

Entry of default under Rule 55(c) may be set aside for good cause shown. While Rule 55(c) distinguishes between setting aside of a default and setting aside a default judgment under Rule 60(b), “[t]he factors described in Rule 60(b) are relevant to [a] determination of whether defendant has shown ‘good cause.’ ” *Miller v. Brocksmith*, 825 P.d 690, 693 (Utah App. 1992) (citations omitted). Thus, the factors to be considered include whether Pulver’s failure to file an answer constitutes excusable neglect and whether the company has presented a meritorious defense to the action. *Id.* (internal citations omitted). Moreover, the question of a meritorious defense arises only if excusable neglect has been shown. *Id.* (internal citations omitted). 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).

Step 2: Articulating A Meritorious Defense

In order for a court 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). Setting aside a default judgment is, therefore, a two-step process: identifying grounds and articulating a meritorious defense. 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.

In this case, Pulver has not submitted a proposed answer let alone proffered a meritorious defense. He presents no facts that would yield a different result. He simply wants more time. If he had a meritorious defense and wanted to demonstrate it, he would have submitted a proposed answer. Although an unqualified denial might be an answer, it does not constitute a meritorious defense either. It provides no insight at all as to what the merits of that defense might be.

Pulver Has Not Demonstrated Excusable Neglect

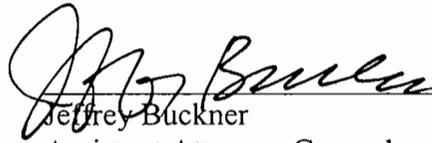
To demonstrate that the default was due to excusable neglect, “[t]he movant must show that he has used due diligence and that he was prevented from appearing by circumstances over which he had no control.” *Airkem Intermountain, Inc. v. Parker*, 30 Utah 2d 65, 68, 513 P.2d 429, 431 (1973) (*emphasis omitted*). In this case, Pulver failed to demonstrate any circumstance beyond his control that prevented him from answering despite due diligence. If he has a dispute with New York counsel, he has only himself to blame. For these reasons, the circumstances of this case are neither unusual nor exceptional and setting aside the order would not yield a different result.

CONCLUSION

For the aforementioned reasons, the Division asks that the motion to set aside the default be denied and that the default judgment be affirmed.

Respectfully submitted this July 30, 2007.

MARK L. SHURTLEFF
UTAH ATTORNEY GENERAL

A handwritten signature in black ink, appearing to read "Jeffrey Buckner", written over a horizontal line.

Jeffrey Buckner
Assistant Attorney General

CERTIFICATE OF MAILING

I, Ina Jensen, certify that on the 30 day of July 2007, I served a copy of the foregoing

Opposition to Motion to Set Aside on JD Pulver by mailing a copy to:

JD Pulver
11705 Boyette Rd., #437
Riverview, FL 33569

A handwritten signature in cursive script, appearing to read "Caudae Jensen". The signature is written in black ink and is positioned to the right of the recipient's address.