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

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IN THE MATTER OF:	:	MOTION TO SET ASIDE ENTRY OF
DAVID FRANKLIN HULL, JR.,	:	DEFAULT AND ORDER DATED FEBRUARY
Respondent.	:	1, 2007
	:	Docket No. 06-0088

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Respondent David Hull, Jr., moves the Division pursuant to Section 63-46(b)-11(3) of the Utah Code and Rules 60(b) and 55(c) of the Utah Rules of Civil Procedure to set aside the Entry of Default and Order entered in this matter on February 1, 2007, by Wayne Klein, Director, Division of Securities. Respondent submits herewith a Memorandum In Support of Motion to Set Aside Entry of Default and Order.

Dated this 30 day of March 2007.

BOYACK ASHTON LC

By   
Wallace T. Boyack  
Attorneys for Respondent David F. Hull, Jr.

Certificate of Service

The undersigned hereby certifies that on this 30 day of March 2007 the foregoing **Motion to Set Aside Entry of Default and Order Dated February 1, 2007** was deposited for ~~service~~ in the U.S. Mails, postage pre-paid, addressed to the following: *hand delivered*

Administrative Court Clerk  
c/o Pam Redinski  
Utah Division of Securities  
160 East 300 South, Second Floor  
Box 146760  
Salt Lake City, Utah 84114-6760  
Tel. 801-530-6600

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*William T. Boyce*

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

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IN THE MATTER OF:	: MEMORANDUM IN SUPPORT OF
	: MOTION TO SET ASIDE ENTRY OF
	: DEFAULT AND ORDER DATED FEBRUARY
DAVID FRANKLIN HULL, JR. ,	: 1, 2007
	: Docket No. 06-0088
Respondent.	:

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Respondent David Hull submits this Memorandum in Support of his Motion pursuant to Section 63-46(b)-11(3) of the Utah Code and Rule 60(b) of the Utah Rules of Civil Procedure to set aside the Entry of Default and Order entered in this matter on February 1, 2007, by Wayne Klein, Director, Division of Securities. Respondent did not receive notice of any of the prior proceedings in this matter, the issues raised by the Division. Respondent should have the opportunity to challenge the allegations and present evidence. Respondent has meritorious defenses to the Division's allegations and claim. Fundamental fairness requires that Respondent's Motion to Set Aside be granted.

FACTS

Respondent David F. Hull, Jr., relies on the following facts:

1. David Hull never received notice of the Order to Show Cause dated November 6,

2006, or the Entry of Default and Order dated February 1, 2007. The Order has already had a negative impact on Mr. Hull. During November and December 2006 he was traveling and away from his residence in Boise, Idaho, for extended periods. Further, he was receiving mail at three different addresses. On one occasion his mailbox was so full (jammed with mail) it would not accommodate any additional pieces of mail and he had difficulty extracting his mail stuffed into the box. The reasons for his absences were he was moving from Boise, Idaho, to Arizona, and he was purchasing a residence in Arizona. When his mailbox was full, his mail was delivered to the condominium manager's office. When Mr. Hull returned to Boise, he would pick up mail at the manager's office. He would carefully go through his mail. The condominium project had a confusing unit numbering system. Mail from time to time was misdelivered. Mr. Hull would receive mail for others and others received his mail. His mail would be brought to him. See Affidavit of David Hull, paragraphs 5, 6, 7, 8, 10, and 11.

2. Mr. Hull believes he can defend each of the alleged claims of wrongdoing against him. The use of the church credit card is discussed at paragraph 13 of the Hull Affidavit. In short, the credit card was used with permission, Mr. Hull reimbursed the congregation for all charges, and the credit card use was in 2005, not 2004. (Use of the credit card was months after D.A.'s purchase of Tambora shares). Hull Affidavit, Paragraph 13.

3. The quotation from a Tambora Shareholder Letter is taken out of context. Tambora at one time did consider doing a transaction with a public shell. At the time of D.A.'s purchase Mr.

Hull never shared any shareholder letters with him. D.A. was an accredited investor when he purchased the shares. Hull Affidavit, Paragraph 15.

4. Mr. Hull denies telling D.A. that the value of the Tambora stock would triple after Tambora went public. Hull Affidavit, Paragraph 14.

5. The Entry of Default and Order signed by Wayne Klein, Director of the Division, are dated February 1, 2007.

6. The Affidavit of Service and Non-Response stated that a certified letter was mailed to Mr. Hull on November 8, 2006, and the certified letter was returned to the Division on December 29, 2006. It is clear from this Affidavit that Mr. Hull did not receive the certified letter. Also it states that the OSC was sent (noncertified) on December 12, 2006. December 12 is after the date of the OSC hearing.

7. The Division had Mr. Hull's telephone number, but made no attempt to contact him by telephone. Hull Affidavit, paragraph 7.

## **ARGUMENT**

**THE DIVISION SHOULD ENTER AN ORDER  
RELIEVING MR. HULL FROM THE  
ENTRY OF DEFAULT AND CEASE AND DESIST ORDER.  
RULE 60(b) PROVIDES FOR SUCH RELIEF  
IN THE INTERESTS OF JUSTICE AND FAIRNESS AND  
CASE LAW FAVORS CLAIMS BEING TRIED ON THE MERITS.**

Rule 60(b) of the Utah Rules of Civil Procedure provides that a court may relieve a party from an order or judgment. See also Rule 55(c). Rule 60 lists several reasons or justifications for

setting aside an order. The ones most applicable to the instant matter are number 1, mistake, inadvertence, surprise, or excusable neglect; number 4, the judgment is void; and number 6 which is a catch-all “for any other reason justifying relief.”

Mr. Hull had no notice of the order to show cause issued by the Division. The lack of notice provides a sufficient basis for the Entry of Default and Order to be set aside. Without notice Mr. Hull was prevented from appearing at the hearing. Mr. Hull had no control over the U.S. Mail. It is unknown what happened to the notice sent by the Division or the notice or notices regarding the certified letter. Mr. Hull has sworn under oath that he did not receive the letter or any such notices. The likely suspects are loss or misdelivery. Mr. Hull also swears he did not receive the letter the Division sent by regular mail. Nevertheless, Mr. Hull did not receive any notice of the OSC. The Division had Mr. Hull’s telephone number. Mr. Hull received no telephone calls from the Division during November and December 2006.

The Entry of Default and Order should be considered void because the lack of notice renders the order unconstitutional under 60(b)(4). Mr. Hull was not accorded due process. Fundamental fairness requires that he receive notice and that he have his day in court.

Mr. Hull comes within the parameters of Rule 60(b)(6) providing for “any other reason justifying relief.” Lack of notice is not mentioned and may not fit squarely within subsections 1 and 4, but lack of notice comes within Rule 60(b)(6). In the instant matter lack of notice is sufficient justification for granting relief from the Default and Order entered by the Division on

February 1, 2007. Relief may be granted under the catch-all provision (6) when the relief is justified and the motion is made timely. Kunzler v. O'Dell, 855 P.2d 270 (Utah 1993). Mr. Hull's Motion is timely and justified when considered under Rule 60(b)(6).

Case law suggests that courts should be liberal in granting relief from default judgments so that cases may be tried on their merits. See: Erickson v. Schenkers International Forwarders, Inc. 882 P. 2d 1147, 1149 (Utah 1984); State by and through Utah State Department of Social Services, v. Musselman, 667 P.2d 1053, 1055 (Utah 1983); Interstate Excavating, Inc., v. Agla Development, Corp., 611 P.2d 369, 371 (Utah 1980); Baird v. Intermountain School Federal Credit Union, 555 P.2d 877, 878 (fn.1 citing Barber v. Calder 522 P.2d 700 (Utah 1974) and Locke v. Peterson, 285 P.2d 1111 (1955).

A movant must show that the motion for relief was timely made and that the movant has a meritorious defense. See: Hernandez v. Baker, 104 P.3d 664, 666, 667 (Utah Ct. App. 2004). Mr. Hull's petition is timely and by his affidavit he has demonstrated that his defenses to the allegations and single claim made in the Order to Show Cause are meritorious.

In Menzies v. Galetka, 150 P.3d 480 (Utah 2006) the Supreme Court discussed the meritorious defense requirement at paragraph 108, at 517 and stated as follows:

The final inquiry in our rule 60(b) analysis is whether Menzies has alleged a meritorious defense. The purpose of the meritorious defense requirement "is to prevent the necessity of judicial review of questions, which on the face of the pleadings are frivolous." Lund v. Brown, 2000 UT 75 ¶28, 11 P.3d 277 (citations and internal quotation marks omitted.) Thus, a litigant seeking rule 60(b) relief "must proffer some defense of at least sufficient ostensible merit as would justify a

trial on the issue thus raised.” *Downey State Bank v. Major-Blakeney Corp.*, 545 P.2d 507, 510 (Utah 1976). This requirement does not set an overly burdensome threshold: “a defense is sufficiently meritorious to have a default judgment set aside if it is entitled to be tried.” *Erickson v. Schenkers Int’l Forwarders, Inc.*, 882 P.2d 1147, 1149 (Utah 1994) Thus, “where a party presents a clear and specific proffer of a defense that, if proven, would [warrant relief] by the claimant ... it has adequately shown a nonfrivolous and meritorious defense.” *Lund*, 2000 UT 75 ¶29, 11 P.3d 277. Even “general denials” that would allow a litigant to prevail if proven are sufficient. *Erickson*, 882 P.2d at 1149.

In spite of its length the foregoing quotation it is helpful and summarizes the issue of a meritorious defense. In the instant matter Hull has proffered meritorious defenses, denials and averments, to the allegations and claim made in the OSC. See Proposed Answer and Hull Affidavit.

If there is doubt about whether relief should be granted from a default judgment, the issue should be resolved in favor of granting the relief from the default. See. Interstate Excavating, *supra* .p. 371. The Supreme Court stated:

.. where there is doubt about whether a default should be set aside, the doubt should be resolved in favor of doing so, to the end that each party may have an opportunity to present his side of the controversy and that there be a resolution in accordance with law and justice.

In the instant matter, even if there is some doubt about setting aside the default, the doubt should be resolved in Mr. Hull’s favor by setting aside the default.

#### CONCLUSION

Mr. Hull respectfully requests that his Motion to Set Aside the Entry of Default and Order be granted. Mr. Hull should be accorded the relief he is requesting and he should be given his day

in court. He should be allowed to proceed and defend against the allegations and claim made against him and he should be given the opportunity to defend his good name and reputation.

Respectfully submitted.

Dated this 30 day of March 2007.

Boyack Ashton LC

By   
Wallace T. Boyack  
Attorneys for Respondent David F. Hull, Jr.

#### Certificate of Service

The undersigned hereby certifies that on this 30 day of March 2007 the foregoing **Memorandum in Support of Motion to Set Aside entry of Default and Order Dated February 1, 2007** was deposited for service in the ~~U.S. Mails~~, postage pre-paid, addressed to the following:  
*hand delivered*

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Attorneys for Respondent

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

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IN THE MATTER OF: : AFFIDAVIT OF DAVID HULL, JR., IN  
: SUPPORT OF MOTION TO SET ASIDE  
: ENTRY OF DEFAULT AND ORDER  
DAVID FRANKLIN HULL, JR. , :  
: Docket No. 06-0088  
Respondent. :  
:

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State of Arizona )  
: ss  
County of Maricopa )

David Franklin Hull, Jr., being duly sworn deposes and states as follows:

1. My name is David Franklin Hull, Jr., I am more than twenty-one years of age, I reside in Scottsdale, Arizona, and I make the following statements in this Affidavit based on my personal knowledge.

2. I am the David Franklin Hull, Jr., named in the caption above.

3. After moving to Park City, Utah, I joined a congregation there. Eventually, I became the Chair of the Board of Trustees.

4. Through my activity and involvement at the congregation I met D. A.

5. I learned of the cease and desist order against me entered by the Utah Division of

Securities through an associate who came across it on the Internet. The cease and desist order has already had a negative impact. Certain personal opportunities which were available to me have been withdrawn because of the cease and desist order.

6. Prior to that time I had not received any notice of the pending proceeding before the Utah Division of Securities. I did not receive the Order to Show Cause issued by the Division. I did not receive any notice of the Order to Show Cause and the Entry of Default and Order until my attorney provided me with a copy in mid-March.

7. Previously I received a telephone call from Mr. Hermanson of the Utah Securities Division. He had my telephone number. He asked me a few questions. I answered his questions. I provided him with my address and telephone numbers including my cellular telephone number. He told me that if there was anything else to be done, I would be contacted. My conversation with Mr. Hermanson, it is my belief, lasted approximately five to ten minutes. I know that Thomas Crowther, Tambora's attorney, provided documents to Mr. Hermanson. Mr. Crowther was Tambora's agent for service in Utah. From time to time I would speak with Mr. Crowther and I would ask him if he had heard anything from the Securities Division. He always told me that he had not heard anything. In late 2006 I received no telephone calls from any representative of the Utah Securities Division regarding the filed Order to Show Cause.

8. In November and December 2006 I was in the process of relocating from Boise, Idaho, to Arizona. During that time I spent approximately thirty days out of town. I was seeking to

purchase a residence in Arizona. I made several trips to Scottsdale, Arizona, where I eventually purchased a home and organized the move from Idaho to Arizona. During this time period I was receiving mail at three different addresses: 344 West Hale Street, No. 103, 343 West Hale Street (across the street from 344), and 2212 South Cross Creek Lane, all in Boise, Idaho. I do not know the reason or reasons why I did not receive the Notice and Order to Show Cause issued by the Utah Securities Division. Also, I never received notice from the U.S. Postal Service of any certified letter available for pick-up. At the Hale address my mail was placed into a mail box which was approximately three inches by five inches. During my absences, mail and other notices would be left at the condominium manager's office. When I returned to Boise, I would go to the office and pick up any mail or other items left at the office. I would carefully examine the letters and other items I received. I am certain I would have noticed a letter from the Utah Securities Division or a certified mail notice. On one occasion in my absence my mail box became so full it would not hold any additional pieces of mail. In fact, the items were packed in so tightly I had difficulty pulling the items from the box. The numbering system in the condominium project was confusing. On occasions items would be misdelivered to my address for others in the project. From time to time I would receive my mail from others that had been misdelivered to them.

9. If I had received the Order to Show Cause, I would have responded and defended the allegations against me.

10. When the certified letter addressed to me in Boise, Idaho, was returned on December 29, 2006, I was in Scottsdale, Arizona. I had authorized the manager of the condominium project to accept mail for me, but apparently the certified letter was not left with her. I received no notice that a certified letter was sent to me and waiting to be picked up at the Post Office. I received no notice, formal or informal, that delivery of a certified letter had been attempted or that a certified letter was available for pick-up. During November and December 2006 I never received by regular mail anything from the Utah Division of Securities.

11. In February 2007, I moved to Scottsdale into a residence which I have purchased.

12. I have reviewed the allegations made in the Order to Show Cause and I believe that I will be able to defend all of the Division's and D.A.'s claims.

13. As to the use of the church's credit card, the time period when I used the card with prior knowledge was late spring and early summer of 2005, not 2004 as claimed. The 2005 time period was after D.A. purchased the Tambora stock. I accounted for and reimbursed the church fully for all the charges on the credit card.

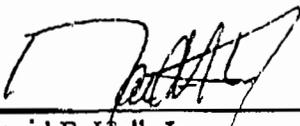
14. The statement quoted from the shareholders letter in the Order to Show Cause lack context. Moreover, I never shared any shareholder letter with D.A. at the time he purchased the \$7,500 of Tambora common stock. I never represented to D.A. that if Tambora became

public the value of his shares would triple. Further, he initially purchased the Tambora shares as a gift to the church's Pastor for her retirement. Later, D.A. changed his mind and he requested that he receive the shares.

15. Prior to D.A.'s purchase of the Tambora shares, I reviewed with him his finances. The review showed that D.A., a well-educated, retired airline pilot, was an accredited investor. The Tambora stock was purchased in the November to December 2004 time period. He had the opportunity to review information about Tambora and to ask any questions.

16. Approximately four to six months after the purchase, D.A. asked me if he could return the shares and receive a refund of his money. I told him that the Board of Directors made such decisions. I suggested that he make his request in writing, and I would present his request to the Board of Directors. He never provided a written request for a refund to me. I assumed he had decided to keep the Tambora shares.

Further Affiant sayeth naught.

  
\_\_\_\_\_  
David F. Hull, Jr.

On this 30<sup>TH</sup> day of MARCH, 2007, David F. Hull, Jr., appeared before me and subscribed and swore the foregoing Affidavit.

  
\_\_\_\_\_  
Notary Public



Certificate of Service

The undersigned hereby certifies that on this 30 day of March 2007 the foregoing **Affidavit of David F. Hull, Jr.**, was deposited for service in the ~~U.S. Mails~~, postage pre-paid, addressed to the following:

*Hand-delivered*

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c/o Pam Redinski  
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*Wallace T. Buckner*