MICHAEL D. ESPLIN (1009)
ESPLIN | WEIGHT
Attorneys for Respondent Jackson
290 West Center Street
P.O. Box "L"
Provo, UT 84603-0200
Telephone: 801-373-4912
Facsimile: 801-371-6964

BEFORE THE DIVISION OF SECURITES

OF THE DEPARTMENT OF COMMERCE

OF THE STATE OF UTAH

| | | |
|---|---|---|
| IN THE MATTER OF | : | **MOTION TO SET ASIDE DEFAULT ORDER** |
| | : | |
| BREAKTHROUGH TECHNOLOGIES CHARLES ROSS CHATWIN, DRD #1080299, MARK A. JACKSON, | : | Case No. SD-12-0071<br>Case No. SD-12-0072<br>Case No. SD-12-0073 |
| RESPONDENTS. | : | |

COMES NOW Respondent Mark A. Jackson on behalf of himself and Breakthrough Technologies, and hereby moves that the Order on Motion for Default dated February 7, 2013, and entered against Respondents be set aside. This motion is filed pursuant to the provisions of the Utah Rules of Civil Procedure, Rule 60(b) and U.C.A. § 63G-4-209(a). The Respondents submit the following memorandum of points

and authorities in support of the motion.

## FACTS

1. Notice of agency actions against Respondents by the Utah State Division of Securities and an Order to Show Cause setting a hearing for February 6, 2013,was alleged to have been served upon Respondent Mark A. Jackson by mailing said documents by certified mail and regular mail on the 10th of December, 2010 to the address of 915 East Ft. Pierce Drive, St. George, Utah, 84790.

2. Mr. Jackson was in Las Vegas, Nevada on the 12th of December, 2012 and flew to England from Las Vegas, arriving in England on the 13th of December, 2012, as evidenced by a copy page nine of his passport. (See Attachment A).

3. Respondent did not receive a copy of any of the documents initiating this action and was not aware of the action until several months following the hearing date when he received a copy of part of an Order on Motion for Default and part of a document entitled Recommended Order on Motion for Default on April 1, 2013. (See Attachment B, Affidavit of Mark A. Jackson).

4. The two incomplete documents were mailed in an envelope postmarked March 29, 2013. (See Attachment C).

5. One of the pages received by Mr. Jackson includes a mailing certificate with the mailing date of March 29, 2012. It is obvious from the content of the pages received

that errors and substantial omissions were made in the copying and mailing of the documents to Mr. Jackson. (See Attachment D).

6. Immediately upon receiving the above documents, Mr. Jackson contacted counsel. After reviewing the documents, counsel attempted to contact Assistant Attorney General Scott Davis, the attorney whose name was on the mailing certificate and presumably the attorney representing the State in the proceeding. After several attempts, counsel was informed that Mr. Davis had been reassigned and that the attorney handling the matter for the plaintiff would be Mr. Paul Amann. Counsel was able to talk with Mr. Amann as well as Ms. Ann Skaggs, Securities Analyst for the Division of Securities and request a complete copy of the proceedings. Counsel was informed that a notice of appearance was required before the documents could be furnished to counsel. Counsel filed the notice of appearance and received that documents initiated this action.

7. After reviewing the documents counsel had an additional discussion with Ms. Ann Skaggs, Securities Analyst for the Utah Division of Securities on May 31, 2013 concerning the service of the notice in this case. Ms. Skaggs indicated that copies of the notice and other documents commencing this action were sent by certified mail and regular mail. Ms. Skaggs indicated that the certified mailing was returned unclaimed, but the regular mailing was not.

8. Respondent is currently being prosecuted by the State of Utah for offenses

arising out of the same allegations that comprise the allegations in this action. It is counsel's experience that in such cases, the Department's action is usually stayed by stipulation of the parties until resolution of the criminal proceedings.

## ARGUMENT

U.C.A. § 63G-4-201(2) provides that a respondent must be served notice of an agency action by mailing. The notice must contain the particulars set forth in the section, including the opportunity to respond to the action in writing, 30 days from the date of mailing. The notice requirement of the statute is not only required by statute, but also must comply with due process. See *Republic Outdoor Advertising, LC., v. Utah Dept. of Transportation,* 258 P. 3d 619, 627 (2011 Ut. App. 198).

Respondent Jackson argues that the Order on Motion for Default entered on February 7, 2013 should be set aside for the reason that he did not receive notice of the commencement of the action or setting of the hearing date based upon the above facts on one or more of the grounds set forth in Rule 60(b) (1). Respondent argues that the proceedings in this action are governed by Rule 60(b)(1) of the Utah Rules of Civil Procedure which also apply to civil actions in the courts of this State.

That rule provides that a court may, upon motion and in furtherance of justice, "relieve a party or his legal representation from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect." Utah R.

Civ. P. 60(b)(1). A trial court has broad discretion in deciding whether to set aside a final judgment, order or proceeding. *See Katz v. Pierce,* 732 P.2d 92, 93 (Utah 1986) (per curiam); *See also Lund v. Brown,* 11 P.3d 277, 279 (Utah 2000). However, Rule 60(b) motions should be liberally granted because of the equitable nature of the rule. *Lund.* at 280. Further, in granting or denying a Rule 60(b) motion, the court cannot act arbitrarily "but should be generally indulgent toward permitting full inquiry and knowledge of disputes so they can be settled advisedly and in conformity with law and justice." *Mayhew v. Standard Gilsonite Co.*, 376 P.2d 951, 952 (Utah 1962). It is considered an abuse of the court's judicial discretion to refuse to set aside a final judgment, order or proceeding where there is a reasonable justification for the defendant's failure to appear, and timely application is made to set aside that final judgment, order or proceeding. *See Id.*; *See also Helgesen v. Inyangumia,* 636 P.2d 1079, 1081 (Utah 1981).

In this case, respondent was out of the country at the time the certified mailing and the regular mailing would have been delivered. He maintains no knowledge of the action until receipt of the partial Recommended Order on Default and the partial Order on Default mailed on March 29, 2013 and received on April 1, 2013. Under these circumstances, respondent urges that his Motion to Set Aside Default Order be granted upon the grounds that the notice given in this case did not comply with respondent's right to due process.

In the alternative, respondent's motion should be granted in the furtherance of justice on the basis of mistake, inadvertence, surprise, or excusable neglect, and he be allowed to answer the allegations set forth in the pleadings.

Dated this 3rd day of June, 2013.

ESPLIN|WEIGHT

MICHAEL D. ESPLIN
Attorney for Respondent Jackson

**CERTIFICATE OF MAILING**

I hereby certify that on the 3rd day of June, 2013, the undersigned mailed a copy of the foregoing Motion to Set Aside Default Order by first class mail, postage prepaid, to the following:

Paul Amann
Assistant Attorney General
160 East 300 South, #500
P.O. Box 140872
Salt Lake City, Utah 84114-0872

Administrative Court Clerk
% Julie Price
Utah Division of Securities
160 East 300 South, 2nd Floor
Box 146760
Salt Lake City, Utah 84114-6760

# EXHIBIT “A”

8

Entries
Entrées / Entradas

Visas

Departures
Sorties / Salidas

DISTRITO FEDERAL
09 JUL 2012

9

Entries
Entrées / Entradas

Visas

Departures
Sorties / Salidas

DEPARTMENT OF HOMELAND SECURITY U.S. CUSTOMS AND BORDER PROTECTION
ADMITTED
LVG
DEC 20 2012
4538

LEAVE TO ENTER FOR SIX MONTHS
ENDORSEMENT AND RECOURSE TO
PUBLIC FUNDS PROHIBITED

IMMIGRATION OFFICER
13 DEC 2012

EXHIBIT “B”

MICHAEL D. ESPLIN (1009)
ESPLIN | WEIGHT
Attorneys for Respondent Jackson
290 West Center Street
P.O. Box "L"
Provo, UT 84603-0200
Telephone: 801-373-4912
Facsimile: 801-371-6964

BEFORE THE DIVISION OF SECURITES

OF THE DEPARTMENT OF COMMERCE

OF THE STATE OF UTAH

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| | | |
|---|---|---|
| IN THE MATTER OF | : | **AFFIDAVIT OF MARK JACKSON** |
| | : | |
| | : | |
| BREAKTHROUGH TECHNOLOGIES | : | |
| CHARLES ROSS CHATWIN, DRD | : | Case No. SD-12-0071 |
| #1080299, MARK A. JACKSON, | : | Case No. SD-12-0072 |
| | : | Case No. SD-12-0073 |
| | : | |
| | : | |
| RESPONDENTS. | : | |

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STATE OF UTAH )
ss.

COUNTY OF UTAH )

COMES NOW Mark Jackson who upon oath deposes and states as follows:

1. I am one of the respondents in the above entitled matter.

2. On April 1, 2013, I received a copy of a document entitled RECOMMENDED ORDER ON MOTION FOR DEFAULT in the mail to my home address.

3. This document was the first notice I have received of this proceeding.

4. I am currently being prosecuted in the Fourth Judicial Court for Utah County, State of Utah in case number 121401193, for criminal offenses alleged which I believe to be related to this matter.

5. I am represented by counsel in that matter. My counsel has indicated that he received no notice of this action nor has he seen any documents related to this action.

6. I request that the default entered herein be set aside and further proceedings in this matter be stayed until the determination of the criminal offenses pending in the Utah County case.

Dated this 2nd day of April, 2013.

MARK A. JACKSON
Affiant

Appeared before me, Mark A. Jackson, who acknowledged the foregoing statements under oath to be true and correct.

NOTARY PUBLIC 4-2-13

JENNEFER ALLAN
NOTARY PUBLIC-STATE OF UTAH
COMMISSION# 664569
COMM. EXP. 03-25-2017

# EXHIBIT “C”

State of Utah
DEPARTMENT OF COMMERCE
DIVISION OF SECURITIES

160 East 300 South
P.O. Box 146760
Salt Lake City, Utah 84114-6760

RETURN SERVICE REQUESTED

UNITED STATES POSTAGE
PITNEY BOWES
02 1R $ 00.46⁰
0002008334 MAR 29 2013
MAILED FROM ZIP CODE 84116

Breakthrough Technologies
Mark Andrew Jackson
915 East Ft. Pierce Dr.
St. George, UT 84790

Wade Farway
~~(801) 366-0215~~ (801) 366-0310

366-0310

84790$8895 C010

# EXHIBIT “D”

DIVISION OF SECURITIES
KEITH WOODWELL, DIRECTOR
DEPARTMENT OF COMMERCE
P.O. BOX 146741
160 EAST 300 SOUTH
SALT LAKE CITY, UTAH 84114-6711
Telephone: (801) 530-6628

BEFORE THE DIVISION OF SECURITIES

OF THE DEPARTMENT OF COMMERCE

OF THE STATE OF UTAH

| IN THE MATTER OF | **ORDER ON MOTION FOR DEFAULT** |
|---|---|
| BREAKTHROUGH TECHNOLOGIES<br>CHARLES ROSS CHATWIN, CRD#1080299<br>MARK ANDREW JACKSON,<br><br>RESPONDENTS | CASE NO. SD-12-0071<br>CASE NO. SD-12-0072<br>CASE NO. SD-12-0073 |

**BY THE UTAH SECURITIES COMMISSION:**

The presiding officer's February 6, 2013 recommended order on motion for default in this matter is hereby approved, confirmed, accepted, and entered by the Utah Securities Commission.

**ORDER**

Respondents are hereby ordered cease and desist from engaging in any further conduct in violation of Utah Code § 61-1 et seq.

Respondents are hereby ordered to pay a fine of $348,750 to the Utah Division of Securities, with any restitution paid to investors serving to offset the administrative fine on a dollar-to-dollar basis.

DIVISION OF SECURITIES
KEITH WOODWELL, DIRECTOR
DEPARTMENT OF COMMERCE
P.O. BOX 146741
160 EAST 300 SOUTH
SALT LAKE CITY, UTAH 84114-6711
Telephone: (801) 530-6628

BEFORE THE DIVISION OF SECURITIES

OF THE DEPARTMENT OF COMMERCE

OF THE STATE OF UTAH

| IN THE MATTER OF | **RECOMMENDED ORDER ON MOTION FOR DEFAULT** |
|---|---|
| **BREAKTHROUGH TECHNOLOGIES**<br>**CHARLES ROSS CHATWIN, CRD#1080299**<br>**MARK ANDREW JACKSON,**<br><br>RESPONDENTS | **CASE NO.** SD-12-0071<br>**CASE NO.** SD-12-0072<br>**CASE NO.** SD-12-0073 |

**BY THE PRESIDING OFFICER:**

This adjudicative proceeding was initiated pursuant to a December 10, 2012 notice of agency action. A response to the accompanying order to show cause was due by January 14, 2013. The notice specified that a failure to comply with the deadline for response would result in the entry of a default order against Respondents without any further notice.

A prehearing conference was held on February 6, 2013. Respondents failed to appear. As of the date of this order, Respondents have not filed a response to the Division's order to show cause or made any effort to participate in the proceeding. Therefore, the presiding officer finds

## NOTICE OF RIGHT TO ADMINISTRATIVE REVIEW

**A request or motion to set a aside this order by default may be filed with the presiding officer and/or with the Director of the Division of Securities pursuant to Utah Code Ann. § 63G-4-209(3)(a) and the Utah Rules of Civil Procedure. If a defaulted party wishes a review of the presiding officer's decision on a motion to set aside a default, Utah Code Ann. § 63G-4-209(3)(c) provides that agency review of the presiding officer's decision on a motion to set aside a default order may be obtained by filing a request for agency review with the Executive Director, Department of Commerce, 160 East 300 South, Box 146701, Salt lake City, Utah 84114-6701, within thirty (30) days after the date of the presiding officer's decision. The agency action in this case was a formal proceeding. The laws and rules governing agency review of this proceeding are found in Title 63G, Chapter 4 of the Utah Code, and Rule 151-4 of the Utah Administrative Code.**

## CERTIFICATE OF SERVICE

I hereby certify that on the 29 day of March, 2012, the undersigned served a true and correct copy of the foregoing ORDER ON MOTION FOR DEFAULT by mailing a copy through first-class mail, postage prepaid, to:

Breakthrough Technologies
Mark Andrew Jackson
915 East Ft. Pierce Dr.
St. George, UT 84790

Charles Ross Chatwin
P.O. Box 110
Colorado City, AZ 86021

and caused a copy to be hand delivered to:

D. Scott Davis, Assistant Attorney General
Office of the Attorney General of Utah

Ann Skaggs, Securities Analyst
Utah Division of Securities