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

IN THE MATTER OF:

JARED BRENT MUIR,

Respondent.

**RESPONDENT'S OPPOSITION TO
MOTION FOR ENTRY OF DEFAULT**

Docket No. SD-13-0008

Respondent, by and through counsel, respectfully requests that the Securities Division's Motion for Entry of Default be dismissed since Respondent's failure to file an answer conforming with the exact requirements of Utah Code Annotated § 63G-4-204(1) is excusable neglect. Furthermore, it is against the principles of fairness and justice to issue a final order in a case without resolving the issue on the merits when possible.

RELEVANT FACTS

1. An Order to Show cause against Respondent for an alleged violation of U.C.A. § 61-1-1 was allegedly sent to Respondent by the Securities Division ("Division") on January 8, 2013. (Division's Motion for Entry of Default, page 2, paragraph 2.)

2. The Order to Show Cause required that an answer be filed within 30-days and that a hearing was scheduled on February 6, 2013 at 9:00 a.m. (*Id.*)
3. Respondent did not personally receive a copy of the Order to Show Cause, as testified to during the March 18, 2013 hearing. (Affidavit of Jared Brent Muir)
4. Respondent learned of the proceedings through a phone conversation with co-Respondent Adam Calvin Leffler, who is also being investigated by the Division under Docket No. SD-13-009. (*Id.*)
5. Leffler, knowing that Respondent was not involved in the transactions between US Tiger and Petitioners, assured Respondent that he would make sure everything against Respondent was dismissed. (Affidavit of Jared Brent Muir)
6. The Division apparently continued the initial hearing date twice. Once by Order of the Administrative Law Judge, Jennie Jonsson and once at the request of the co-Respondent. The new hearing date was set for March 18, 2013. (Division's Motion for Entry of Default, page 2, paragraphs 3 and 4.)
7. The only reason Respondent knew to show up to the March 18, 2013 hearing was because Leffler communicated to him the hearing date and location the morning of the hearing. (Affidavit of Jared Brent Muir)
8. At the March 18, 2013 hearing, Judge Jonsson ordered a bifurcation of the cases between Respondent Muir and Respondent Leffler. (Recording of Hearing)
9. It was also ordered that the date of Notice of Agency Action against Respondent be changed to March 18, 2013, which gave Respondent until April 17, 2013 to file an answer with the Division. (*Id.*)

10. It was also agreed at the hearing that all service, including Respondent's answer to the Division, would be done electronically via e-mail. (*Id.*)
11. Respondent answered the Division's Order to Show Cause on April 17, 2013 via e-mail by pleading the Fifth Amendment. (Affidavit of Jared Muir, E-mail to Judge Jonsson.)
12. Respondent, without having the expertise of legal counsel, believed this to be a complete denial of all claims alleged against him by the Division. (Affidavit of Jared Muir.)
13. On April 19, 2013, Respondent retained legal counsel, who being unaware that Respondent had already attempted to answer the Order to Show Cause by pleading the Fifth Amendment, asked for an extension to file an answer in accordance with the requirements of U.C.A § 63G-4-204, or in the alternative, what other options Respondent had in order to get a fair hearing on the alleged claims. (E-mails between Jalyn Peterson and Jennie Jonsson.)
14. The Presiding Officer denied the request for an extension to file an answer and stated that Respondent had already been given "meaningful consideration" by the Division and the Division would most likely be filing a Motion for Entry of Default against Respondent. (*Id.*)
15. Respondent's counsel then received the Division's Motion for Entry of Default and the Scheduling Order on the Motion for Entry of Default on April 24, 2013.

ARGUMENT

RESPONDENT FILED A TIMELY RESPONSE IN THE CASE AND THEREFORE THE MOTION FOR ENTRY OF DEFAULT SHOULD BE DENIED

Under U.C.A. § 63G-4-209, a default may be entered in a formal action "when a party to a formal adjudicative proceeding fails to attend or participate in a properly scheduled hearing

after receiving proper notice; or a respondent in a formal adjudicative proceeding fails to file a response under U.C.A. § 63G-4-204(1).” Furthermore, Utah case law has repeatedly held that, “A pro se defendant's 'lack of technical knowledge of law and procedure ... should be accorded every consideration that may reasonably be indulged.' " *Orem City v. Todd Bovo*, 2003 UT App 286, 1173 (Utah 2003) (quoting *Nelson v. Jacobsen*, 669 P.2d 1207, 1213 (Utah 1983) and *Heathman v. Hatch*, 13 Utah 2d 266, 372 P.2d 990, 991 (1962)).

Respondent did participate in the initial hearing held on this matter and did file a timely response. As a pro-se Respondent, Mr. Muir believed that his response of pleading the Fifth Amendment was an adequate response to the Division’s claims against him. His e-mail to Judge Jonsson on April 17, 2013 states, “So I should be able to plead the 5th amendment. and [sic] that should meet your request for the answer by the 17th .” (*Affidavit of Jared Brent Muir*, page 2, paragraphs 8-10.) Clearly, Respondent believed his response qualified as an answer required by the Division on or before April 17, 2013.

Additionally, Respondent lacks a clear understanding of the law and administrative procedure and should therefore be granted “every consideration that may reasonably be indulged.” (*Orem City v. Todd Bovo* at 1173.) Now with the benefit of legal counsel, Respondent concedes that his response did not strictly comply with the requirements of U.C.A. § 63G-4-204(1). However, as a pro-se respondent without the benefit of legal counsel, he believed that by pleading the Fifth Amendment he was denying all claims against him by the Division. (*See Affidavit of Jared Brent Muir.*) Additionally, at the March 18, 2013 hearing when asked if he understood what “discovery” meant, he stated he did not understand the meaning. (Recording of Hearing.) Respondent was also acting under the belief that he had so little involvement in the alleged facts surrounding this case that with co-Respondent Leffler’s assurances he would handle

the matter, his denial of all claims was all he needed to do and hiring legal counsel was unnecessary. (*See* Affidavit of Jared Brent Muir.) These facts clearly illustrate Respondent's lack of knowledge regarding the law and the severity of the Division's action against him.

It is true that the Division did grant Respondent additional time to file a response to the Division's claims. However, once Respondent obtained legal counsel, his request for a 5-day extension to file an answer that would strictly comply with U.C.A. § 63G-4-204(1) was denied. (*See* E-mail exchange between Jalyn Peterson and Judge Jonsson.) The Division granted itself an extension by moving the first hearing date, then granted co-Respondent Leffler an extension by moving the second hearing date, yet was unwilling to grant Respondent, who now had the benefit of legal counsel, an additional five days to file an answer in compliance with U.C.A. § 63G-4-204(1). The Division has yet to hear Respondent's side of the story and therefore his case has not been given meaningful consideration nor "every consideration that may be reasonably indulged." (*Orem City v. Todd Bovo* at 1173.)

Respondent, as a pro se defendant, attended the initial hearing held on March 18, 2013 and filed a timely response by denying all claims against him. Therefore, the Division's Motion for Entry of Default should be denied and Respondent granted the opportunity to file an Amended Answer that complies with U.C.A. § 63G-4-204(1) and given the full opportunity to defend the Division's claims against him.

UNDER RULE 60(b) OF THE UTAH RULES OF CIVIL PROCEDURE, RESPONDENT'S FAILURE TO FILE AN ANSWER IN STRICT COMPLIANCE WITH U.C.A. § 63G-4-204(1) IS EXCUSABLE NEGLIGENCE AND ENTRY OF DEFAULT WILL BE SET-ASIDE ON THOSE GROUNDS

Pursuant to the Scheduling Order issued by Judge Jonsson on April 24, 2013, the decision as to whether or not an Entry of Default should enter against Respondent will be based upon an

analysis of whether an entry of Default Judgment against Respondent would be set aside under Rule 60(b) of the Utah Rules of Civil Procedure. Rule 60(b)(1) of the Utah Rules of Civil Procedure states that relief from a judgment or order may be granted for “mistake, inadvertence, surprise, or excusable neglect.” In addressing the excusable neglect component of Rule 60(b), the Supreme Court of Utah stated,

“We have repeatedly emphasized that district courts have “broad discretion” in deciding whether to set aside a judgment for excusable neglect under rule 60(b). This discretion stems from the equitable nature of the excusable neglect determination itself. By their nature, equitable inquiries are designed to be flexible, taking into account all relevant factors in light of the particular circumstances. Equitable inquiries defy distillation into any formal legal test; instead, the question is always whether the particular relief sought is justified under principles of fundamental fairness in light of the particular facts.” *Jones v. Layton/Okland*, 214 P.3d 859, 863-864 (Utah 2009.)

The Court in *Jones v. Layton/Okland* clarified the meaning of excusable neglect by finding that

“in deciding whether a party is entitled to relief under rule 60(b) on the ground of excusable neglect, a district court must determine whether the moving party has exercised sufficient diligence that it would be equitable to grant him relief from the judgment entered as a result of his neglect. In making this determination, the district court is free to consider all relevant factors and give each factor the weight that it determines it deserves.” (*Id.* at 864)

Respondent’s attendance at the initial hearing and his compliance with filing a timely response on April 17, 2013 illustrate his sufficient diligence, especially considering he was operating pro se and under Leffler’s assurances that he would handle the matter against Mr. Muir. Furthermore, Respondent showed further diligence in finally seeking legal counsel and asking the court for additional time to file an answer in compliance with U.C.A. § 63G-4-204(1). Respondent’s absence of filing an answer by the initial February 8, 2013 deadline was due to the fact that he was unaware of the Division’s action against him at that time, despite the fact that the Division’s service of process was sufficient. However, when Respondent finally learned of the Division’s action against him, he participated in the proceedings and responded in a manner that

he believed was adequate. Respondent's lack of knowledge of the law and procedure is not to be regarded as a blatant disregard for the Division's action against him, but as excusable neglect considering the totality of the circumstances.

Additionally, it would be inequitable to grant a default judgment when Mr. Muir has attempted to defend himself. Equity demands that a case should be ruled on the merits, not just defaulted after a breach of administrative procedure by a pro se respondent. Respondent has sought to cure his deficiencies in defending himself by hiring legal counsel, which allows the case to be heard and judged on the facts and correct application of the law. Respondent is merely asking the Division for his proper day in court and an opportunity to truly defend.

A default judgment against Respondent would be set aside pursuant to U.R.C.P. Rule 60(b) for excusable neglect because Respondent acted diligently by participating in the initial hearing and filing a timely response. Furthermore, the relief sought (the ability to defend in order to have the case decided on its merits) is justifiable "under principles of fundamental fairness in light of the particular facts." *Jones v. Layton/Okland* at 863-864.

CONCLUSION

The Division's Motion for Entry of Default should be denied because an answer was filed in the case by Respondent. Additionally, even if the Division does not accept Respondent's answer to be in strict compliance with the Administrative Procedures Act, as a pro-se defendant his response should be read in light of the Court's requirement to give Respondent "every consideration that may reasonably be indulged." (*Orem City v. Todd Bovo* at 1173.)

Furthermore, an Entry of Default would be set aside under U.R.C.P. Rule 60(b) for excusable neglect. Respondent has demonstrated sufficient diligence in defending himself and equity demands that he be given the opportunity to have his case heard on its merits.

Additionally, requiring the Division and the Respondent to expend more attorney fees and waste valuable judicial resources to argue a Motion to Set Aside does not promote judicial efficiency or justice.

Therefore, Respondent asks the Presiding Officer to deny the Division's Motion for Entry of Default and allow Respondent the opportunity to amend his answer to comply with the Administrative Procedures Act.

Respectfully submitted this 3rd day of May, 2013,

SEB Legal

/s/

Jalyn Peterson, signed electronically
Attorneys for Respondent

CERTIFICATE OF SERVICE

I certify that on the 3rd day of May, 2013, I served a true and correct copy of the foregoing **RESPONDENT'S OPPOSITION TO MOTION FOR ENTRY OF DEFAULT**, via e-mail as agreed upon during the March 18, 2013 hearing, to the following:

Ann Skaggs
Division of Securities
Heber M. Wells Building, 2nd Floor
askaggs@utah.gov

/s/

Jalyn Peterson, signed electronically
SEB Legal

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Sam Bell (10791)
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**BEFORE THE DIVISION OF SECURITIES
OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH**

IN THE MATTER OF:

JARED BRENT MUIR,

Respondent.

AFFIDAVIT OF JARED BRENT MUIR

Docket No. SD-13-0008

I, Jared Brent Muir, under penalties of perjury do state the following:

1. I am the Respondent in the above-referenced matter.
2. I am fully competent to testify regarding the matters related herein, which are based upon my personal knowledge.
3. If called upon to testify, my testimony would establish the facts averred in this Affidavit.
4. I did not personally see a copy of the Division of Securities (“Division”) Order to Show Cause against me until it was presented to me at the March 18, 2013 hearing.
5. I found out about the March 18, 2013 hearing from a former roommate Calvin Leffler, who is a co-Respondent in the Division’s action against both of us for securities fraud.

6. My communications with Leffler, US Tiger, and the Petitioners were so limited that I believed I did not need to go to the expense of hiring an attorney to defend me in this matter.
7. Furthermore, Leffler, knowing that I wasn't involved with the transactions between US Tiger and the Petitioner's, told me that he would make sure that everything against me was dropped.
8. It was my understanding from the March 18, 2013 hearing that an e-mail answer would be acceptable by Judge Jonsson and the Division.
9. I sent the attached e-mail directly to Judge Jonsson on April 17, 2013 as my answer to the Division's Order to Show Cause.
10. I believed my pleading the Fifth Amendment by e-mail to Judge Jonsson was a sufficient answer to deny all claims the Division has against me.
11. I retained legal counsel on April 19, 2013, who better explained the Division's action against me and the procedural mistakes I have made in this case.
12. I admit that I was in over my head and should have retained legal counsel much earlier in the process. I only ask that I be given a fair opportunity to provide the Division with my side of the story in order resolve the claims against me.

Pursuant to Utah Code 78B-5-705, I declare under criminal penalty of the State of Utah that the foregoing is true and correct.

DATED: May 2, 2013

Jared Brent Muir

Jared Brent Muir

EXHIBIT

APRIL 17, 2013 ELECTRONIC ANSWER FROM RESPONDENT TO JUDGE JONSSON

From: muir_j@hotmail.com
To: jonsson@utah.gov
Subject: RE: Case SD-13-0008 scheduling order
Date: Wed, 17 Apr 2013 22:22:12 -0600

Jennie T. Jonsson,

Here is my response to the documents you sent to me .
I haven't hear from an attorney I sent it to today.

Both the attorney office and I didn't have time to review and respond.

I also read the document, but don't now what format you need it in.

I also have only been in town 4 day this last 30 day and I just don't have time to fill out.

So I should be able to plead the 5th amendment. and that should meet your request for the answer by the 17th .

I please the 5th amendment all all questions and discover.

thanks

-

Jared Muir
801-870-5597

let me know if you need something more.

EXHIBIT

E-MAIL EXCHANGE BETWEEN JALYN PETERSON AND JUDGE JONSSON

On Fri, Apr 19, 2013 at 1:18 PM, Jalyn Peterson <jalyn@seblegal.com> wrote:
Ms. Jonsson –

I am writing on behalf of my client, Jared Brent Muir, who only recently retained our services regarding the above-referenced case.

Clearly, the April 17th deadline to file an answer has past. My client is frequently out of town and wasn't able to meet the deadline – hence the need for our services.

I am asking for an extension to be able to file an answer next Friday, the 26th with initial disclosures due by May 3rd. All other deadlines should be fine.

Please let me know if this is acceptable with the Division and if not, what options are now available to my client in order to get a fair hearing.

Thank you for your consideration of this matter.

Jalyn Peterson
Attorney
[801.449.9749](tel:8014499749)
2225 E. Murray Holladay Road, Suite 111
Salt Lake City, Utah 84117

Ms. Peterson,

Under the administrative rules governing this proceeding, I do not have the discretion to extend the deadline for filing an answer. See Utah Administrative Code §§ R151-4-205(3), R151-4-107, and R151-4-109(3). I have forwarded to the Division's representatives your e-mail and copied them on this response. You may discuss with them whether they would consider declining to move for a default at this time.

Please be advised that the Division has already given Mr. Muir meaningful consideration. He acknowledges that the notice of agency action mailed on January 8, 2013 was sent to his correct address and likely received by his wife. Therefore, he could have been defaulted on approximately February 11, 2013. However, the Division declined to move for default at that time, and I went forward with the initial hearing on March 18, 2013. Mr. Muir was over 30 minutes late for the proceeding and admitted that he had not read the Division's pleading and was not prepared to present an answer. The Division provided him with a copy of the notice and

order to show cause at that meeting, and I advised him that he needed to review it, as well as any offer of settlement that the Division might make, in a timely manner. I also invited him to call me directly if he had questions or needed general assistance regarding the elements or format of the filings he was required to make as a pro se respondent.

At the initial hearing, Mr. Muir suggested that I should e-mail him with anything I wanted him to actually see. Accordingly, and on that same day, I sent the scheduling order to him by e-mail and requested a return e-mail to confirm receipt. Mr. Muir did not comply with this request until April 17, when he e-mailed me indicating that he still was not prepared to file an answer..

In these circumstances, should the Division move for default, I would have to consider it. However, I would allow you to file a response before issuing a recommended order.

I have attached my recording of the initial hearing for your review.

Regards,

Jennie T. Jonsson
Administrative Law Judge
Utah Department of Commerce