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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.

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

CASE NO. SD- 13-0008

COMES NOW the undersigned Assistant Attorney General, Paul G. Amann, on behalf of the Securities Division of the state of Utah and hereby respectfully submits the following Reply to Respondent's Opposition to Motion for Entry of Default:

STATEMENT OF FACTS

1. An Order to Show Cause (OSC) was filed against Respondent Muir (SD-13-008) and Co-Respondents U.S. Tiger (SD-13-007) and Adam Calvin Leffler (SD-13-009) on January 3, 2013.
2. A Notice of Agency Action (Notice) was mailed to Respondent's proper address on January 8, 2013.

3. Respondent has acknowledged receipt of the Notice, stating that it was likely received by his wife.
4. This matter was ripe for entry of Default against Respondent on February 11, 2013.
5. The Division did not seek default at that time and the matter went forward to initial pre-hearing conference on March 18, 2013.
6. Respondent received notice of the date and time for the pre-hearing conference.
7. Respondent appeared in person, over thirty (30) minutes late and acknowledged failing to read the OSC.
8. Copies of the Notice and the OSC were again provided to Respondent at the initial hearing.
9. Respondent was advised by the presiding officer, Jennie Jonsson, to review the documents and any offer of settlement tendered by the Division.
10. Judge Jonsson also invited Respondent to call with any questions or if Respondent needed general assistance regarding the elements or format of the filings he was required to make as a pro se Respondent.
11. Judge Jonsson entered a scheduling order setting April 17, 2013 as the deadline for filing an answer.
12. Respondent was made aware of the deadline at the pre-hearing conference, and a copy of the scheduling order containing the deadline was sent to him.
13. Respondent failed to respond during regular business hours on April 17, 2013.
14. Respondent sent a non-responsive letter to Judge Jonsson by email at 10:22:12 p.m. that night.
15. That letter states, "I haven't hear [sic] from an attorney I sent it to today."
16. That letter also states, "Both the attorney office and I didn't have time to review and respond."
17. Respondent never sought an extension within which to file an answer until two days after the deadline had passed.
18. Though this tribunal was extraordinarily open and invited calls with any questions, there were none between the hearing on March 18, 2013 and the April 17, 2013 deadline.
19. On April 23, 2013, when there was still no responsive pleading, the state filed a Motion for Entry of Default.
20. Respondent, through counsel, filed a document styled as "Respondent's Opposition to Motion for Entry of Default and Exhibits" on May 3, 2013.

STATEMENT OF LAW

The Utah Administrative Code provides the following, with respect to Default Orders:

R151-4-710. Default Orders.

- (1) The presiding officer may enter a default order under Section 63G-4-209, with or without a motion from a party.
- (2) If a basis exists for a default order, the order may enter without notice to the defaulting party or a hearing.
- (3) A default order is not required to be accompanied by a separate order.

Section 63G-4-209 of the Utah Administrative Procedures Act governs default and provides, in relevant part:

- (1) The presiding officer may enter an order of default against a party if:
 - (c) a respondent in a formal adjudicative proceeding fails to file a response under Section 63G-4-204.

The Fifth Amendment to the United States Constitution states:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; *nor shall be compelled in any criminal case to be a witness against himself*, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Emphasis added.

ARGUMENT

Respondent has failed to file an answer to the OSC. Respondent's letter stating, "I haven't hear [sic] from an attorney I sent it to today," is an implicit acknowledgment that Respondent waited until the last day to even seek counsel. Respondent's claim that, "Both the attorney office and I didn't have time to review and respond," is unfounded. Respondent had a full month to respond and obviously delayed until the last moment. Then he submitted an unresponsive letter.

Respondent cites to *Orem City v. Bovo*, a criminal case, for the proposition that, "A pro se defendant's 'lack of technical knowledge of law and procedure ... should be accorded every consideration that may reasonably be indulged.'" citing *Nelson v. Jacobsen*, 669 P.2d 1207, 1213

(Utah 1983) (quoting *Heathman v. Hatch*, 13 Utah 2d 266, 372 P.2d 990, 991 (1962)). 75 P.3d 1170, 1172¹ (Utah App. 2003). While that argument applies with full force in the criminal context, where life, liberty or property may be at stake, its applicability in an administrative context is more refined. Nonetheless, Respondent has already been accorded every consideration that may be reasonably indulged. In opposing entry of the default order, he now seeks to be unreasonably indulged. Respondent has asserted that his neglect was excusable. The state will address this issue *infra*.

Inasmuch as the *Orem City* ruling cites to civil matters involving pro se litigants, we should briefly examine those cases.² They are more germane than the *Orem City* ruling itself, given the administrative context of this matter.

Nelson sued Jacobsen for alienation of affection. 669 P.2d at 1209-10. In *Nelson v. Jacobsen*, the Utah Supreme Court found that, “In this case, the trial judge was as considerate and helpful as he could be expected to be during the course of the trial.” 669 P.2d at 1214. Likewise, the presiding officer in the matter sub judice has been as considerate as could be expected, moreso. Unlike Respondent Muir, Jacobsen (the pro se litigant in *Nelson v. Jacobsen*) was not informed of information he should have been. He was not informed of the date of trial until two days prior to trial. He was not informed of the right to a jury trial. The *Nelson v. Jacobsen* case is distinct from Muir’s case because the judge who presided over the *Nelson v. Jacobsen* trial failed to fully apprise Jacobsen of his rights. Conversely, Judge Jonsson fully apprised Respondent Muir of his rights and opened the door to provide any further guidance. Judge Jonsson has been as considerate and as helpful as she could be expected to be throughout these proceedings.

Heathman v. Hatch is a case that is closer factual to Muir’s with regard to the pro se issue. The *Heath* Court found:

It is not to be gainsaid that plaintiff as a layman has the right to act as his own attorney and to pursue his own rights in this action; [footnote omitted] nor, that because of his lack of

¹ In Respondent’s brief at 4 (Respondent’s brief is unnumbered, but this quote is made on the fourth page therein), Respondent’s pin cite for this quote is “1173,” the quote is actually at page 1172.

² Since the matter before this tribunal is not criminal, there is of course no Sixth Amendment right to counsel.

technical knowledge of law and procedure he should be accorded every consideration that may reasonably be indulged. Nevertheless, it appears from the record that at hearings on motions attacking his complaints, the judges of our district court patiently and at some length explained to him the necessity of observing . . . our Utah Rules of Civil Procedure.

372 P.2d at 991. Judge Jonsson likewise patiently: 1) awaited Respondent's arrival at the pre-hearing conference and 2) explained at some length to him the necessity of observing the rules adherent to this proceeding. She went above and beyond the call of duty by even inviting phone calls during which Respondent could have inquired as to any matter about which he had questions. The *Heathman* case stands for the proposition that acting pro se is not a license to ignore the rules.

In Respondent's letter of April 17, he asks (though without a question mark), "So I should be able to plead the 5th amendment. and [sic] that should meet your request for the answer by the 17th." Respondent was aware that he was at peril that his putative Fifth Amendment plea was non-responsive. Had he not been, there was no reason for this query. He could have merely replied with one sentence, "I plead the Fifth." Rather, he blames an attorney he contacted the same day for not responding, claims a lack of time to review the documents, *then* pleads a blanket Fifth Amendment right.

In the response filed on Respondent's behalf at page five, it is claimed that, "his denial of all claims was all he needed to do and hiring legal counsel was unnecessary." This assertion is either disingenuous or disregards the fact that the April 17 letter states, "I haven't hear[d] from an attorney I sent it to today. Both the attorney office and I didn't have time to review and respond." The assertion is also inaccurate in that there was no denial of all claims. Respondent's assertion that he "filed a timely response by denying all claims against him," (also contained on page five of his brief) is incorrect for the same reason. Pleading the Fifth Amendment is not tantamount to a denial. Quite the opposite. A jury may be instructed to take into consideration a defendant's refusal to testify due to defendant's invocation of the right against self-incrimination. *Carroll by Carroll v. Price*, 144 Misc.2d 837, 545 N.Y.S.2d 966 (N.Y. Supp. 1989).³

³ Counsel for the Securities Division was unable to locate cases on point in Utah involving the invocation of the right against self-incrimination in a civil context, and therefore broadened the scope of his search.

The Fifth Amendment to the Constitution provides that no person shall be compelled in any criminal case to be a witness against himself. This is not a criminal matter. No criminal charges have been screened, nor is there any impending threat of criminal charges against Respondent. His invocation of the Fifth Amendment is therefore non-responsive. Respondent's letter of April 17 contained no denial of any of the assertions contained in the OSC. Respondent's opposition brief attempts to morph the inappropriate invocation of the Fifth Amendment into denials, but Respondent's letter was devoid of any denial.

Additionally, even if there were some threat of criminal charges, one cannot merely make a blanket invocation of the Fifth Amendment. *Id.* A defendant in a criminal case, or a respondent in a civil case who may face criminal charges, may only invoke the privilege on questions to which he honestly feels the answer may incriminate him in a criminal proceeding. *Id.* at 144 Misc. 2d 838, 545 N.Y.S. 2d at 968.

Finally, this Tribunal should consider *S.E.C. v. Grossman*, 121 F.R.D. 207 (S.D.N.Y. 1987). The Securities Exchange Commission (S.E.C.) brought a civil action against Grossman and others. Grossman refused to provide any discovery to plaintiff based on an assertion of the right against self-incrimination. *Id.* at 208. The Court stated,

In *Musella*, [38 Fed.R.Serv.2d 426, 427 (S.D.N.Y.1983) (citing *United States v. Kordel*, 397 U.S. 1, 11, 90 S.Ct. 763, 769, 25 L.Ed.2d 1 (1970))] the court stated, “[t]he discomfort of defendant's position does not rise to the level of a deprivation of due process. Others have faced comparable circumstances; the choice may be unpleasant, but it is not illegal, and must be faced.” In addition, in *Gellis v. Casey*, 338 F.Supp. 651 (S.D.N.Y.1972) the court stated generally, “[p]laintiff has no constitutional right to be relieved of the burden of the choice he faces. There is no violation of due process where a party is faced with the choice of testifying or invoking the Fifth Amendment.... Any witness in a civil or criminal trial who is himself under investigation or indictment is confronted with the dilemma of choosing to testify or to invoke his privilege against self-incrimination. Nevertheless, he must make the choice despite any extra legal problems and pressures that might follow.” *Id.* at 653 (citations omitted).

Id. at 210. The *Grossman* Court also notes it is “unconstitutionally coercive to condition the exercise of the Fifth Amendment privilege against self-incrimination on the loss of substantial economic interests.” *Id.* citing *Garrity v. New Jersey*, 385 U.S. 493, 498, 87 S.Ct. 616, 619, 17 L.Ed.2d 562 (1967) (unconstitutional to automatically remove police officers from office based on invocation of their Fifth Amendment right against self-incrimination during state investigation).

“This principle has been applied only in situations where (1) the sanctions imposed were so severe as to be inherently coercive, and (2) the sanctions followed automatically upon exercise of the right to remain silent.” *S.E.C. v. Gilbert*, 79 F.R.D. 683, 685 (S.D.N.Y.1978). Grossman did not meet these criteria. The *S.E.C. v. Grossman* Court therefore denied Grossman’s motion to stay civil proceedings. The Fifth Amendment did not provide Grossman a safe harbor from proceeding in a civil realm. Likewise Muir does not meet these criteria. His invocation of the Fifth Amendment does not provide him a safe harbor in this administrative realm. His letter of April 17 was not a response and no response has ever been filed. Entry of Default is therefore appropriate.

II. Respondent’s neglect was not excusable.

The issue herein is whether Respondent’s neglect was excusable. Respondent cites to *Jones v. Layton/Okland* for support of his position that his default should not be entered due to excusable neglect. 214 P.3d 859 (Utah 2009).

The following language from *Jones v. Layton/Okland* is instructive:

But while a party need not be perfectly diligent in order to obtain relief, some diligence is necessary. To grant relief on the ground of excusable neglect where a party has exercised no diligence at all, but simply because other equitable considerations might favor it, subverts the purpose of the excusable neglect inquiry. Rule 60(b)’s use of “excusable” as a modifier of “neglect” makes clear that mere neglect alone is an insufficient justification for relief. The neglect must be excusable upon some basis.

It would be impermissible, for example, to grant relief for excusable neglect under rule 60(b) solely because the moving party would be severely prejudiced by a refusal to grant relief while the nonmoving party would only suffer the inconvenience incident to delay of the litigation. Although considerations of prejudice and good faith are relevant to the excusable neglect inquiry, to grant relief under rule 60(b) simply because there might be some equitable basis for doing so, absent any diligence by the moving party, would allow relief based on mere neglect alone. We decline to read the word “excusable” out of the rule in this manner.

Therefore, we hold 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 case was ripe for entry of default on February 11, 2013. The Division did not move for entry of default at that time, rather it went forward with the initial pre-hearing conference on

March 18. Respondent arrived 30 minutes late for the pre-hearing conference. His default may have been entered prior to that point for failure to appear. Instead, the proceeding was delayed until his arrival for his benefit. Respondent arrived without his copy of the OSC. He was provided another copy.

When the pre-hearing conference went forward on March 18, Respondent was apprised that his response was due in a month. A scheduling order was sent to him providing him the date as well. Respondent was well aware his response was due on April 17. Respondent, by his own admission, waited until April 17 to attempt to contact a lawyer. He then variously claimed that he didn't hear from the lawyer and that the lawyer didn't have time to respond. If, indeed a lawyer was contacted on April 17, s/he did not have time to respond only because of Respondent's neglect in not allowing time to respond.

Respondent has offered only evidence of his neglect. He has made no proffer as to why his neglect was excusable. Like Jones, he would have this tribunal read the word "excusable" out of the rule. In *Jones v. Layton/Okland*, the trial court and the Utah Supreme Court found that Jones "did not even exercise a minimal level of diligence." *Id.* at 865. Like the trial court in *Jones v. Layton/Okland* and the Utah Supreme Court, this tribunal should decline to read the word "excusable" out of the rule.

CONCLUSION

For the reasons stated herein, Respondent's Motion should be denied.

RESPECTFULLY SUBMITTED this 10th day of May, 2013.



PAUL G. AMANN
Assistant Attorney General
Counsel for the Securities Division

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this _____ day of May, 2013, I served a true and correct copy of the foregoing Reply to Respondent's Opposition to Motion for Entry of Default , via email, as agreed upon during the March 18, 2013 hearing, to the following:

Jalyn Peterson
Counsel for Respondent
jalyn@seblegal.com

and hand-delivered a true and correct copy to:

Ann M. Skaggs
Department of Commerce
160 East 300 South, Second Floor
Salt Lake City, Utah 84111

Maria Skedros