

MANNING CURTIS BRADSHAW  
& BEDNAR LLC  
David C. Castleberry [11531]  
[dcastleberry@mc2b.com](mailto:dcastleberry@mc2b.com)  
Christopher M. Glauser [12101]  
[cglouser@mc2b.com](mailto:cglouser@mc2b.com)  
136 East South Temple, Suite 1300  
Salt Lake City, UT 84111  
Telephone (801) 363-5678  
Facsimile (801) 364-5678

*Attorneys for Plaintiff R. WAYNE KLEIN, the  
Court-Appointed Receiver of U.S. Ventures, LC,  
Winsome Investment Trust, and the assets of Robert  
J. Andres and Robert L. Holloway*

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UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH

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R. WAYNE KLEIN, the Court-Appointed  
Receiver of U.S. Ventures LC, Winsome  
Investment Trust, and the assets of Robert J.  
Andres and Robert L. Holloway,

Plaintiff,

- vs -

FORRES McGRAW,

Defendant,

**PLAINTIFF'S OPPOSITION TO  
DEFENDANT'S MOTION TO VACATE  
JUDGMENT**

Case No. 2:12-cv-00102

Judge Bruce S. Jenkins

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R. Wayne Klein (the "Receiver"), as duly court-appointed Receiver for U.S. Ventures LC ("U.S. Ventures"), Winsome Investment Trust ("Winsome"), and all the assets of Robert J. Andres ("Andres") and Robert L. Holloway ("Holloway"), by and through his counsel of record,

hereby submits his Opposition to Defendant's Motion to Vacate Judgment.

### **FACTUAL BACKGROUND**

1. On January 20, 2012, the Receiver filed a lawsuit against Defendant Forres McGraw ("McGraw") wherein the Receiver alleges that McGraw received fraudulent transfers from U.S. Ventures.

2. At the outset, McGraw was represented by counsel located in Utah; however, relations between McGraw and his legal counsel deteriorated until McGraw's counsel requested leave to withdraw only a few days before the close of discovery on August 22, 2013. Motion to Withdraw as Counsel for Defendant, Doc. No. 33. For example, McGraw's former counsel stated that "communications with Defendant have been difficult and sporadic, hindering counsel's ability to advance the litigation and schedule events accordingly." *Id.*

3. The Court granted the request by McGraw's counsel to withdraw, and McGraw appeared as a pro se defendant.

4. The Court also allowed McGraw extra time to conduct discovery. *See* Amended Scheduling Order, Doc. No. 51.

5. Even though McGraw was allowed extra time for discovery, he did not take any discovery in this case until about a month before the close of discovery when he served discovery requests on the Receiver.

6. On February 19, 2014, the Receiver served discovery responses to McGraw via U.S. Mail pursuant to Rule 4 of the Federal Rules of Civil Procedure.

7. The next day, on February 20, 2014, the Receiver filed a Motion for Summary

Judgment against McGraw.

8. The Receiver served the Motion for Summary Judgment via U.S. Mail to McGraw's address of 5427 Preston Haven Dr., Dallas, TX 75229, pursuant to Rule 4 of the Federal Rules of Civil Procedure. *See* Declaration of Valerie Merritt, attached as Ex. A.

9. Neither the Motion for Summary Judgment nor the discovery responses were ever returned to the Receiver.

10. Although McGraw's opposition to the Motion for Summary Judgment was due on March 24, 2014, he never filed a response.

11. On March 31, 2014, Doc. No. 53, the Receiver filed a Request to Submit the Motion for Summary Judgment for decision. *See* Declaration of Lori Anderson, attached as Ex. B.

12. On April 1, 2014, Doc. No. 54, the Court entered an order granting the Motion for Summary Judgment and asked the Receiver's counsel to submit proposed findings of fact, conclusions of law, and judgment.

13. On April 15, 2014, Doc. Nos. 55, 56, the Court signed and entered Findings of Fact, Conclusions of Law, and a Judgment.

14. A few hours after the Court entered the Judgment in this case, McGraw sent an email to the Court claiming that he never received a copy of the Motion for Summary Judgment, never received a copy of the Request to Submit, and never received a copy of the Order from the Court granting the Motion for Summary Judgment. *See* Email from Forres McGraw to Judge Jenkins, dated April 15, 2014, styled as "Motion to Vacate Judgment" in Court's docket, Doc.

No. 57.

15. In McGraw's email, he claims that two attorneys in Dallas were helping him with the case and they "each sent me a notice they had received in the mail, which stated that the Court was going to grant Receiver Klein's Motion for Summary Judgment because I had not responded to the Motion. That correspondence, sent from third parties, was the very first notice I had that a motion for summary judgment filed against me in this matter." *Id.*

16. McGraw also sent counsel for the Receiver an email claiming that "Carl Weinkauff and Prater Monning have both sent [him] copies of notices that the Court has granted a motion for summary judgment in favor of your client[,] and that he had "no record of being served with the motion for summary judgment[.]" Email exchange between Forres McGraw and David Castleberry, dated April 11, 2014, attached as Ex. C.

17. In response to McGraw's email, counsel for the Receiver sent McGraw another copy of the Motion for Summary Judgment, and also explained that "the motion for summary judgment was served on [him] on February 20, 2014 via U.S. mail to the address [he] used in [his] discovery requests, the address listed by [his] former counsel in her motion to withdraw, and also the address listed in [his] notice of appearance."

18. The Receiver's counsel also explained to McGraw:

The certificate of service for the motion for summary judgment identifies the method of service, and there is no doubt that we mailed the motion for summary judgment to you. Under Rule 5(b)(2)(C) of the Federal Rules of Civil Procedure, the only manner in which we could serve you was by mailing the motion to your last known address, and "service is considered complete upon mailing." You will also find attached to this email the request to submit on the motion for summary judgment that we also served on you via U.S. Mail. I should note that we also

sent to you our discovery responses to the Preston Haven address nearly two months ago, and you presumably received our responses because you have never followed up or asked about them. In fact, the discovery responses, the motion for summary judgment, and the request to submit were all sent to your Preston Haven address, and you must have received these mailings because they have not been returned to us.

*Id.*

19. Before McGraw emailed the Receiver's counsel, Carl Weinkauf also wrote the Receiver's counsel. *See* Email exchange between David Castleberry and Carl Weinkauf dated April 10, 2014 and April 11, 2014, attached as Ex. D. In his initial email, Weinkauf wrote: "***Forres McGraw advised me that he received a notice of summary judgment had been granted against him. . . .***" *Id.* at 2 (emphasis added). Weinkauf's statement – that McGraw told him that summary judgment had been entered against him – directly contradicts the statement made by McGraw to the Court on April 14, 2014 – that Weinkauf had first told McGraw that summary judgment had been entered against him. *Compare id. with* Motion to Vacate Judgment, Doc. No. 57.

### **ARGUMENT**

The Receiver respectfully requests that the Court deny the Motion to Vacate Judgment, or, at the very least, require sworn evidence from McGraw showing that he is entitled to relief and that this is not another attempt at delay. The Court has discretion to grant or deny a motion to vacate a judgment pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 60(b); *see also FDIC v. Oldenburg*, 38 F.3d 1119, 1122–23 (10th Cir. 1994) (reviewing Rule 60(b) motion to vacate judgment under abuse of discretion standard). Rule 60(b) permits

the Court to grant relief from a judgment or order for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence . . .; (3) fraud . . ., misrepresentation, or other misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b). Relief under Rule 60(b) "is extraordinary and may only be granted in exceptional circumstances." *Yapp v. Excel Corp.*, 186 F.3d 1222, 1231 (10th Cir.1999).

"Carelessness by a litigant or his counsel does not afford a basis for relief under" Rule 60. *Id.* (citing *Pelican Prod. Corp. v. Marino*, 893 F.2d 1143, 1146 (10th Cir. 1990)).

Here, the certificate of service for the motion for summary judgment identifies the method of service, and there is no doubt that the motion for summary judgment was mailed to McGraw. Under Rule 5(b)(2)(C) of the Federal Rules of Civil Procedure, the only manner in which the Receiver could serve McGraw was by mailing the Motion for Summary Judgment to his last known address, and "service is considered complete upon mailing." Both the Motion for Summary Judgment and the Request to Submit were served by mailing them to McGraw's current address, and neither was returned to the Receiver.

Further, McGraw has not submitted to the Court any sworn testimony regarding his claim that he did not receive the Motion for Summary Judgment. For McGraw to have the Court vacate a judgment, he must, at the very least, base his request on sworn testimony or admissible evidence demonstrating that he did not receive the Motion for Summary Judgment. *See Simpson v. University of Colorado*, 2007 WL 1217173, \*6 (D. Colo. April 24, 2007) ("Assuming relief

might be available to the plaintiffs under Rule 60(b), the plaintiffs have not come forward with admissible evidence that demonstrates an entitlement to such relief. This is an independent basis for the denial of the motion." ). Presumably McGraw received the Motion for Summary Judgment, the Request to Submit, and the Order from the Court granting summary judgment because these documents were sent to him and have not been returned, but McGraw states in an unsworn email that he never received any of these documents. Instead, according to McGraw's unsworn statement to the Court, a Prater Monning and a Carl Weinkauff received notices of a summary judgment in the mail. McGraw fails to explain, however, why these "third parties" received notice of the judgment against him when he himself did not.

Also, McGraw's statement that he first received notice of the judgment from Weinkauff and Monning is contradicted by Weinkauff's statement to the Receiver's counsel that McGraw received notice of the judgment and then contacted Weinkauff about it. In light of the current record before the Court, McGraw cannot be granted the "extraordinary relief" allowed by Rule 60(b).

**CONCLUSION**

For the foregoing reasons, the Receiver respectfully requests that the Court deny the Motion to Vacate Judgment submitted by McGraw.

DATED this 2nd day of May, 2014.

**MANNING CURTIS BRADSHAW  
& BEDNAR LLC**

/s/ David C. Castleberry  
David C. Castleberry  
Christopher M. Glauser  
Attorneys for Receiver for US Ventures, LC,  
Winsome Investment Trust, and the assets of  
Robert J. Andres and Robert L. Holloway



**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and correct copy of the foregoing **PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO VACATE JUDGMENT** to be served in the method indicated below to the Defendant in this action this 2nd day of May, 2014.

<input type="checkbox"/> HAND DELIVERY	Forres McGraw
<input checked="" type="checkbox"/> U.S. MAIL (CERTIFIED)	5427 Preston Haven Dr.
<input type="checkbox"/> OVERNIGHT MAIL	Dallas, TX 75229
<input type="checkbox"/> FAX TRANSMISSION	<a href="mailto:forres@outlook.com">forres@outlook.com</a>
<input checked="" type="checkbox"/> E-MAIL TRANSMISSION	Defendant <i>pro se</i>
<input type="checkbox"/> USDC ECF NOTICE	

/s/ David C. Castleberry