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**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH**

U.S. COMMODITY FUTURES)	
TRADING COMMISSION)	Case No. 2:11CV00099 BSJ
)	
Plaintiff,)	
)	PLAINTIFF U.S. COMMODITY
v.)	FUTURES TRADING COMMISSION'S
)	RESPONSE IN OPPOSITION TO
U.S. VENTURES LC, a Utah limited liability)	DEFENDANT ROBERT J. ANDRES'S
company, WINSOME INVESTMENT)	MOTION TO CORRECT/CLARIFY
TRUST, an unincorporated Texas entity,)	ACTIONS OF RECEIVERSHIP
ROBERT J. ANDRES and ROBERT L.)	
HOLLOWAY,)	
)	
Defendants.)	
)	
)	

Plaintiff United States Commodity Futures Trading Commission (“CFTC”) hereby respectfully responds to the *Motion to Correct/Clarify Actions of Receivership* (“Motion”) filed

by Defendant Robert J. Andres (“Andres”) (Docket Entry #453) and sets forth its opposition thereto.

I. BACKGROUND

On January 24, 2011, the CFTC filed a Complaint (Docket Entry #1) against U.S. Ventures LC, Winsome Investment Trust, Robert J. Andres, and Robert L. Holloway (collectively, “Defendants”) alleging, among other things, that Defendants fraudulently solicited at least \$50.2 million from at least 243 individuals in connection with the trading of commodity futures contracts, misappropriated participant funds to operate a Ponzi scheme and to pay personal expenses, and issued false account statements to participants.

Defendant Andres was served with the Complaint and the Summons on January 29, 2011 (Docket Entry #22). The CFTC filed its proof of service with the Clerk of the Court’s Office on February 8, 2011 (Docket Entry #22). Pursuant to Fed. R. Civ. P. 12(a)(1)(A)(i), Andres’s Answer was due on or before February 19, 2011. On February 28, 2011, Andres filed a motion seeking an extension of time until March 7, 2011 to file his Answer (Docket Entry #36). On March 1, 2011, the CFTC filed a response to Andres’s motion stating that it would not oppose an extension of time until March 1, 2011 (Docket Entry #39). Andres failed to respond to the CFTC’s Complaint by March 1, 2011, or at any time thereafter. On March 28, 2011, the CFTC, pursuant to Fed. R. Civ. P. 55(a), filed a *Request for Clerk’s Entry of Default Against Andres* (Docket Entry #49). The Court ordered the Clerk to enter a default against Andres on April 19, 2011 (Docket Entry #52).

At no time thereafter did Andres attempt to set aside the Clerk’s entry of default or to file an Answer to the CFTC’s Complaint. On April 21, 2014, the CFTC filed a *Motion and Supporting Memorandum for Entry of Default Judgment, Permanent Injunction, Civil Monetary*

Penalties, and Ancillary Equitable Relief Against Defendants U.S. Ventures LC, Winsome Investment Trust, Robert J. Andres, and Robert L. Holloway (“Default Judgment Motion”) (Docket Entry #344). Andres failed to file a response to the CFTC’s Default Judgment Motion. On June 6, 2014, the Court granted the CFTC’s Default Judgment Motion and entered an *Order for Entry of Default Judgment, Permanent Injunction, Civil Monetary Penalties, and Ancillary Equitable Relief Against Defendants U.S. Ventures LC, Winsome Investment Trust, Robert J. Andres, and Robert L. Holloway* (“Default Judgment Order”) (Docket Entry #358). Among the provisions of the Court’s Default Judgment Order were orders: (1) imposing restitution in the amount of \$12 million jointly and severally upon Andres and his co-defendants; (2) imposing a civil monetary penalty in the amount of \$32,370,000 jointly and severally upon Andres and his co-defendants; and (3) permanently enjoining Andres from entering into any transactions involving commodity futures, options on commodity futures, commodity options, security futures products, swaps, and/or forex contracts for his own personal account or for any account in which he has a direct or indirect interest or from having such products traded on his behalf.

At no time until the instant Motion, filed on January 17, 2017, did Andres attempt to set aside the Default Judgment Order or to seek relief from it.

II. ARGUMENT

A. **ANDRES’S MOTION SHOULD BE CONSTRUED AS A MOTION FOR RELIEF FROM A JUDGMENT OR ORDER PURSUANT TO RULE 60 AND SHOULD BE DENIED FOR FAILURE TO MEET THE RULE’S GROUNDS FOR RELIEF UNDER RULE 60(b)**

Although Andres styles his Motion as a motion to correct or clarify certain actions of the Court-appointed Receiver in this matter, his Motion seeks, among other things, relief from various of the provisions of the Court’s Default Judgment Order, including: (1) the restitution amount imposed by the Court as it applies to Andres; (2) the civil monetary penalty imposed by

the Court insofar as it applies to Andres; and (3) the permanent injunctive order imposed by the Court upon Andres. To the extent that the Motion seeks such relief, the CFTC respectfully argues that the Court should construe Andres's Motion as a motion for relief from a judgment or order pursuant to Fed. R. Civ. P. 60 ("Rule 60"). The CFTC further argues that the Motion should be denied for failure to meet the requirements of the Rule.

Rule 60(b) provides that "on motion and just terms" the Court may relieve a party from a final judgment or order for any of the following reasons: "(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud, misrepresentation, or 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."

Rule 60(b) is "an extraordinary procedure permitting the court that entered judgment to grant relief therefrom upon a showing of good cause within the rule." *Cessna Fin. Corp. v. Bielenberg Masonry Contracting Inc.*, 715 F.2d 1442, 1444 (10th Cir. 1983). Rule 60(b) is not intended to be a substitute for a direct appeal. *Cashner v. Freedom Stores, Inc.*, 98 F.3d 572, 576 (10th Cir. 1996); *Morris v. Adams-Mills Corp.*, 758 F.2d 1352, 1356-57 (10th Cir. 1985). "In order to grant a Rule 60(b) motion the district court must make two distinct findings: 'a justification for relief [under one of the clauses of the rule] and a meritorious defense.'" *Mullin v. High Mountain*, 182 Fed. App'x. 830, 833 (10th Cir. 2006) (quoting *Olsen v. Stone (In re Stone)*, 588 F.2d 1316, 1319 (10th Cir. 1978)). If the moving party fails to establish the first prong, the court need not consider the second. *Olivas v. Brentwood Place Apartments, LLC*, 2010 U.S. Dist. LEXIS 115059*5 (D. Kan. October 28, 2010) (citing *Mullin*, 182 Fed. App'x. at

834, n. 5 (“Because we conclude that the district court did not abuse its discretion in finding High Mountain’s eleven month delay was unreasonable, we do not address the second prong of the analysis, i.e., whether High Mountain offered a meritorious defense to the Mullins’ claims.”)).

Andres’s Motion fails to plead or prove any justification for relief under any of clauses (1) through (5) of Rule 60(b). He cites neither mistake or excusable neglect pursuant to Rule 60(b)(1), nor fraud, misrepresentation or misconduct by an opposing party pursuant to Rule 60(b)(3). The statements he cites regarding his co-defendant Robert Holloway’s role vis-à-vis U.S. Ventures do not constitute newly discovered evidence pursuant to Rule 60(b)(2), but, rather, are merely arguments that were available for Andres to make in 2011, in response to the CFTC’s Complaint (which he failed to answer) or in 2014, in response to the CFTC’s Default Judgment Motion (to which he failed to respond).¹ Andres does not claim that the Court’s judgment is void for lack of jurisdiction pursuant to Rule 60(b)(4), nor does he claim that it has it been satisfied, released, or discharged, or based on an earlier judgment that has been reversed or vacated pursuant to Rule 60(b)(5).

Rule 60(b)(6) provides that relief may be granted for “any other reason that justifies relief.” However, a district court may grant a Rule 60(b)(6) motion “only in extraordinary circumstances and only when necessary to accomplish justice.” *Cashner*, 98 F.3d at 579; *Lyons v. Jefferson Bank & Trust*, 994 F.2d 716, 729 (10th Cir. 1993). Andres’s Motion demonstrates no such extraordinary circumstances. Again, insofar as Andres seeks to justify relief from the restitution, civil monetary penalty, and injunctive provisions imposed by the Court’s Default

¹ Indeed, one of the pieces of “evidence” Andres attaches to his motion is an email from Holloway to Andres dated January 25, 2008.

Judgment Order, he merely raises arguments that have been available for him to raise since the inception of this matter.

The CFTC presented ample evidence in support of its Default Judgment Motion that showed that Andres, together with his co-defendants, fraudulently solicited at least \$50.2 million from at least 243 individuals in connection with the trading of commodity futures contracts, misappropriated participant funds to operate a Ponzi scheme and to pay for his and his wife's personal expenses, and issued false account statements to participants. That evidence provided more than adequate justification for the restitution, civil monetary penalty,² and injunctive relief provisions imposed in the Court's Default Judgment Order. Andres failed to file any response to the CFTC's Default Judgment Motion, yet now, two and a half years after entry of the Court's Default Judgment Order, he seeks relief from that order. There is nothing so unusual or compelling about the circumstances of Andres's Motion that the extraordinary relief of Rule 60(b)(6) is warranted, nor would denial of such relief offend justice. *See Cashner*, 98 F.3d at 580 ("Relief under Rule 60(b)(6) is appropriate where circumstances are 'so unusual or compelling' that extraordinary relief is warranted, or when it 'offends justice' to deny such relief.").

B. ANDRES'S MOTION DOES NOT MEET THE TIMELINESS REQUIREMENT OF RULE 60(c)(1)

Andres's request for relief from the restitution, civil monetary penalty, and injunctive relief provisions of the Court's Default Judgment Order fails to satisfy any of the requirements of

² Andres's Motion requests "identification from the United States of America" as to "the specific computations underlying the calculation" of the civil monetary penalty. As the civil monetary penalty was imposed by the Court and not the CFTC, the CFTC is not in a position to address this request; however the CFTC notes that it requested in its Default Judgment Motion a civil monetary penalty of \$32,370,000, to be imposed jointly and severally on all Defendants, and set forth in detail the calculations it used to derive its requested figure.

Rule 60, not least of which is the timeliness requirement of Rule 60(c)(1), which states that a motion under Rule 60(b) must be made “within a reasonable time – and for reason (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.” To the extent that Andres’s request relies on any of the grounds in Rule 60(b)(1) – (3), it should be denied for failing to meet the Rule’s one-year outer limit for filing. To the extent that the request can be construed to rely on Rule 60(b)(6),³ it should still be denied for Andres’s failure to file within a reasonable time. Surely, two and a half years post-judgment, without any proffered justification for such delay, is well outside of any definition of “reasonable time.” See *Mullin*, 182 Fed. App’x. 839 (upholding a district court’s denial of a Rule 60(b) motion on the grounds that an eleven month delay was unreasonable); *In re Bench*, 556 B.R. 500 (D. Utah 2016) (holding that a Rule 60(b) motion to set aside a default judgment filed seventeen months after entry of the judgment was not brought within a reasonable time).

III. CONCLUSION

For the foregoing reasons, the CFTC respectfully requests that Andres’s Motion, insofar as it seeks relief from the Court’s Default Judgment Order, be denied.

³ The provisions of Rule 60(b) are mutually exclusive, and a party who failed to take timely action under clauses (1)-(3) may not seek relief more than a year after the judgment by resorting to clause (6). See *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership*, 507 U.S. 380 (1993).

Respectfully submitted,

/s/ Alan Edelman

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Dated: February 2, 2017

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of February 2017, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served on all parties or counsel of record identified below in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing:

1. US Ventures LC
c/o Robert L. Holloway, #29851-298
FCI Ft. Worth
PO Box 15330
Ft. Worth, TX 76119
[via U.S. Mail]
2. Winsome Investment Trust
c/o Robert J. Andres, #71972-279
FCI Englewood
9595 W. Quincy Avenue
Littleton, CO 80123
[via U.S. Mail]
3. Robert J. Andres, #71972-279
FCI Englewood
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