IN THE SUPREME COURT OF THE STATE OF MONTANA
Case No. DA 22-0741

THOMAS F. MIETZEL, LLC, a/k/a THOMAS F. MIETZEL, LLC and THOMAS F. MIETZEL,

Plaintiffs/Appellees,

v.

CREATIVE WEALTH ACQUISITIONS & HOLDINGS, LLC, BRAD QUINTANA, and CHAD MCCALL,

Defendants/Appellants.

BRIEF OF APPELLANTS CREATIVE WEALTH ACQUISITIONS & HOLDINGS, LLC, BRAD QUINTANA, AND CHAD MCCALL

On Appeal from the Montana Eighth Judicial District Court, Cascade County
The Honorable John A. Kutzman, Presiding
Case No. CDV-21-0413

Steve J. Fitzpatrick, Esq.
Michael L. Rausch, Esq.
Megan E. Wampler, Esq.
BROWNING, KALECZYC,
BERRY & HOVEN, P.C.
Liberty Center, Ste. 302
9 Third Street North
Great Falls, MT 59401
Telephone: 406.403.0041
Fax: 406.453.1634
stevef@bkbh.com
mike@bkbh.com
meganw@bkbh.com
Attorneys for Appellants

Josh L. Campbell
JARDINE, STEPHENSON,
BLEWETT & WEAVER, P.C.
P.O. Box 2269
Great Falls, Montana 59403
jcampbell@ jardinelaw.com

Attorney for Appellees

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITES iii

STATEMENT OF ISSUES 1

STATEMENT OF THE CASE 2

STATEMENT OF RELEVANT FACTS 4

STANDARD OF REVIEW 12

SUMMARY OF THE ARGUMENT 12

ARGUMENT 16

I. THE DISTRICT COURT ERRED BY FAILING TO SET ASIDE THE DEFAULT JUDGMENT UNDER RULE 60(b)(4) 17

A. The Default Judgment is Void Because Creative Wealth, Quintana, and McCall Did Not Breach the Terms of the Promissory Notes 18

B. The Default Judgment in Favor of Thomas Mietzel in his Individual Capacity is Void Because Thomas Mietzel Lacks Standing to Assert Any Claims in his Individual Capacity 21

C. The Default Judgment Entered Against Quintana and McCall is Void 23

1. Quintana and McCall are Not Parties to the Promissory Notes 23

2. The Claims Asserted Against Quintana and McCall are Barred by the Corporate Shield Doctrine 24

II. THE COURT ERRED BY FAILING TO SET THE DEFAULT JUDGMENT ASIDE UNDER RULE 60(b)(1) 27

III. THE COURT ERRED BY FAILING TO SET JUDGMENT ASIDE UNDER RULES 60(b)(1) and 60(b)(5) 30

A. Thomas Mietzel, LLC is Only Entitled to Recover the Agreed Upon Interest Rate in the Event of a Default 30

B. The Court Should Impose a Penalty for Attempting to Collect Usurious Interest Rates 31

C. The Maximum Interest Rate Which May Be Imposed is 15% 33

IV. THE COURT ERRED BY FAILING TO SET THE DEFAULT JUDGMENT ASIDE UNDER RULE 60(b)(6) 33

CONCLUSION 35

CERTIFICATE OF COMPLIANCE 36

TABLE OF AUTHORITIES

Page

Cases

Bartell v. Zabawa,
2009 MT 204, 351 Mont. 211 16

Bottrell v. Am. Bank,
237 Mont. 1, 773 P.2d 694 (1989) 25, 26

Bowyer v. Loftus,
2008 MT 332, 346 Mont. 182, 194 P.3d 92 25

Bradley v. Crow Tribe of Indians,
2005 MT 309, 329 Mont. 448, 124 P.3d 1143 18

Crawford v. Pierse,
56 Mont. 371, 185 P. 315 (1919) 18, 20

Deschamps v. Farwest Rock, Ltd.,
2020 MT 270, 402 Mont. 15, 474 P.3d 1282 21

DeTienne v. Sandrock,
2017 MT 181, 388 Mont. 179 17

Essex Ins. Co. v. Moose's Saloon, Inc.
2007 MT 202, 338 Mont. 423 ..... 12, 34

First Bank (N.A.) - Billings v. Transamerica Ins. Co.,
209 Mont. 93, 679 P.2d 1217 (1984) 32

Greater Missoula Area Federation of Early Childhood Educators v. Child Start, Inc., 2009 MT 362, 353 Mont. 201, 219 P.3d 881 17

In re Hofmann's Estate,
132 Mont. 387, 318 P.2d 230 (1957) 17

Krajacich v. Great Falls Clinic, LLP,
2012 MT 82, 364 Mont. 455 18

Krohne Fund, LP v. Simonsen,
2017 WL 3105839 26

Little Horn State Bank v. Real Bird,
183 Mont. 208, 598 P.2d 1109 (1979).....29

Palmer v. Bahm,
2006 MT 29, 331 Mont. 105, 128 P.3d 1031 22

Peeler v. Rocky Mountain Log Homes Canada, Inc.,
2018 MT 297, 393 Mont. 396, 431 P.3d 911 18

Phillips v. Mont. Educ. Ass'n.,
187 Mont. 419, 610 P.2d 154 (1980).....25, 26

Richland Nat. Bank & Trust v. Swenson,
249 Mont. 410, 816 P.2d 1045 22

Sagorin v. Sunrise Heating & Cooling, LLC,
2022 MT 58, 408 Mont. 119, 506 P.3d 1028 .....21, 22

Saucier v. McDonald's Restaurants of Montana, Inc.,
2008 MT 63, 342 Mont. 29, 179 P.3d 481 25

Scarr v. Boyer,
250 Mont. 248, 818 P.2d 381 (1991).....31

State v. Daniels,
2017 MT 163, 388 Mont. 89, 397 P.3d 460 27

Sunburst Sch. Dist. No. 2 v. Texaco, Inc.,
2007 MT 183, 338 Mont. 259, 165 P.3d 1079 34

Whitefish Credit Union v. Sherman,
2012 MT 267, 367 Mont. 103, 289 P.3d 174 28

Wittich Law Firm, P.C. v. O'Connell,
2013 MT 122, 370 Mont. 103, 304 P.3d 375 27

Statues, Codes and Court Rules

Mont. R. Civ. P. 55(c) 16
Mont. R. Civ. P. 59(f) 4
Mont. R. Civ. P. 60 ..... 11, 12
Mont. R. Civ. P. 60(b) 12, 15, 16, 17, 33, 35
Mont. R. Civ. P. 60(b)(1) 1, 14, 27, 28, 30
Mont. R. Civ. P. 60(b)(4) 1, 12, 17
Mont. R. Civ. P. 60(b)(5) 1, 30
Mont. R. Civ. P. 60(b)(6) 2, 15, 33, 34, 35
Mont. R. Civ. P. 60(c) 16
Mont. Code Ann. § 31-1-105 31
Mont. Code Ann. § 31-1-107 ..... 31, 32
Mont. Code Ann. § 31-1-107(1) 4, 33
Mont. Code Ann. § 31-1-108(1) 15, 32, 33
Mont. Code Ann. § 35-8-1101 21
11 Fed. Prac. & Proc. Civ. § 2857 (3d ed.) 17
11 Fed. Prac. & Proc. Civ. § 2862 (3d ed.) 17

STATEMENT OF ISSUES

1. Did the District Court err in failing to set aside the default judgment against Creative Wealth, Quintana, and McCall under Rule 60(b)(4) when the language of the promissory notes says payment is not due until the property securing the note is sold?
2. Did the District Court err in failing to set aside the default judgment in favor of Thomas Mietzel individually under Rule 60(b)(4) when Thomas Mietzel is not a party to the promissory notes in his individual capacity?
3. Did the District Court err in failing to set aside the default judgment against Quintana and McCall individually under Rule 60(b)(4) when Quintana and McCall are not parties to the promissory notes in their individual capacity?
4. Did the District Court err in failing to set aside the default judgment against Creative Wealth, Quintana, and McCall under Rule 60(b)(1) when Creative Wealth, Quintana, and McCall were unrepresented and were attempting to resolve the matter?
5. Did the District Court err in failing to set the default judgment against Creative Wealth, Quintana, and McCall under Rule 60(b)(1) and Rule 60(b)(5) when the plain language of the promissory notes limits the amount of recoverable interest to the "agreed upon interest" rate?

6. Did the District Court err in failing to set aside the default judgment against Creative Wealth, Quintana, and McCall under Rule 60(b)(6)?

STATEMENT OF THE CASE

This lawsuit arises from a dispute over the repayment of money for the construction of two homes in Great Falls. In 2019, Respondent Thomas Mietzel, LLC ("Thomas Mietzel, LLC") entered into two promissory note agreements with Appellant Creative Wealth Acquisitions & Holdings, LLC ("Creative Wealth"). First, in April 2019, Thomas Mietzel, LLC agreed to loan Creative Wealth the principal amount of $120,000 for work on a property located at 213 7th Street North, Great Falls, Montana. Second, in June 2019, Thomas Mietzel, LLC entered into another agreement to loan Creative Wealth the principal amount of $125,000 for work on a property located at 1506 16th Street South, Great Falls, Montana

On August 2, 2021, Thomas Mietzel ("Mietzel") individually and Thomas Mietzel, LLC brought this action against Creative Wealth, Brad Quintana ("Quintana"), and Chad McCall ("McCall"). In the Complaint, Mietzel and Thomas Mietzel, LLC alleged Quintana and McCall individually and behalf of themselves individually and on behalf of Creative Wealth executed and delivered the promissory notes. (Compl. ¶¶ 1-3.) The Complaint alleged Creative Wealth, Quintana, and McCall failed to make payments and to comply with the terms of the promissory notes and thus were in default. (Compl. ¶ 7.)

Creative Wealth, Quintana, and McCall failed to appear and on September 27, 2021, the Clerk of District Court entered a default against Creative Wealth, Quintana, and McCall. On January 31, 2022, the District Court entered a Default Judgment and Decree of Foreclosure against Creative Wealth, Quintana, and McCall. In the Judgment and Decree of Foreclosure, the Court ruled Mietzel and Thomas Mietzel, LLC were entitled to recover the principal amount of $120,000 together with interest in the amount of 18% per annum from April 3, 2019 to the date of the judgment, the principal amount of $125,000 together with interest on the in the amount of 18% per annum from June 28, 2019 to the date of the judgment, costs and attorney fees, and post-judgment interest at the rate of 6.25%. The amounts were decreed as liens on the real property subject to the promissory notes and ordered the Cascade County Sheriff to sell the real property.

On or around April 21, 2022, the Cascade County Sheriff conducted a sale where the real properties located at 213 7th Street North, Great Falls, Montana and 1506 16th Street South, Great Falls were sold. Following the sale of the real property, on May 19, 2022, Mietzel and Thomas Mietzel, LLC filed a Motion to Set Amount of Deficiency Judgment. On October 4, 2022, Mietzel and Thomas Mietzel, LLC filed an Unopposed Motion to Amend Judgment and Decree of Foreclosure to reduce the amount of the interest rate in the judgment to 15% to

conform with § 31-1-107(1), MCA. To date, the District Court has not ruled on either motion.

On October 5, 2022, Creative Wealth, Quintana, and McCall filed a Motion to Set Aside the January 28, 2022 Judgment and Decree of Foreclosure. The District Court did not rule upon the motion within 60 days. Following the expiration of the 60 day time limit set forth in Mont. R. Civ. P. 59(f), Creative Wealth, Quintana, and McCall filed a notice of appeal.

STATEMENT OF RELEVANT FACTS

On August 2, 2021, Thomas Mietzel ("Mietzel") individually and Thomas Mietzel, LLC brought this action against Creative Wealth, Quintana, and McCall. Thomas Mietzel, LLC is a Nevada corporation. (D.C. Doc. 1 – Complaint.) Mietzel is the manager of Thomas Mietzel, LLC and a citizen and resident of Nevada. (Ex. A to D.C. Doc. 33.)

Creative Wealth is an expired Utah limited liability company. (Ex. B to D.C. Doc. 33.) Creative Wealth was a company which renovated and resold homes. (D.C. Doc. 34 - Quintana Aff. ¶ 5.) The members of the company were Quintana and McCall. (Quintana Aff. ¶¶ 1, 4.) Quintana is a citizen and resident of Utah. (Quintana Aff. ¶ 1.) McCall is a citizen and resident of Florida. (D.C. Doc. No. 31 - McCall Aff. ¶ 1.)

Quintana, McCall, and Mietzel have all known each other for many years. (Quintana Aff. ¶¶ 3-4.) Quintana met Mietzel on the conference circuit. (Quintana Aff. ¶ 3.) McCall has known Mietzel for many years and considered him a friend. (McCall Aff. ¶ 3.) In 2019, Quintana and McCall, through their limited liability company, decided to enter into an agreement with Thomas Mietzel, LLC. (Quintana Aff. ¶ 5.) At the time, Mietzel wanted to make an investment in a home flipping business to assist with his goal of becoming a conference circuit speaker on personal finance matters. Id.

The substance of the deal was that Thomas Mietzel, LLC would provide funding for the renovation of two different properties, subject to two different promissory notes, in exchange for a flat percent return on that cash after closing once the properties sold. (Quintana Aff. ¶ 6.) Quintana, McCall, and Mietzel discussed the deal extensively before signing any documents. Id., ¶ 7.

In April 2019, Creative Wealth executed a promissory note for the amount of $120,000 with Thomas Mietzel, LLC. (Ex. 1 to D.C. Doc. 1.) In paragraph 1 of the April 2019 promissory note, the note states "FOR VALUE RECEIVED, The Borrower Promises to pay Lender the principal amount of $120,000 plus 10% interest in 4 months (or earlier) from property closing date starting on the 8th day of April 2019." Id. (emphasis added). In paragraph 3, the promissory note states "repayment will be at the rate of 10% for 4 months from the day the property

closes. No early prepayment penalties or discounts if paid prior to scheduled repayment date." Id. (emphasis added). Finally, in paragraph 4, the promissory note states "[a]ll costs, expenses and expenditures including, and without limitation, the complete legal costs incurred by the Lender in Enforcing this Note as a result of any default by the Borrower, will be added to the principal plus the agreed upon interest (ex: principal + 10% + legal fees = ____)." Id. (emphasis added).

In June 2019, the parties executed another promissory note. (Ex. 2 to D.C. Doc. 1.) In paragraph 1 of the June 2019 promissory note, the note states "FOR VALUE RECEIVED, The Borrower Promises to pay Lender the principal amount of $125,000 plus 9% interest in 3 months (or earlier) from property closing date." Id. (emphasis added). In paragraph 3, the promissory note states "repayment will be at the rate of 9% for 3 months from the day the property closes. No early prepayment penalties or discounts if paid prior to scheduled repayment date." Id. (emphasis added). Finally, in paragraph 4, the promissory note states "[a]ll costs, expenses and expenditures including, and without limitation, the complete legal costs incurred by the Lender in Enforcing this Note as a result of any default by the Borrower, will be added to the principal plus the agreed upon interest (ex: principal + 10% + legal fees = ____)." Id. (emphasis added).

Quintana drafted the two promissory notes at issue in this lawsuit. (Quintana Aff. ¶ 8.) He intended for each promissory note to convey, that in exchange for the value received, Thomas Mietzel, LLC would receive either a flat 9% or 10% return on investment after closing. Id. The promissory notes were never intended to require installment payments or regular payments. Id. Payment was only required after the property subject to the note had been sold. Id.

For the first promissory note signed in April 2019, this meant that for the principal value of $120,000.00, Thomas Mietzel, LLC would be paid back $120,000.00 plus a flat $12,000.00 return, constituting 10% of the principal amount, within four (4) months after closing of the 213 7th St. N. property sale. (Quintana Aff. ¶ 9.) For the second promissory note signed in June 2019, this meant that for the principal value of $125,000.00, Thomas Mietzel, LLC would be paid back $125,000.00 plus a flat $12,500.00 return, constituting 9% of the principal amount, within three (3) months after closing of the 1506 16th St. N. property sale. (Quintana Aff. ¶ 10.) If either promissory note was not paid back within four or three months of each property closing, respectively, the promissory note would be in default. (Quintana Aff. ¶ 11.) There was no provision for default before either property closed. Id.

After beginning the renovations on both properties, Quintana and McCall discovered that the projects were much more extensive than they first realized, and

they would need more money to complete the projects. (Quintana Aff. ¶ 15.) The properties needed stairs to be relocated in both properties, complete electrical replacement in both properties, a new city sewer line in one property, and completely new drywall and insulation in both properties. Id. As part of the construction process, the buildings were more or less gutted down to the studs. Id. All of the plumbing was replaced in each building and new mechanical was installed. Id. Egress windows were also cut into the basements in both buildings. Id.

As part of the remodeling work, McCall personally performed some of the construction work and coordinated with contractors on the job sites in Great Falls. (McCall Aff. ¶ 5.) McCall stayed in regular communication with Mietzel and informed him of the progress during construction. Id. At one point, Mietzel travelled to Great Falls to visit the properties. Id. During this visit, McCall and Mietzel filmed video for Mietzel at the properties. Id.

In the spring and early summer of 2021, Creative Wealth's realtor was showing the properties. (Quintana Aff. ¶ 20.) Creative Wealth received verbal offers for $280,000.00 even though the properties were not even on the market. Id. Around this time, McCall, who was performing some of the work personally, moved to Arizona and underwent a divorce. Id. Because of this, it was difficult for him to continue working in Great Falls. Id.

At some point, Mietzel became impatient and hired an attorney. (Quintana Aff. ¶ 21.) Nonetheless, Quintana and McCall continued to discuss the status of the projects with Mietzel, assuring Mietzel that Creative Wealth would be able to pay these balances once the properties sold, and Mietzel told Quintana and McCall that he understood. Id. Quintana and McCall told Mietzel that the properties were very close to being ready for sale. Id.

In August 2021, Mietzel and Thomas Mietzel, LLC brought suit against Creative Wealth, Quintana, and McCall. The Complaint contains nine causes of action including claims for foreclosure, promissory note, breach of contract, breach of the covenant of good faith and fair dealing, constructive fraud, fraud, negligent misrepresentation, deceit, and malice.

Following service of the Complaint, Creative Wealth, Quintana, and McCall failed to appear. On September 27, 2021, the Clerk of Court entered default against Defendants. (D.C. Doc. 7.)

Quintana and McCall are not lawyers and did not understand the consequences of failing to respond to the lawsuit. (Quintana Aff. ¶ 22.) Quintana and McCall believed that if Creative Wealth finished the work and got the properties on the market, Creative Wealth could sell the properties and there would not be any problems. Id. In fact, even after Mietzel and Thomas Mietzel, LLC requested default to be entered, Quintana and McCall still believed that Mietzel

and Thomas Mietzel, LLC not going to execute on the properties and would allow them to finish the properties and put them on the market. Id.; (McCall Aff. ¶ 9).

In April 2021, McCall had a number of communications by text message regarding a possible resolution. Id. Quintana even received an email from Mietzel and Thomas Mietzel, LLC's attorney regarding settlement. (Quintana Aff. ¶ 22.) Instead of trying to litigate this matter in court, Creative Wealth, Quintana, and McCall focused their efforts on finishing the properties and getting them sold. (Quintana Aff. ¶ 24.)

On September 30, 2021, Mietzel and Thomas Mietzel, LLC filed a motion for a default judgment. (D.C. Doc. 8.) On November 10, 2021, the District Court held a hearing on the motion. (D.C. Doc. 10.) During the hearing, Mietzel testified the April 2019 promissory note allowed him to recover interest at the rate of 2.5% per month and the June 2019 promissory note to recover interest at the rate of 3% per month. (Default J. Hr'g Tr., 6:3-14; 8:2-12.)

On January 28, 2022, the District Court entered a Judgment and Decree of Foreclosure against Creative Wealth, Quintana, and McCall. (D.C. Doc. 13.) In the Judgment and Decree of Foreclosure, the Court ruled Mietzel and Thomas Mietzel, LLC were entitled to recover the principal amount of $120,000 together with interest in the amount of 18% per annum from April 3, 2019 to the date of the judgment, the principal amount of $125,000 together with interest on the in the

amount of 18% per annum from June 28, 2019 to the date of the judgment, costs and attorney fees, and post-judgment interest at the rate of 6.25%. Id. The amounts were decreed as liens on the real property subject to the promissory notes. Id. Further, the judgment ordered that the real property be sold by the Cascade County Sheriff. Id.

Creative Wealth, Quintana, and McCall have been looking for an attorney to represent them since spring of 2022. (Quintana Aff. ¶ 28.) Quintana called more than a dozen offices, including inquiring with the Montana State Bar, trying to find someone who would take their case, but no one would. Id. Creative Wealth, Quintana, and McCall could not get an attorney to represent them until August 2022. Id. When Quintana could not find an attorney, he got desperate and tried to file a Rule 60 motion on his own to reverse the default judgment. Id.; (D.C. Doc. 16.) However, Quintana did not understand the challenge of attempting to overturn a default judgment. Id.

Throughout the process, Creative Wealth, Quintana, and McCall did not understand the legal proceedings that should have happened before now, nor did they understand that they could have fought back against the claims asserted by Mietzel and Thomas Mietzel, LLC. (Quintana Aff. ¶ 29.) Creative Wealth, Quintana, and McCall thought that if they finished the deal as planned, everything would go back to the way it was supposed to be. Id. In addition, Quintana and

McCall do not understand how they can be held personally liable when they did not enter into either promissory note in their personal capacity or sign any personal guarantees. Id.; (Quintana Aff. ¶ 15).

STANDARD OF REVIEW

The standard of review of a district court's ruling on Rule 60 depends upon the nature of the final judgment, order, or proceeding from which relief is sought and the specific basis of Rule 60(b). Essex Ins. Co. v. Moose's Saloon, Inc., 2007 MT 202, ¶ 16, 338 Mont. 423, 166 P.3d 451.

When a trial court has denied a motion to set aside a default judgment, "only [a] 'slight abuse' is sufficient to reverse an order refusing to set aside a default" judgment. Id., ¶ 17 (citations omitted). However, when a party seeks relief under Rule 60(b)(4) on the grounds that the judgment is void, "the standard of review is de novo, since the determination that a judgment is or is not void is a conclusion of law." Essex Ins., ¶ 16.

SUMMARY OF THE ARGUMENT

The Court should set aside the default judgment entered against Creative Wealth, Quintana, and McCall.

First, the District Court erred by failing to set the default judgment aside because the judgment is void. Under Rule 60(b)(4), a court may relieve a party of a final judgment, order, or proceeding if the judgment in void. In this situation, the

judgment is void because Creative Wealth, Quintana, and McCall did not breach the terms of the promissory notes. Under the terms of the promissory notes, payment is not due until the property securing the note is sold. There is nothing in the plain language of the promissory notes requiring payment before the closing of the property and there is nothing requiring monthly payments or any other type of payment until the property is sold. Because neither property had sold when Mietzel and Thomas Mietzel, LLC filed suit, there was no breach of the contract and thus no basis for suit.

Second, the District Court erred in failing to set the default judgment aside in favor of Thomas Mietzel in his individual capacity. Under Montana law, standing is a threshold jurisdictional requirement. In this case, Mietzel lacks standing in his individual capacity because he did not enter into a contract with any party. Instead, Mietzel is nothing more than a member of a limited liability company. Mietzel's status as a member of a limited liability company does not give him the right to bring an action for claims possessed by the limited liability company. Since Mietzel is not a party to any of the contracts and has not sustained any damages in his personal capacity, Mietzel cannot bring suit in his individual capacity. Thus, the default judgment entered in favor of Mietzel in his individual capacity is void.

Third, the District Court erred by failing to set the default judgment aside against Quintana and McCall. In this case, Quintana and McCall are not parties to either of the promissory notes. Thus, neither Mietzel, nor Thomas Mietzel, LLC possesses the right to sue Quintana or McCall for any breach of contract based claims. Moreover, neither Mietzel, nor Thomas Mietzel, LLC possess the right to bring an action against Quintana or McCall because both individuals are protected by the corporate shield doctrine. Under Montana law, when a member of a limited liability company acts within the scope of his employment and in furtherance of the corporate interest, the member is entitled to protection from personal liability under the corporate shield doctrine. In this case, there is no evidence to suggest Quintana or McCall acted outside the scope and course of employment. Therefore, Quintana and McCall are protected by the corporate shield doctrine and the judgment entered against Quintana and McCall is void.

Fourth, the District Court erred by failing to set the default judgment aside under Rule 60(b)(1). Under Rule 60(b)(1), a default judgment may be set aside for reasons of mistake or excusable neglect. In this case, Creative Wealth, Quintana, and McCall made an error arising from their ignorance of the legal process. After the initiation of the suit, Creative Wealth, Quintana, and McCall continued to work on the properties and prepare them for sale. At the time, Creative Wealth, Quintana, and McCall were unrepresented by counsel. Under Montana law, *pro se*

litigants are generally entitled to less stringent standards in litigation than licensed attorneys. Because Creative Wealth, Quintana, and McCall were *pro se* parties, the judgment should be set aside because of mistake and excusable neglect for failing to appear and defend due to Creative Wealth, Quintana, and McCall's lack of knowledge and understanding of the legal process.

Fifth, the District Court erred by failing to set the default judgment aside with respect to the interest rate authorized as part of the judgment. When the District Court entered the default judgment, the District Court determined Mietzel and Thomas Mietzel, LLC were entitled to interest at the rate of 18%. However, under the terms of the promissory notes, the applicable interest rate in the event of a default is the "agreed upon" interest rate of 9% or 10%. Moreover, under Montana law, the maximum interest rate which can be charged is 15%. Thus, the 18% interest rate is unlawful as a matter of law. Lastly, because Mietzel and Thomas Mietzel, LLC argued they actually entered into promissory notes allowing them to charge usurious rates of 30% to 36%, the District Court erred by failing to impose a penalty under § 31-1-108(1), MCA.

Sixth, the District Court erred by failing to set the default judgment aside under the catchall provision of Rule 60(b). A successful Rule 60(b)(6) motion requires the movant to prove that something prevented a full presentation of the cause or an accurate determination on the merits and that for reasons of fairness

and equity redress is justified. In this case, principles of equity favor setting aside the judgment. There are legitimate defenses to the claims and Creative Wealth, Quintana, and McCall should be permitted to assert them. In addition, Mietzel and Thomas Mietzel, LLC are seeking compensation far and above what was permitted under the terms of the promissory notes. For these reasons, the default judgment should be set aside.

ARGUMENT

Under Mont. R. Civ. P. 55(c), a district court may set aside a default judgment under Mont. R. Civ. P. 60(b). Rule 60(b) of the Montana Rules of Civil Procedure authorizes a district court to "relieve a party . . . from a final judgment, order, or proceeding for . . . (1) mistake, inadvertence, surprise, or excusable neglect; . . (4) the judgment is void; (5) . . . applying it prospectively is no longer equitable; or (6) any other reason that justifies relief." "A motion under Rule 60(b) must be made within a reasonable time – and for reasons (1), (2), and (3) no more than a year after the entry of the judgment." Mont. R. Civ. P. 60(c).

When considering a motion to set aside a default judgment, the Court must be guided by the principle that every litigated case should be tried on the merits and that judgment by default is not favored. Bartell v. Zabawa, 2009 MT 204, ¶ 10, 351 Mont. 211, 214 P.3d 735. "Based on the remedial nature of Rule 60(b), the discretion of the district court to deny a motion for relief is limited. As long as

the movant seeking timely relief has a meritorious defense, doubt should be resolved in favor of a motion to set aside the default judgment." 11 Fed. Prac. & Proc. Civ. § 2857 (3d ed.) (discussing Fed. R. Civ. P. 60(b)); see also DeTienne v. Sandrock, 2017 MT 181, ¶ 30, 388 Mont. 179, 400 P.3d 682 (stating a decision to deny a motion to set aside a default judgment is reviewed for a slight abuse of discretion).

I. THE DISTRICT COURT ERRED BY FAILING TO SET ASIDE THE DEFAULT JUDGMENT UNDER RULE 60(b)(4).

Under Rule 60(b)(4), the Court must set aside a default judgment if it finds that the judgment is void. "A judgment is void only if the court which rendered it lacked jurisdiction of the subject matter or the parties, or if it acted inconsistent with due process of law." Greater Missoula Area Federation of Early Childhood Educators v. Child Start, Inc., 2009 MT 362, ¶ 21, 353 Mont. 201, 219 P.3d 881 (citations omitted). "[I]f an examination of the complaint negatives conclusively the existence of a cause of action then of course the judgment is void and may be attacked collaterally." In re Hofmann's Estate, 132 Mont. 387, 396, 318 P.2d 230, 236 (1957).

"There is no question of discretion on the part of the court when a motion is under Rule 60(b)(4)." 11 Fed. Prac. & Proc. Civ. § 2862 (3d ed.). "Nor is there any requirement, as there usually is when default judgments are attacked under Rule 60(b), that the moving party show a meritorious defense." Id. "Either a

judgment is void or it is valid." Id. "Determining which it is may well present a difficult question, but when that question is resolved, the court must act accordingly." Id. "If a pleading is not sufficient to put the defendant in the wrong, the court cannot grant redress." Crawford v. Pierse, 56 Mont. 371, ___, 185 P. 315, 318 (1919). As a result, "a judgment based upon such a pleading is invalid." Id.

A. The Default Judgment Is Void Because Creative Wealth, Quintana, and McCall Did Not Breach the Terms of the Promissory Notes.

The default judgment is void because the plain language of the promissory notes shows Mietzel and Thomas Mietzel, LLC did not have a cause of action upon which to base their claims. Under Montana law, a contract must be interpreted to give effect to the mutual intention of the parties as it existed at the time of contracting. Krajacich v. Great Falls Clinic, LLP, 2012 MT 82, ¶ 13, 364 Mont. 455, 276 P.3d 922. When construing a contract, contractual provisions must be interpreted according to their plain, ordinary meaning. Bradley v. Crow Tribe of Indians, 2005 MT 309, ¶ 28, 329 Mont. 448, 124 P.3d 1143. However, the Court must also construe particular provisions in the context of the agreement as a whole, giving consistent meaning and effect to all provisions as possible. Peeler v. Rocky Mountain Log Homes Canada, Inc., 2018 MT 297, ¶ 18, 393 Mont. 396, 431 P.3d 911.

The judgment is void because Creative Wealth, Quintana, and McCall did not breach the contracts. According to the plain language of both promissory notes, payment is only due after the property is sold. The first promissory note, signed April 4, 2019, states "FOR VALUE RECEIVED, The Borrower Promises to pay Lender the principal amount of $120,000 plus 10% interest in 4 months (or earlier) from property closing date." See (Compl. - Ex. 1) (emphasis added). Then in paragraph three, the promissory note states: "This Note repayment will be at the rate of 10% for 4 months from the day the property closes. No early prepayment penalties or discounts if paid prior to scheduled repayment date." Id. (emphasis added).

The second promissory note, signed June 27, 2019, contains almost identical language. In paragraph 1, the promissory note states "FOR RECEIVED, The Borrower Promises to pay Lender the principal amount of $125,000 plus 9% interest in 3 months (or earlier) from property closing date." See (Compl. - Ex. 2) (emphasis added). In paragraph 3, the promissory note states: "This Note repayment will be at the rate of 9% for 3 months from the day the property closes. No early prepayment penalties or discounts if paid prior to scheduled repayment date." Id. (emphasis added).

Paragraphs one and three of both promissory notes make it clear that each loan will not be repaid until after each property is sold. There is nothing in the

plain language of the promissory notes requiring payment before the closing of the property and there is nothing requiring monthly payments or any other type of payment until the property is sold. Because neither property had been sold when Mietzel and Thomas Mietzel, LLC filed suit, there was no breach of the contract and thus basis for filing suit against Creative Wealth, Quintana, or McCall. See Crawford, 56 Mont. at ___, 185 P. at 317–18 (1919) (default judgment void where the contract upon which the claim for breach of contract was predicated was never breached).

Besides the breach of contract claims, the Complaint contains several tort claims. However, Mietzel and Thomas Mietzel, LLC's tort claims are dependent upon the existence of a breach of contract and cannot exist as a matter of law without a breach of contract. If Creative Wealth, Quintana, and McCall are acting in conformance with the terms of the contract, Mietzel and Thomas Mietzel, LLC cannot suffer any tort damages. Moreover, Mietzel and Thomas Mietzel, LLC have not alleged, nor sought recovery for any damages independent of their breach of contract claims. All of the claimed damages are damages which flow from a breach of contract. Therefore, in the absence of a breach of contract, the default judgment is void and should be set aside.

B. The Default Judgment in Favor of Thomas Mietzel in his Individual Capacity is Void Because Thomas Mietzel Lacks Standing to Assert Any Claims in his Individual Capacity.

The default judgment entered in favor of Mietzel is void because Mietzel lacks standing to assert any claims in his personal capacity. Under Montana law, "[s]tanding is a threshold jurisdictional requirement." Sagorin v. Sunrise Heating & Cooling, LLC, 2022 MT 58, ¶ 8, 408 Mont. 119, 506 P.3d 1028. The doctrine of standing examines "whether a litigant is entitled to have the court decide the merits of a particular dispute." Id. In this case, Mietzel lacks standing in his individual capacity to bring suit because he did not enter into a contract with any party. (D.C. Doc. 1. – Ex. 1 & 2.) Instead, Mietzel is nothing more than a member of a limited liability company and therefore lacks standing to bring suit.

A limited liability company is "a legal entity, distinct from its members." Sagorin, ¶ 11. As a legally distinct entity, a limited liability company may be sued and bring suit "in its own name." § 35-8-1101, MCA. A person's status as a member of a limited liability company does not give the person the right to bring an action for claims possessed by the limited liability company. See Deschamps v. Farwest Rock, Ltd., 2020 MT 270, ¶ 19, 402 Mont. 15, 474 P.3d 1282 (stating a plaintiff "relinquished his right to personally enforce contracts when he chose to enjoy the liability benefits of conducting business through a limited liability company.").

Even if a member signs a contract or acts as an agent on behalf of a limited liability company, the member lacks standing to assert claims possessed by the limited liability company. Sagorin, ¶ 19; see also Richland Nat. Bank & Trust v. Swenson, 249 Mont. 410, 424, 816 P.2d 1045, 1054 (stating "Montana law is clear that the stockholders and guarantors of a corporation do not have the right to pursue an action on their own behalf when the cause of action accrues to the corporation.").

Because Mietzel is a member of a limited liability company and not a party to any of the contracts, he lacks standing to bring an action. All of the claims and causes of action arise from the execution of the promissory notes between the two limited liability companies. Mietzel is a stranger to both promissory notes and does not possess any rights under the terms of the promissory notes in his individual capacity. See Palmer v. Bahm, 2006 MT 29, ¶ 13, 331 Mont. 105, 128 P.3d 1031 (stating "[a] stranger to a contract lacks standing to bring a claim for breach of the contract.").

Moreover, Mietzel has not suffered any losses in his personal capacity. The money at issue was loaned by his limited liability company and his limited liability company is the party who suffered the alleged loss. Even though Mietzel may feel he has a personal stake in the outcome of the controversy, the claims belong to his limited liability company, not him in his individual capacity. See Sagorin, ¶ 20

(stating even though a member of a limited liability company "may feel he has a personal stake in the outcome of the controversy," the claims belong to the limited liability company alone.). As a consequence, Mietzel cannot bring suit against any party in his individual capacity. Therefore, the judgment entered in favor of Mietzel is void and should be set aside.

C. The Default Judgment Entered Against Quintana and McCall is Void.

1. Quintana and McCall are Not Parties to the Promissory Notes.

In the Complaint, Mietzel and Thomas Mietzel, LLC alleged Quintana and McCall "individually and on behalf of Creative Wealth Acquisitions & Holdings, LLC executed and delivered a promissory note[s] to Plaintiffs" and that "Defendants have failed to make payments under and comply with the terms of the Promissory Notes, and Plaintiffs have declared default." (D.C. Doc. 1, ¶¶ 1, 4, 7.)

Although Mietzel and Thomas Mietzel, LLC have asserted these claims, there is no basis in the promissory notes for asserting claims against Quintana and McCall for any type of breach of contract. The plain language of the promissory notes states the "Borrower" is "Creative Wealth Acquisitions & Holdings, LLC" and the "Lender" is "Thomas Meitzel, LLC." There is nothing in the language of the promissory notes stating Quintana and McCall are borrowing money, nor that they are agreeing to personally guarantee the loans. Instead, the language of both agreements is clear – the "Borrower" is Creative Wealth and nobody else.

Since the "Borrower" is Creative Wealth, Mietzel and Thomas Mietzel, LLC do not possess any valid claims for breach of contract against Quintana or McCall. In Weaver v. Tri-County Implement, Inc., 2013 MT 309, 372 Mont. 267, 311 P.3d 808, the Montana Supreme Court considered a case with similar facts to the situation presented here. In Weaver, a party brought suit against the member of a limited liability company for breach of contract and tort claims. Id., ¶¶ 17-18. However, the member was not a party to the contract, nor did the member guarantee any payments. Id., ¶ 17. Since there was no contract between the member of the limited liability company and the other party, the Montana Supreme Court concluded individual liability for breach of contract could "not lie." Id.

Given this authority, there is no basis for permitting Mietzel and Thomas Mietzel, LLC to assert any claims against Quintana and McCall for breach of contract. Therefore, the default judgment for any breach of contract claims is void as a matter of law.

2. The Claims Asserted Against Quintana and McCall are Barred by the Corporate Shield Doctrine.

Besides lacking the ability to assert contract based claims against Quintana and McCall, Mietzel and Thomas Mietzel, LLC cannot assert any tort based claims against either individual. Limited liability companies provide members with a corporate styled liability shield. Weaver, ¶ 12. Under the doctrine of *respondeat superior*, a principal is responsible for the acts of its agent who acts within the

scope of his or her duties. Saucier v. McDonald's Restaurants of Montana, Inc., 2008 MT 63, ¶ 64, 342 Mont. 29, 179 P.3d 481; Bowyer v. Loftus, 2008 MT 332, ¶ 8, 346 Mont. 182, 194 P.3d 92. That legal doctrine likewise provides a corporate shield to agents acting within the course and scope of the principal. Bottrell v. Am. Bank, 237 Mont. 1, 24-25, 773 P.2d 694, 708-709 (1989); Phillips v. Mont. Educ. Ass'n., 187 Mont. 419, 425-426, 610 P.2d 154, 158 (1980).

On several occasions, the Montana Supreme Court has upheld the dismissal of claims against an agent of a business under the corporate shield doctrine. For example, in Bottrell, a plaintiff made similar allegations to the situation presented here. In that case, a plaintiff alleged individual employees of a bank made false statements and engaged in negligent misrepresentation, constructive fraud, bad faith, and punitive damages while loaning money to plaintiffs. See id. at 24, 773 P.2d at 708. The plaintiffs argued that the loan officers who carried out the alleged wrongful acts were personally liable. Bottrell, 237 Mont. at 24-25, 773 P.2d at 708-709. The district court dismissed the claims against the loan officers holding the corporate shield protected them. The Montana Supreme Court affirmed and held as follows:

> The actions of the loan officers Beaton and Derrig were not on behalf of themselves as individuals or for their own pecuniary benefit, nor were their actions against the best interest of the corporation for which they were employed. They acted within the scope of their employment, and in furtherance of corporate interest. As such, they are entitled to the protection of the corporate shield from personal liability.

Id. at 25, 773 P.2d at 708 (emphasis added).

In Krohne Fund, LP v. Simonsen, 2017 WL 3105839, the U.S. District Court reached a similar conclusion. In that case, the U.S. District Court dismissed claims for fraud, constructive fraud, and negligent misrepresentation against an agent of a limited liability company because the individual acted within the scope of the individual's agency. Id. at 3.

Similarly, in Phillips, a plaintiff sued individual board members for tort claims arising from a breach of contract. The individual defendants argued that officers, directors, and employees are the only people who can act on behalf of a corporation. Phillips, 187 Mont. at 423-424, 610 P.2d at 157. In addition, the individual directors argued that corporations simply could not function if officers, directors, and employees were exposed to individual liability on every occasion when the corporation allegedly committed a wrong. Id. at 424, 610 P.2d at 157. The district court agreed and dismissed the tort claims against the board members. The Montana Supreme Court affirmed, citing the corporate shield doctrine. Id. at 426, 610 P.2d at 158.

Like the defendants in Bottrell, Simonsen, and Phillips, Quintana and McCall are entitled to the protection of the corporate shield from personal liability because the acts performed were in the scope and course of their agency with Creative Wealth. Under Montana law, "[a] member or manager, as an agent of the

company, is not liable for the debts, obligations, and liabilities of the company simply because of the agency." Weaver, ¶ 15. There are no pleaded facts showing that either Quintana or McCall acted outside the scope and course of an agency relationship, or in an individual capacity. As a consequence, there are no facts sufficient to support any claims for personal liability against Quintana or McCall. Thus, the judgment entered against Quintana and McCall in their individual capacities is void and should be set aside.

II. THE COURT ERRED BY FAILING TO SET THE DEFAULT JUDGMENT ASIDE UNDER RULE 60(b)(1).

Creative Wealth, Quintana, and McCall are entitled to relief for mistake and excusable neglect because they made a good faith error in failing to respond timely to the Complaint. Under Montana law, *pro se* litigants are generally entitled to less stringent standards in litigation than licensed attorneys. See Wittich Law Firm, P.C. v. O'Connell, 2013 MT 122, ¶ 26, 370 Mont. 103, 304 P.3d 375 (stating Montana courts "afford *pro se* litigants a certain amount of latitude."). When considering an action by a *pro se* litigant, a court is allowed to make reasonable accommodations to ensure self-represented litigants are afforded the opportunity to have their matters fairly heard. State v. Daniels, 2017 MT 163, ¶ 17, 388 Mont. 89, 397 P.3d 460.

In this case, Creative Wealth, Quintana, and McCall's failure to grasp the implications of not responding to Mietzel and Thomas Mietzel, LLC's filings,

while simultaneously trying to resolve this conflict, constitutes mistake and excusable neglect justifying a reversal of the default judgment.

Under Rule 60(b)(1), a court may set aside a default judgment when a party can show "mistake, inadvertence, surprise, or excusable neglect." Under Montana law, a "mistake" is "some unintentional act, omission, or error arising from ignorance, surprise, imposition, or misplaced confidence." In re Winckler, 2000 MT 116, ¶ 22, 299 Mont. 428, 2 P.3d 229. "Excusable neglect" is a higher standard than "mere carelessness or ignorance of the law" by either a litigant or their attorney. Whitefish Credit Union v. Sherman, 2012 MT 267, ¶ 20, 367 Mont. 103, 289 P.3d 174 (citations omitted).

In this case, Creative Wealth, Quintana, and McCall made an error arising from their ignorance of the legal process. In this case, after the initiation of the suit, Creative Wealth, Quintana, and McCall continued to work on the properties and prepare them for sale. Although mistaken, Creative Wealth, Quintana, and McCall believed that if they finished the work and got the properties on the market, they could sell them and there would not be any problems. (Quintana Aff. ¶ 22.) Instead of trying to fight the matter in Court, Creative Wealth, Quintana, and McCall focused their efforts on finishing the properties and getting them sold. (Quintana Aff. ¶ 24.)

On at least two occasions, the Montana Supreme Court has set aside a default judgment where a *pro se* litigant had a mistaken belief about the litigation process. For example, in Winckler, the Montana Supreme Court set aside a default judgment for mistake and excusable neglect when a *pro se* defendant believed opposing counsel was preparing a settlement offer and would not proceed with prosecution. Winckler, ¶¶ 19-22. Likewise, in Little Horn State Bank v. Real Bird, 183 Mont. 208, 210, 598 P.2d 1109, 1109 (1979), the Montana Supreme Court set aside a default judgment on unpaid promissory notes overturned where default judgment exceeded the debt owed by defendant, and defendant mistakenly believed plaintiff would not pursue the claim while defendant attempted to secure a loan to pay off her debt.

Not only did Creative Wealth, Quintana, and McCall attempt to resolve the matter, as *pro se* parties, Creative Wealth, Quintana, and McCall reasonably could not be expected to understand the legal issues presented by this case and the potential defenses. There are multiple legal issues in this case which a *pro se* litigant would not be expected to understand. These include choice of law issues (Utah contract, Montana forum), the application of usury statutes including offsets and penalties, the interpretation of a contract under Montana law (the promissory notes state the matter is governed by Utah law), and issues of personal liability and the corporate shield.

Creative Wealth, Quintana, and McCall should not be punished for default when they made a good faith and reasonable effort to resolve this conflict outside of the court system. Creative Wealth, Quintana, and McCall worked to finish the projects and prepare the homes for sale. Creative Wealth, Quintana, and McCall should have the opportunity to defend their case in court with the assistance of experienced counsel to prevent unfairness and a manifest injustice. Therefore, the Court should grant this motion and set aside the default judgment.

III. THE COURT ERRED BY FAILING TO SET JUDGMENT ASIDE UNDER RULES 60(b)(1) AND 60(b)(5).

A. Thomas Mietzel, LLC is Only Entitled to Recover the Agreed Upon Interest Rate in the Event of a Default.

Assuming the judgment is valid, according to the plain language of the promissory notes, Thomas Mietzel, LLC is only entitled to recover interest at the "agreed upon" rate in the event of a default. (D.C. Doc. 1 – Ex. 1 and 2 - ¶ 4.) When drafting the promissory notes, the parties agreed to a provision which specifically described the interest rate that would be applicable in the event of a default. According to paragraph 4 of the promissory notes, Thomas Mietzel, LLC is entitled to recover the "principal plus agreed upon interest [ex: principal+10%+legal fees = ____]." Nowhere, in either promissory note, does it

state that Thomas Mietzel, LLC or anybody else is entitled to recover a rate of interest in excess of the agreed upon rate of 9% or 10% annually.[1]

Because the language of the promissory notes is clear and unambiguous, the Court must adhere to the plain language of the contract. There is no basis in the contractual language for imposing an interest rate in excess of 10% annually. The plain language of the promissory notes states Thomas Mietzel, LLC is entitled to interest at the "agreed upon" rate and nothing more. An interpretation of the contract which grants interest at a rate higher than the contractual language functionally renders paragraph 4 of the promissory notes meaningless. As such, no party is entitled to interest over and above amount of 9% or 10% annually in the event of a default.

B. The Court Should Impose a Penalty for Attempting to Collect Usurious Interest Rates.

Non-regulated lenders may not charge a higher interest rate than either 15% or 6 points above the prime rate reported three business days before the execution of the agreement. § 31–1–107, MCA; Scarr v. Boyer, 250 Mont. 248, 251, 818 P.2d 381, 382 (1991). "The taking, receiving, reserving, or charging a rate of interest greater than is allowed by 31-1-107 must be considered a forfeiture of a sum double the amount of interest that the note, bill, or other evidence of debt

[1] Since the promissory notes do not contain any language specifying the period of time by which the rate of interest is to be calculated, the appropriate time period for calculating interest is annually. Under Montana law, "when a rate of interest is prescribed by a law or contract without specifying the period of time by which such rate is to be calculated, it is to be deemed an annual rate." § 31-1-105, MCA. Therefore, the appropriate interest rate in the event of a default is 9% or 10% annually.

carries or that has been agreed to be paid on the note, bill, or other evidence of debt." § 31-1-108(1), MCA.

During the default judgment hearing, Mietzel and Thomas Mietzel, LLC argued the actual per annum interest rate in the promissory notes was 30% in the April 2019 promissory note (10% every four months) and 36% in the June 2019 promissory note (9% every three months). In order to comply with § 31-1-107, MCA, the Court reduced the interest rate to 18% in the default judgment.

Assuming the Court does not agree with Creative Wealth, Quintana, and McCall's argument that the interest rate should be reduced to the amount of the agreed upon interest rate, the judgment should be set aside to apply the penalty provision found in § 31-1-108(1), MCA. Since Mietzel and Thomas Mietzel, LLC have argued the actual rate is somewhere in the range of 30% to 36%, the Court must impose a penalty of 60% to 72%. See § 31-1-108, MCA (stating an interest rate above the permitted limit "must be considered a forfeiture of a sum double . . . .") (emphasis added).

The policy of the State of Montana is absolutely clear. No person is entitled to charge usurious rates and if they do, they are subject to a severe penalty. § 31-1-108(1), MCA; see First Bank (N.A.) – Billings v. Transamerica Ins. Co., 209 Mont. 93, 96, 679 P.2d 1217, 1219 (1984) (stating public policy is found in the constitution and laws of the State of Montana). As such, if the Court is going to

rule the parties actually entered into a contract where Thomas Mietzel, LLC loaned money at rates of 30% to 36% per annum, the judgment is subject to the penalty provisions of § 31-1-108(1), MCA and those penalty provision must be enforced.

C. The Maximum Interest Rate Which May Be Imposed is 15%.

Even if the Court decides not to apply a penalty, the 18% interest contained in the Judgement and Decree of Foreclosure is not appropriate. In April and June 2019, the prime rate was 5.5%, as reported by the Federal Reserve System database.[2] Under Montana law, the highest interest rate that may be imposed by a non-regulated lender is the greater of either 15% or 11.5%. § 31-1-107(1), MCA. The interest rate requested by Respondents and imposed by the default judgment is three percentage points above what is allowed by state law. Even Mietzel and Thomas Mietzel, LLC agree on this point. On October 4, 2022, Mietzel and Thomas Mietzel, LLC filed a motion to alter or amend the judgment to a 15% interest rate. Because the interest rate cannot exceed 15% as a matter of law, the District Court abused its discretion by failing to set aside the default judgment.

IV. THE COURT ERRED BY FAILING TO SET THE DEFAULT JUDGMENT ASIDE UNDER RULE 60(b)(6).

If this Court does not find Creative Wealth, Quintana, and McCall's default should be set aside under the other provisions of Rule 60(b), the Court should grant relief from judgment under Rule 60(b)(6) on principals of equity.

[2]https://www.federalreserve.gov/datadownload/Download.aspx?rel=H15&series=23422f11d8e2a91162030200b6a04a50&filetype=spreadsheetml&label=include&layout=seriescolumn&from=01/01/2018&to=01/01/2020

A successful Rule 60(b)(6) motion requires the movant to prove that "something prevented a full presentation of the cause or an accurate determination on the merits and that for reasons of fairness and equity redress is justified." Essex Ins., ¶ 22 (citations omitted). The movant must demonstrate (1) extraordinary circumstances, (2) that the movant acted to set aside the judgment within a reasonable period of time, and (3) the movant was blameless. Essex Ins., ¶ 25.

Here, Creative Wealth, Quintana, and McCall were *pro se* litigants who did not understand the nature of the situation facing them. Creative Wealth, Quintana, and McCall worked to remedy the situation and to finish the projects and did not understand the implications of not responding to the complaint.

Moreover, principles of equity favor setting aside the judgment. There are legitimate defenses to the claims and Creative Wealth, Quintana, and McCall should be permitted to assert them. In addition, Mietzel and Thomas Mietzel, LLC are seeking compensation far and above what was permitted under the terms of the promissory notes. The terms of the promissory notes plainly state Plaintiff Thomas Mietzel, LLC is only entitled to interest at a rate of 9% and 10%. Yet, Plaintiffs are seeking interest at a rate of 15%.

Our legal system demands that parties are to be made whole and to be compensated for actual loss, but not realize a profit. See Sunburst Sch. Dist. No. 2 v. Texaco, Inc., 2007 MT 183, ¶ 40, 338 Mont. 259, 165 P.3d 1079. The default

judgment is a hefty penalty for claims with legitimate and substantial defenses. It would be unjust for this judgment to stand. Therefore, if the Court is unwilling to grant relief under the other subsections of Rule 60(b), the Court should grant equitable relief from default judgment under Mont. R. Civ. P. 60(b)(6).

CONCLUSION

This is a case which deserves a trial on the merits. As this Court has stated many times, litigated cases should be tried on the merits and that judgment by default are not favored. There are legitimate defenses to this action and Creative Wealth, Quintana, and McCall should be allowed to present them. For these reasons, the default judgment should be set aside.

DATED this 16th day of March, 2023.

BROWNING, KALECZYC, BERRY & HOVEN, P.C.

By /s/ Steve J. Fitzpatrick
Steve J. Fitzpatrick, Esq.
Michael S. Rausch, Esq.
Megan E. Wampler, Esq.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4), Mont.R.App.P., I certify that Appellant's Opening Brief is double spaced, is a proportionately spaced 14 point Times New Roman typeface, and contains 8,467 words.

/s/ Steve J. Fitzpatrick
BROWNING, KALECZYC, BERRY & HOVEN, P.C.

CERTIFICATE OF SERVICE

I, Steven J. Fitzpatrick, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 03-16-2023:

Joshua Ian Campbell (Attorney)
PO Box 2269
300 Central Avenue, Floor 7
Great Falls MT 59403
Representing: Thomas F. Mietzel, Thomas F. Mietzel, LLC
Service Method: eService

Electronically Signed By: Steven J. Fitzpatrick
Dated: 03-16-2023