IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause No. DA 22-0741

THOMAS F. MIETZEL, LLC, a/k/a THOMAS F. MEITZEL, LLC and THOMAS F. MIETZEL Plaintiffs and Appellees, -vs- CREATIVE WEALTH ACQUISITIONS & HOLDINGS, LLC, BRAD QUINTANA, and CHAD McCALL Defendants and Appellants.	**APPELLEES' ANSWER BRIEF**

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STATEMENT OF THE ISSUES

1. Did the District Court properly deny Appellants' untimely and unsupported Rule 60(b) Motion?
2. Is the District Court's default judgment against Appellants' now void since Appellants believe they have a defense?

STATEMENT OF THE CASE

Self-proclaimed real estate tycoons Brad Quintana ("Quintana") and Chad McCall ("McCall"), individually and as members of Creative Wealth Acquisitions & Holdings, LLC ("LLC"), (LLC, Quintana, and McCall will be collectively referred to as "Creative Wealth") are not permitted to claim non-sophistication as a defense to default entered in the underlying suit for Creative Wealth's multiple wrongful acts including, but not limited to, their failure to pay two enforceable promissory notes held by Thomas F. Mietzel, LLC, a/k/a Thomas F. Meitzel, LLC, and Thomas F. Mietzel (collectively "Mietzel"). Mietzel sought default and entry of a default judgment after Creative Wealth made a calculated business decision to ignore service of Mietzel's suit. The LLC was formally served on August 5, 2021; Quintana on August 5, 2021; and McCall on August 17, 2021. Default was entered on September 27, 2022. After hearing, default judgment was entered on January 28, 2022. Creative Wealth was served with a Notice of Entry of Judgment on February 4, 2022. Creative Wealth ignored the proceedings for 257 days after

service (74 days after the Notice of Entry of Judgement) only to file a Motion to Set Aside Default and Default Judgment (without brief) ("Motion 1") on April 19, 2022. Creative Wealth then waited another 169 days (426 days after service/243 days after Notice of Entry of Judgment) to file a second Motion for Relief from Default Judgment ("Motion 2") on October 5, 2022.

The underlying suit was precipitated by the failure of Creative Wealth to repay money owed to Mietzel pursuant to two promissory note agreements and other wrongful acts and misrepresentations by Creative Wealth. Creative Wealth entered into a promissory note agreement to repay Mietzel $120,000 plus interest in April 2019 ("Note 1") and a second promissory note agreement to repay Mietzel $125,000 plus interest in June 2019 ("Note 2"). To induce Mietzel to lend the requested funds, Creative Wealth misrepresented their expertise on flipping houses and the time such would take. As security for Note 1, Creative Wealth granted Mietzel a security interest or lien against Creative Wealth's real property located at 213 7th St. N., Great Falls, Montana. As security for the Note 2, Creative Wealth granted Mietzel a security interest or lien against Creative Wealth's real property located at 1506 16th St. S., Great Falls, Montana. Installment payments for these loans were to begin no later than April 8, 2019, and June 28, 2019, respectively. After failed attempts to reconcile the dispute, Mietzel's Complaint was filed on August 2, 2021.

STATEMENT OF FACTS

Quintana and McCall hold themselves out to the public as fully-qualified national experts in real estate investment and foreclosure matters. (District Court Docket Number (hereinafter "D.C. Doc.") 36, at ¶¶ 2-6, 9(a), and Exhibits 1-2. Such vast experience includes, but is not limited to, "short-[term], mid-[term], and long-term investment game-plans," and the "complet[ion of] over 3,100 real estate transactions all across the United States," including foreclosures. *See* D.C. Doc. 36, at Exhibits 1, 2, 4, and 5.

In early 2019, Quintana and McCall negotiated for Mietzel to loan $120,000.00 to purchase the property located at 213 7th St. N., Great Falls, Montana ("Note 1"), and $125,000.00 to purchase the property located at 1506 16th St. S, Great Falls, Montana ("Note 2"). *See* D.C. Doc. 1, at Exhibits 1 and 2. Quintana and McCall represented to Mietzel that the two Great Falls properties would be fixed (i.e., remodeled) and then flipped (i.e., resold at a planned profit). D.C. Doc. 36, ¶ 9(b).

Quintana and McCall further represented to Mietzel they were experienced experts in fixing and flipping properties, the two projects would be finished quickly (approximately three months each), the note terms would be only a few months (i.e. payment of principal and interest on the promissory notes would be made in full within a few months of when the notes were executed), and interest on the principal amounts would accrue until the promissory notes were paid in full

and such payment of accrued interest would be made either at the end of the note term or when the properties sold, whichever occurred first. D.C. Doc. 36, at ¶¶ 9(a)-9(g). This understanding is memorialized in Note 1, drafted by Quintana and McCall with their legal counsel, which states "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**." D.C. Doc 1, at Exhibit 1 (emphasis added); D.C. Doc 36, at ¶¶ 9(a)-9(g), ¶ 11, and Exhibit 3. Note 1 states the applicable repayment date and accrual of interest began on April 8, 2019, and payment made in full by August 8, 2019. Note 2 states "Borrower Promises (*sic*) to pay Lender the principal amount of $125,000 plus 9% interest in 3 months (or earlier) from property closing date." D.C. Doc. 1., at Exhibit 2. Given the otherwise identical agreement and the course of conduct, Note 2's triggering "property closing date" was on or about June 28, 2019 – i.e., the date on which Creative Wealth purchased (or "closed" on) 1506 16th St. S, Great Falls, Montana, and not the later date when this property was sold to a third-party buyer – and payment in full was due on or before September 28, 2019. D.C. Doc. 1, at Exhibit 1 and 2; D.C. Doc 36, at ¶¶ 9(a)-9(g).

Mietzel relied to his detriment on the promises made by Quintana and McCall, both individually and as members of the LLC. *See* D.C. Doc 36, at ¶ 10; *see also* D.C. Doc. 1, at ¶¶ 32, 33, 39, 41, 46. During negotiations, Quintana and McCall failed to disclose to Mietzel that they were acting on behalf of the LLC.

D.C. Doc. 36, at ¶¶ 7-8. To the contrary, Quintana and McCall affirmatively represented that they were acting individually or on behalf of "Your Life of Wealth." D.C. Doc 36, at Exhibits 1, 3, 4, and 6-10.

By May 22, 2020, Mietzel's attempts at informal resolution proved futile. *See* D.C. Doc 36, at ¶ 12, and Exhibits 6-11. Despite several conversations and meetings, neither Quintana nor McCall responded to Mietzel's written attempts to resolve this matter prompting Mietzel to file this action on August 2, 2021. *See* D.C. Doc. 36, at ¶¶ 13-14, and Exhibits 6-11.

Quintana and the LLC were served on August 5, 2021. D.C. Doc. 4; D.C. Doc. 6. McCall was served on August 18, 2021. D.C. Doc. 5. Following service, Quintana, McCall, and the LLC made the calculated business decision to ignore Mietzel's suit and Default was entered on September 27, 2021. *See* D.C. Doc. 7. The District Court then held a hearing on Mietzel's Motion for Entry of Default Judgment on November 10, 2021, in conformity with Mont. R. Civ. P. 55(b)(2), and entered Judgment and Decree of Foreclosure ("Judgment") on January 28, 2022. D.C. Doc. 10; D.C. Doc. 13. The Judgment ordered the LLC, Quintana, and McCall to pay Mietzel as follows:

a. $120,000 for the unpaid principal balance on the April 2019 promissory note;

b. Together with accrued interest on the April 2019 promissory note in the amount of 18%[1] per annum from April 3, 2019, to the date of the judgment;

c. $125,000 for the unpaid principal balance on the June 2019 promissory note;

d. Together with accrued interest on the June 2019 promissory notes in the amount of 18%[2] per annum from June 28, 2019, to the date of the judgment;

e. Costs and attorney's fees incurred by Mietzel in pursuing this matter; and

f. Post-judgment interest on the foregoing amounts accruing at the rate of 6.25% per annum.

D.C. Doc. 13, at ¶ 1. The Judgment further directed the two Great Falls properties be sold at sheriff's sale and granted Mietzel judgment and execution against Creative Wealth for any deficiency that remained owing after applying the proceeds of the sale of property. D.C. Doc. 13, at ¶¶ 3, 5. Pursuant to the Judgment, the Cascade County Sheriff sold the properties at public sale on April 21, 2022. D.C. Doc. 19, at Exhibits 1-2. Contrary to Creative Wealth contentions,

[1] Mietzel filed an Unopposed Motion to Amend the Judgment and Decree of Foreclosure on October 3, 2022, to change this interest rate to 15% to conform with Mont. Code Ann. § 31-1-107. The District Court had not yet ruled on this motion at the time this appeal was filed. *See* D.C. Doc. 29.

at the time of the sheriff's sale the property located at 213 7th St. N., Great Falls, Montana, remained in need of substantial work and repair while the property located at 1506 16th St. S., Great Falls, Montana, was in better shape but not move-in ready.[3] D.C. Doc. 36, at ¶ 15.

Creative Wealth filed their unbriefed and unserved Motion to Set Aside Default and Judgment ("Motion 1") dated April 21, 2022.[4] D.C. Doc. 16. By operation of Mont. R. Civ. P. 59(f), Creative Wealth's Motion 1 was deemed denied on June 21, 2022. Mietzel filed a Motion to Set Amount of Deficiency Judgment on May 19, 2022, and responsive briefs were due on or before June 6, 2022. D.C. Doc. 20. Without requesting an extension to respond or seeking leave of the District Court or any other motion, Creative Wealth filed their opposition brief on or about September 15, 2022, some 101 days after such was due. D.C. Doc. 28. Creative Wealth filed their second Motion to Aside Default Judgment on October 5, 2022 ("Motion 2"). D.C. Doc. 33. By operation of Mont. R. Civ. P.

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[2] *See* D.C. Doc. 29.

[3] Had Creative Wealth truly believed that the properties were worth significantly more than the value received at Sheriff's sale as per Quintana, certainly any real estate and foreclosure expert would have either purchased the property at such sale or exercised their redemption rights under Title 25, Chapter 13, Part 8 of the Mont. Code Ann. Neither option was exercised or even attempted. *See* D.C. Doc. 34, at ¶¶ 20, 26; D.C. Doc. 36, at ¶¶ 3-6, and Exhibits 1-2; D.C. Doc 19.

[4] Mietzel only learned of Creative Wealth's Motion 1 several months later when reviewing an updated copy of the Court Docket Sheet for the matter. *See* D.C. Doc. 24, at ¶¶ 4-5.

59(f), the District Court denied Creative Wealth's motions for relief from the District Court's Judgment on December 5, 2022.

STATEMENT OF THE STANDARD OF REVIEW

As a general rule, a district court's denial of relief pursuant to Mont. R. Civ. P. 60(b) is reviewed for an abuse of discretion. Essex Ins. Co. v. Moose's Saloon, Inc., 2007 MT 202, ¶ 16, 338 Mont. 423, 166 P.3d 451. When relief is sought pursuant to Mont. R. Civ. P. 60(b)(4), a court's denial is reviewed de novo. *See id.* When an appeal is from a denial or a motion to set aside a default judgment only a slight abuse of discretion needs to be shown. *See* DeTienne v. Sandrock, 2017 MT 181, ¶ 22, 388 Mont 179, 400 P.3d 682 (citing Lords v. Newman, 212 Mont. 359, 364, 688 P.2d 290, 293 (1984)). This slight abuse of discretion "requires the reviewing court to weigh the conflicting concerns of respecting the trial court's sound discretion while recognizing the policy favoring trial on the merits" and must be decided on a case-by-case basis. DeTienne, 2017 MT 181, ¶ 22 (internal citations and quotations omitted). However, Rule 60(b) "is designed to be applied primarily as an exception to the finality of a judgment where a party was wronged through no fault of its own. In re Marriage of Hopper, 1999 MT 310, ¶ 29, 297 Mont. 255, 991 P.2d 960. The party seeking to set aside a default judgment has the burden of proof. In re Marriage of Winckler, 2000 MT 116, ¶ 10, 299 Mont. 428, 2 P.3d 229. Here, where a party fails to but could have submitted evidence in

support of its claim or defense, that party's "desire to retroactively argue a factual issue in the case" is not a sufficient reason justifying the setting aside of a judgment. Hopper, 1999 MT 310, ¶ 29; *cf.* Falcon v. Faulkner, 273 Mont. 327, 334, 903 P.2d 197 (1995) (holding that where a party chooses not to appear in an action and the court relies on evidence submitted by the other party, a default judgment will not be set aside).

SUMMARY OF ARGUMENT

Mietzel brought well-pled causes of action against and properly served the LLC, Quintana, and McCall. As foreclosure experts, Creative Wealth made the business decision to forego retaining counsel, ignore Mietzel's action, and live with the consequences. After allowing default, default judgment, foreclosure, and sheriff's sale, and finally 426 days after service, Creative Wealth unreasonably and belatedly sought relief under Mont. R. Civ. P. 60(b) to delay entry of the deficiency judgment amount. The District Court did not abuse its discretion in denying relief as Creative Wealth's Motion 2 was untimely pursuant to 60(c)(1). Even if Creative Wealth's Motion 2 is deemed timely, Creative Wealth failed to provide any grounds justifying they were entitled to relief pursuant to Mont. R. Civ. P. Rules 60(b)(1), 60(b)(4), 60(b)(5), or 60(b)(6). Mietzel's claims are well-pled and Creative Wealth's purported "defenses" irrelevant. The District Court's Judgment should be affirmed.

ARGUMENT

I. CREATIVE WEALTH FAILED TO FILE ITS RULE 60(B) MOTION WITHIN A REASONABLE TIME AND SUCH DELAY WAS UNJUSTIFIED.

Rule 60(c)(1), Mont. R. Civ. P., provides "[a] motion under Rule (b) must be made within a **reasonable time**—and for the reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding." (emphasis added). The delay must be shown to be reasonable. Mont. R. Civ. P. Rule 60(c)(1). *See* City of Missoula v. Fox, 2019 MT 250, ¶ 18, 397 Mont. 388, 450 P.3d 898. ("We interpret a statute first by looking to its plain language. We construe a statute by reading and interpreting the statute as a whole, 'without isolating specific terms from the context in which they are used by the Legislature.'"). "While pro se litigants may be given a certain amount of latitude, that latitude cannot be so wide as to prejudice the other party, and it is reasonable to expect all litigants, including those acting pro se, to adhere to procedural rules." Greenup v. Russell, 2000 MT 154, ¶¶ 14-15. 300 Mont. 136, 3 P.3d 124. Such latitude narrows even more when the defaulted parties are sophisticated and experienced real estate and foreclosure experts.

Creative Wealth failed to take any action until 257 days after formal service/83 days after judgment was entered.[5] Only when the sheriff's sale was

[5] It should not be lost on this Court that not only was the LLC formally served with notice of the suit, Quintana and McCall were also formally served individually.

eminent (day of) did Creative Wealth, in the most cavalier fashion and in a last-ditch effort to further delay foreclosure, revisit their decision to ignore the proceeding and file their first (unbriefed and unserved) Motion to Set Aside Default on April 21, 2022. D.C. Docs. 13, 14, and 16. Creative Wealth's failure to act zealously and timely pursue the same is not. *See, e.g.,* Frye v. Roseburg Forest Products, Co., 2020 MT 10, ¶ 12-13 ("No knowledge of the nuances of legal procedure is required to exercise care and common sense when served with process . . ."). Creative Wealth failed to even start looking for legal representation until several months after judgment was entered, and over six months from the time they were served and default was entered against them. D.C. Doc 34, at ¶ 28. Such delay, in the face of multiple notices that the underlying action was progressing, can only be interpreted as intentional and blatant disregard of the judicial process and does not support its present assertions that such alleged lack of knowledge justifies relief. Creative Wealth should not be afforded relief for their deliberate failure to zealously defend itself and consequently both its first and second Motions to Set Aside Default Judgment were not filed within a reasonable time after Judgment was entered and such delay is not excusable. *See* Mont. R. Civ. P. Rule 60(c)(1). *See, e.g.,* Frye, 2020 MT 10, ¶ 12-13.

Likewise, the LLC, Quintana, and McCall affirmatively ignored a Notice of Entry of Judgment served on February 4, 2022. As experts in foreclosures, such delay is wholly unreasonable.

II. RELIEF UNDER RULE 60(B)(4) IS IMPROPER AS THE JUDGMENT IS NOT VOID

Undeterred by the absence of authority to excuse its calculated decision to allow the default, default judgment, foreclosure, and sheriff's sale, Creative Wealth daringly offers its own tortured and painful impressionistic construction of Crawford v. Pierse, 56 Mont. 371, 185 P. 315 (1919). Creative Wealth maintains Crawford established that in Montana all default judgments are void if a defaulted defendant can cobble together any prima facie defense. Bootstrapping on this Crawford analysis, Creative Wealth argues Mietzel's Judgment is "void" since Creative Wealth has now raised purported defenses on appeal. Most telling is Creative Wealth's failure to cite any language, quote, explanation, or other part of Crawford that in any way supports Creative Wealth's offered holding analysis – "default judgment void where the contract upon which the claim for breach was predicated was never breached." Brief of Appellants, p. 20. Equally telling is Creative Wealth's inability to cite even one Montana Supreme Court decision issued since 1919 which cites Crawford to support Creative Wealth's interpretation of the Crawford holding. Such quotes and citing decisions are not provided because such do not exist.

The standard established in Crawford, and cited by subsequent decisions, does not consider the defenses raised by the defaulting defendant. Rather, in Crawford this Court explained:

> a judgment rendered upon default will not be held void even though the statement of the cause of action may be so defectively made that it would have been open to general demurrer, provided its direct averments necessarily imply, or reasonably require, an inference of the facts necessary to supply the defect.

56 Mont. at __, 185 P. at 318. Under Crawford, so long as the Complaint "put" the defaulting defendant "in the wrong" such resulting default judgment was not void or voidable. Mietzel's Complaint clearly alleges facts and allegations sufficient to put Creative Wealth in the wrong. Such is shown all too well by Creative Wealth's strategic decision to ignore the actual content of Mietzel's Complaint but rather argue the purported factual defenses it now wants to raise.[6]

Unlike the pleadings in Crawford, Mietzel's Complaint alleges more than sufficient prima facie elements and is not facially insufficient so as to conclusively negate the existence of a cause of action. *Cf.* Crawford, 56 Mont. at __, 185 P. at 318, 322.[7] As Creative Wealth fails to present facts or arguments supporting its

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[6] Only in the rare occasion if 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. 287, 295-96, 318 P.2d 230 (1957) (citing State ex rel. Delmoe v. District Court, 100 Mont. 131, 46 P.2d 39 (1935); Hanrahan v. Andersen, 108 Mont. 218, 237, 90 P.2d 494 (1976).

[7] Creative Wealth has never challenged the sufficiency of Mietzel's Complaint in the District Court, (and frankly do not actually challenge the sufficiency of the Complaint here) but rather now wants this Court to determine the allegations set forth in the Complaint are not true by presenting factual and legal arguments supporting such assertions on appeal. Given the foregoing, Creative Wealth's arguments submitted under Rule 60(b)(3) are better analyzed under Rule 60(b)(1) and reviewed under an abuse of discretion standard.

assertion that the Judgment entered by the District Court is void, hence relief under Mont. R. Civ. P. 60(b)(4) is unavailable. *See* Greater Missoula Area Federation of Early Childhood Educators v. Child Start, Inc., 2009 MT 362, ¶21, 353 Mont. 201, 219 P.3d 881 ("A judgement 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." (internal citations omitted)). Creative Wealth has not shown the District Court's Judgment to be "void." Only a void judgment is afforded relief pursuant to Rule 60(b)(4). *See, e.g.,* Interstate Counseling Service v. Emeline, 144 Mont. 409, 411-12, 396 P.2d 727 (1964) (for Rule 60(b)(4) relief to be possible, the judgment must first be determined "void").

A. Creative Wealth's Belated Defenses Do Not Make the Judgment "Void"

Creative Wealth argues that the Court must apply the "plain, ordinary meaning" of the language of the promissory notes to the interpretation thereof.[8] Bradley v. Crow Tribe of Indians, 2005 MT 309, ¶ 28, 329 Mont. 448, 124 P.3d 1143. The plain language of Note 1 provides the "Borrower [p]romises to pay Lender the principal amount of $120,000 plus 10% interest in 4 months (or earlier)

[8] Creative Wealth contradicts their own arguments about plain and ordinary meaning. Quintana states that "Mietzel's limited liability company would receive either a flat 9% or 10% return on investment after closing." D.C. Doc. 34, at ¶¶ 8-10. Yet the promissory notes make no reference to a flat return on investment. Instead, the promissory notes state very clearly that an interest rate was being applied to principal and not a flat 9% or 10% return on investment after a future sale. *See* D.C. Doc. 1, at Exhibits 1-2.

from property **closing date starting on the 8th day of April 2019.**" D.C. Doc. 1, at Exhibit 1 (emphasis added). Note 2 provides Borrower will pay Lender "$125,000 plus 9% interest in 3 months (or earlier) from property closing date." D.C. Doc 1, at Exhibit 2. The plain language of Note 1, when construed in context of the agreement as a whole, demonstrates the clear intent of the parties that the term of Note 1 would not exceed 4 months which began to run on or before April 8, 2019, which is consistent with the discussions held between Mietzel and Creative Wealth. *See* D.C. Doc.1, at Exhibit 1; D.C. Doc. 36, at ¶9(a) – 9(g), and Exhibits 6-8 (supporting the contention that Note 1 and Note 2 were intended to be short, bridge loans consistent with Creative Wealth's self-pronounced expertise in quick fix and flip projects); *see also* Mont. Code Ann. § 28-3-301 ("A contract must be so interpreted as to give effect to the mutual intentions of the parties as it existed at the time of contracting . . ."). Note 2 does not include a date certain; however, Note 2 was signed at the end of June 2019, and the course of conduct between the parties supports the undefined "closing date" was on or soon after Note 2 was executed and payment of principal and interest was due three months later. *See* D.C. Doc. 1, at Exhibits 1-2; *see, e.g.,* First Nat'l Properties, LLC v. Joel D. Hillstead Trust, 2020 MT 211, ¶35, 401 Mont. 59, 472 P.3d 134 ("The practical interpretation of a contract, which the parties place upon it by their course of conduct, is entitled to a great, if not controlling influence in ascertaining what they understood by its terms.") (internal citations omitted).

At most, the contracts **drafted by Creative Wealth** are ambiguous which is a fact issue raising a question of the intention of the parties which is not sufficient to raise jurisdictional or due process concerns. *See* Lewis and Clark County v. Wirth, 2022 MT 105, ¶ 19, 409 Mont. 1, 510 P.3d 1206 ("When a contract is ambiguous, a factual question exists, and the finder of fact must determine what it means by considering the intention of the parties.") (holding modified on other grounds by Tai Tam, LLC, v. Missoula Cty, 2022 MT 229, 410 Mont. 465, 520 P.3d 312); *see also* First National Properties, 2020 MT 211, ¶ 35 ("Where contracts are ambiguous, [the Court] will construe the ambiguity 'most strongly' against the drafter. When a contract is ambiguous, a court may consider extrinsic evidence to discern the parties' intent and meaning."). Consequently, Creative Wealth's assertion that there was no breach of contract rendering the Judgment void is without merit or support and their failure to actively participate in the underlying lawsuit to present its factual and legal arguments is without justification to support relief under Rule 60(b)(1). D.C. Doc. 34, at ¶ 8; D.C. Doc. 36, at Exhibit 3.

B. Mietzel, Individually, Has Standing to Bring Suit.

In addition to breach of contract, Mietzel also brought claims for breach of covenant of good faith and fair dealings, constructive fraud, fraud, negligent misrepresentation, deceit, and malice (i.e., punitive damages). *See* D.C. Doc. 1, at ¶¶ 22-48. Creative Wealth's argument that Mietzel "has not suffered any losses in

his personal capacity" is fatally flawed. *See* D.C. Doc. 1, ¶¶ 22-48; D.C. Doc 36. Mietzel's Complaint alleges he was personally damaged by the actions, fraud, and misrepresentations of the LLC, Quintana, and McCall and is facially sufficient to support the District Court's default judgment. *See* In re Hofmann's Estate, 132 Mont. 287, 295-96, 318 P.2d 230 (1957) ("Only in the rare occasion if 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.").

C. Quintana and McCall Are Proper Parties.

Quintana and McCall erroneously contend Montana's corporate shield doctrine provides them absolute immunity for their frauds and misdeeds, but an agent is only shielded when he acts "within the scope of his or her duties." Bowyer v. Loftus, 2008 MT 332, ¶ 8, 346 Mont. 182, 194 P.3d 92. Furthermore, "[w]here an officer or director acts against the best interests of the corporation, acts for his own pecuniary benefit, or within the intent to harm the plaintiff, he is personally liable." Bottrell v. American Bank, 237 Mont. 1, 25, 773 P.2d 694, 709 (1989). "[T]he corporate veil should not be utilized as a protective device by those who employ corporate power or authority to serve their own ends." Phillips v. Montana Educ. Ass'n, 187 Mont. 419, 425-26, 610 P.2d. 154, 158 (1980). An agent is personally liable when his "acts are wrongful in their nature." Mont. Code

Ann. § 28-10-702(3). This includes claims for fraud and misrepresentation. *See* Williams v. DeVinney, 259 Mont. 354, 360-61, 856 P.2d 546, 550 (1993).[9]

The Complaint specifically alleges: "Defendants Chad McCall and Brad Quintana, **on behalf of themselves individually** and on behalf of Defendant Creative Wealth & Holdings, LLC. . .". D.C. Doc. 1, at ¶¶ 1, 3 (emphasis added); *see* Knox v. Monsanto Company, 2019 WL 3219158, *2 (D. Mont.) ("District courts in Montana have determined that it is enough to allege that the corporate agent . . . participated in the principal's tortious conduct to hold the agent personally liable."). The Complaint specifically alleges constructive fraud, fraud, negligent misrepresentation, deceit, and malice against Quintana and McCall individually. D.C. Doc. 1, at ¶¶ 26-48. These allegations are well pled and fit squarely within Montana law for holding members of LLC's personally liable for their own tortious conduct. D.C. Doc. 1, at ¶¶ 22-47. *See* Knox, 2019 WL 3219158, *2 (internal citations omitted); s*ee also* Mont. Code Ann. Section 28-1-702; Williams v. DeVinney, 259 Mont. at 360-61 (holding that an agent could be liable for actions undertaken in the course of agency if such actions were wrongful in nature). Mietzel's Complaint is facially sufficient to support the District Court's default judgment.

[9] Ironically, the LLC, a Utah LLC, has never been registered to do business in Montana. Hence service was made in Utah. D.C. Doc. 4.

III. RELIEF IS NOT APPROPRIATE UNDER RULE 60(b)(1) OR 60(b)(5).

A. Creative Wealth Failed to Show Their Inactions Were Due to Mistake of Excusable Neglect.

Rule 60(b)(1), Mont. R. Civ. P., states judgment may be set aside due to mistake, inadvertence, surprise, or excusable neglect. "Mistake is defined as 'some unintentional act, omission, or error arising from ignorance, surprise, imposition, or misplaced confidence." Creative Wealth argues it is entitled to relief because their failure to respond to the Complaint was due to their pro se status and such constitutes a justifiable mistake and excusable neglect. Even if Creative Wealth's proclaimed ignorance of the legal process is believed, their failure to take any actions to determine the "implications of [Mietzel's] filings" until at least 227 days[10] after being served with a lawsuit is unjustified and patently unreasonable for anyone, let alone successful and sophisticated businessmen. *See* Frye, 2020 MT 10, ¶¶ 12-13 ("In determining whether a litigant's neglect was excusable, we examine whether the reasons given for the neglect are such that reasonable minds might differ in their conclusions concerning excusable neglect.") (internal citations omitted). Here, there is no excusable neglect as Creative Wealth was formally served with summons and Complaint and consequently were aware of the contents

[10] Summons was formally served on August 5, 2021, and Quintana states that he had "been looking for an attorney to represent us since spring of 2022." Even if such began on the first day of Spring, March 20, 2022, this means Creative Wealth intentionally ignored the suit for at least 227 days prior to "beginning" to look for counsel.

thereof. *See, e.g.,* Whitefish Credit Union v. Sherman, 2012 MT 267, ¶19-20, 367 Mont. 103, 289 P.3d 174. ("We have stated that when a party, aware of the contents of the documents served, ignored the command of the summons, there is no 'excusable neglect.'"). The plain language of the summons put Quintana, McCall, and the LLC on notice that an answer to Mietzel's Complaint was due to the court within twenty-one days of the receipt of the summons and warned that judgment would be entered against Quintana, McCall, and the LLC in default if they did not answer within that timeframe. *See* Frye, 2020 MT 10, ¶ 13. No notice of intent to proceed with default is required from Mietzel and "[n]o knowledge of the nuances of legal procedure is required to exercise care and common sense when served with process that clearly communicates to 'appear or answer' within twenty-one days.[11] *See id.* "Excusable neglect requires some justification for an error beyond mere carelessness or ignorance of the law on the part of the litigant." *See* Whitefish Credit Union, 2012 MT 267, ¶ 20.

Despite written requests, the record is devoid of any evidence that Creative Wealth ever communicated any settlement offer to Mietzel or participated in any ongoing negotiations rather than defending suit. Creative Wealth's suggestion otherwise is baseless fiction. Creative Wealth was informed default had been

[11] Creative Wealth argues it lacked knowledge of appropriate defenses, choice of law, and other legal issues. Nothing prevented Creative Wealth from hiring

entered and did nothing. D.C. Doc. 35, at p. 7-8. Creative Wealth has not shown its actions constitute mistake or excusable neglect. Relief under Rule 60(b)(1) was properly denied.

B. Relief Under Rule 60(b)(1) and 60(b)(5) Should be Denied Because Judgment Is Equitable and Has Not Been Satisfied

1. The interest rate.

The plain language of the promissory notes provides the "Borrower [p]romises 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" (emphasis added) and "$125,000 **plus 9% interest in 3 months** (or earlier) from property closing date." D.C. Doc. 1, at Exhibits 1 and 2 (emphasis added). The interest rate listed does not specify that the percentage rate is per annum, annually, or any other language to indicate that the interest rate was to be calculated per year. *See* Mont. Code Ann. § 31-1-105 (creating a presumption of an annual interest rate if not otherwise specified in the contract). *See* D.C. Doc. 1, at Exhibits 1 and 2. Consequently, when extrapolating an annual interest rate from the stated short-term rates, the annual interest rates become 30% for Note 1 and 36% for Note 2.

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counsel to advise them on such. Instead, Creative Wealth ignored the plain language of the summons and intentionally did nothing.

To the extent that the Court determines that Note 1 and Note 2 are "susceptible to two different interpretations, an ambiguity exists." *See* First Nat'l Properties, 2020 MT 211, ¶ 35. "Where contracts are ambiguous, [the Court] will construe the ambiguity 'most strongly' against the drafter. When a contract is ambiguous, a court may consider extrinsic evidence to discern the parties' intent and meaning." First Nat'l Properties, 2020 MT 211, ¶ 35. As previously noted, and as Creative Wealth acknowledge, such were the drafters of the promissory notes with the assistance of legal counsel. *See* D.C. Doc. 34, at ¶ 8; D.C. Doc. 36, at Exhibit 3. Therefore, any ambiguities in the promissory notes are and should be construed most strongly against Creative Wealth. *See, e.g.,* Montana Health Network, Inc. v. Great Falls Orthopedic Assoc., 2015 MT 186, ¶ 22.

2. Creative Wealth cannot claim public policy defenses for the interest provision they drafted.

Creative Wealth drafted Note 1 and Note 2, not Mietzel. D.C. Doc. 34, ¶ 8; D.C. Doc 36, at Exhibit 3. Despite drafting these documents, Creative Wealth now argues that usury penalties should be leveled against Mietzel. Creative Wealth's argument is akin to the maxim of the murdering child who pleads for mercy as an orphan. *See also* Mont. Code Ann. § 1-3-208 ("A person may not take advantage of the person's own wrong."). Creative Wealth is barred from using the documents they drafted against Mietzel under the doctrines of estoppel and unclean hands. Kauffman-Harmon v. Kauffman, 2001 MT 238, ¶ 19, 307 Mont. 45, 36 P.3d 408

("[P]arties must not expect relief in equity, unless they come into court with clean hand.") (internal citations omitted); In re Estate of Stukey, 2004 MT 279, ¶ 37, 323 Mont. 241, 100 P.3d 114.

As shown by the pleadings and motions filed in this matter, Mietzel has not sought an interest rate greater than allowed under Mont. Code Ann. § 31-1-107.[12] Thus, Mietzel has not taken, received, reserved, or charged any amount that is greater than that allowed under Mont. Code Ann. § 31-1-107. *See also* Mont. Code Ann. § 31-1-108(1). Relief pursuant to Rule 60(b)(5) was properly denied.

IV. CREATIVE WEALTH FAILED TO ESTABLISH THAT RELIEF PURSUANT TO RULE 60(b)(6) IS APPLICABLE.

A Rule 60(b)(6) motion "must be more than a request for rehearing, or a request for the district court to change its mind; it must be shown that something preventing a full presentation of the cause or an accurate determination of the merits that for reasons of fairness or equity redress is justified." Wagenman v. Wagenman, 2016 MT 121, ¶ 11, 384 Mont. 149, 376 P.3d 121. Creative Wealth has not and cannot establish all three of the elements required for a successful Rule 60(b)(6) motion: "(1) extraordinary circumstances; (2) the movant acted to set aside the judgment within a reasonable period of time; **and** (3) the movant is

[12] The Judgment and Decree of Foreclosure provided for a prejudgment interest of 18%. D.C. Doc. 13, at ¶ 1. This appears to have been a clerical error as the prejudgment interest should be 15%. Consequently, Mietzel filed an Unopposed Motion to Amend the Judgment and Decree of Foreclosure to correct this clerical mistake. D.C. Doc. 29.

blameless." Essex Ins. Co., 2007 MT 202, ¶ 25 (emphasis added). The circumstances argued by Creative Wealth are anything but extraordinary. Creative Wealth's assertion that it "did not understand the nature of the situation facing them," rings hollow.[13] Quintana and McCall are experienced real estate experts and investors with decades of experience and who instruct others in this field including foreclosures. D.C. Doc., 33, at p. 18, lines 14-17; D.C. Doc. 36, at ¶5 and Exhibits 1, 2, 4, and 5. Creative Wealth's pro se status does not excuse their failure to appear in the matter after notice. *See, e.g.,* Whitefish Credit Union v, 2012 MT 267, ¶19-20. ("We have stated that when a party, aware of the contents of the documents served, ignored the command of the summons, there is no 'excusable neglect.'"). Creative Wealth's continued failure to seek counsel or actively engage in the lawsuit was calculated and intentional. *See* Argument at I, *supra. See also* Frye, 2020 MT 10, ¶ 13 ("No knowledge of the nuances of legal procedure is required to exercise care and common sense when served with process that clearly communicates to 'appear or answer' within twenty-only days.").

Creative Wealth further provides no argument or evidence that its actions were anything other than calculated and intentional; frankly, the course of the business relationship belies their current assertions of blamelessness and ignorance. Creative Wealth negotiated, drafted, and executed two promissory notes

[13] Creative Wealth was experienced enough to be able to file Motion 1 as an attempted means to forestall the foreclosure.

with untrue promises of quick remodeling and sales. *See* D.C. Doc. 36, at ¶¶ 9(a)-9(g), ¶ 12, and Exhibits 6-11. Given the ultimate condition of the properties at the time of foreclosure, it is abundantly clear that such were false assertions and intended to induce Mietzel to a course of action to his detriment. D.C. Doc. 35, at ¶ 15. Creative Wealth wholly fails to establish the elements required for relief pursuant to Rule 60(b)(6).

CONCLUSION

Creative Wealth had their day in the Montana District Court, they just failed to show up to participate. Only when faced with the consequences of such business decisions did Creative Wealth decide to finally appear 227 days after service. Such appearance was made to coincide with the Sheriff's sale. Creative Wealth, however, found no need to file any briefs or take any other action for an additional 149 days (426 days after service). The District Court did not abuse any discretion in disallowing Creative Wealth's well calculated attempts to forestall Mietzel from obtaining justice. The Court should affirm the District Court and allow Mietzel to pursue the owed deficiencies.

Dated May 17, 2023.

JARDINE, STEPHENSON, BLEWETT & WEAVER, P.C.

By: /s/ Patrick R. Watt
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Word, and is 6383 words excluding table of contents, table of citations, certificate of service, and certificate of compliance.

Dated May 17, 2023.

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CERTIFICATE OF SERVICE

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