

# Appendix A

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 STATE OF MONTANA  
 By Kristin Stees  
 STATE OF MONTANA  
 DV-15-2021-0000853-BC  
 Case Number: DA 23-0582  
 Ubricht, Heidi J  
 42.00

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9 MONTANA ELEVENTH JUDICIAL DISTRICT COURT, FLATHEAD COUNTY

10 PERKINS FAMILY HOLDINGS, LLC, a	) Cause No. DV-15-2021-0000853-BC
11 Montana Limited Liability Company	)
	)
12 Plaintiff,	) <b>BRIEF IN SUPPORT OF ENTRY OF</b>
	) <b>DEFAULT</b>
13 vs.	)
	)
14 THE TILE GUYS, LLC, AND MARSHAL	)
15 RAY BUTTERFIELD, an individual,	)
	)
16 Defendants.	)

17 COMES NOW, Plaintiff Perkins Family Holdings, LLC (“PFH”), by and through counsel,  
 18 and respectfully provides the below Brief in Support of Entry of Default. This brief is in  
 19 response to the Court’s request for additional briefing regarding the application of the “Cribb”  
 20 factors.

21 **I. Introduction**

22 On August 2, 2021, nearly three years ago, PFH filed its Complaint against Defendants  
 23 The Tile Guys, LLC and Marshal Ray Butterfield (“Butterfield”), alleging Breach of Contract,  
 24 Breach of the Implied Covenant of Good Faith and Fair Dealing, Negligent Misrepresentation,  
 Negligent Construction, Unjust Enrichment, Consumer Protection Violation, Unfair Trade  
 Practices, and Constructive Fraud by Butterfield. Doc. # 1.

1 On August 19, 2021, Butterfield was personally served with the Complaint and  
2 Summons. Doc. #5-6. Butterfield did not answer or otherwise defend against the Complaint and,  
3 on September 13, 2021, PFH moved the Court for entry of default and default judgment.

4 On September 15, 2021 the Court, via the Clerk, issued its Order of Default and Default  
5 Judgment, awarding damages to PFH in the amount of \$43,386.71. Doc. # 9. After receiving the  
6 order, unable to contact Butterfield, PFH sought and received Writs of Execution to enforce the  
7 Court's judgment. Doc. # 10-11.

8 On October 15, 2021, PFH received a return on its Writ of Execution from Glacier Bank  
9 in the amount of \$1,006.39. See Doc. # 17, ¶ 26. On the same day, Butterfield contacted PFH's  
10 counsel for the first time. Doc. # 17, ¶ 27.

11 On November 17, 2021, 90 days after service was made and 33 days after execution of  
12 the writ, Butterfield filed his Motion to Set Aside Default and Default Judgment, along with a  
13 brief and affidavit in support. Doc # 12-15.

14 On December 23, 2021, this Court set aside the entry of default and default judgment.  
15 Thereafter, PFH filed a motion for relief under Mont.R.Civ.P. 60(b)(6), the Court did not rule on  
16 this motion and it was deemed denied.

17 On March 30, 2022, PFH appealed the setting aside the entry of default in this case.

18 On January 24, 2023, the Montana Supreme Court remanded with instructions to conduct  
19 an analysis of the factors found in *Cribb v. Matlock Communications*, 236 Mont. 27, 30, 768 P.2d  
20 337, 339 8 (1989).

## 21 ARGUMENT

22 A court may set aside an entry of default under Mont.R.Civ.P 55(c) upon a finding of  
23 good cause. While this standard is more lenient than the requirement to set aside a default  
24

1 judgment under Mont.R.Civ.P. 60(b), the Montana Supreme has established a three-part test that  
2 the moving party must meet. "(1) whether the default was willful, (2) whether the plaintiff would  
3 be prejudiced if the default should be set aside, and (3) whether the defendant has presented a  
4 meritorious defense to plaintiff's claim. The court must also balance the interests of the defendant  
5 in the adjudication of his defense on the merits, against the interests of the public and the court in  
6 the orderly and timely administration of justice." *Cribb v. Matlock Communications*, 236 Mont.  
7 27, 30, 768 P.2d 337, 339 (1989). The party attempting to avoid entry of default bears the burden  
8 of proof of showing each factor of the Cribb test. *State ex rel. Department of Env'tl. Quality v.*  
9 *Robinson*, 1998 MT 185, ¶ 18, 290 Mont. 137, 962 P.2d 1212.

10 **I. Butterfield's Default was Willful**

11 There is no dispute that Butterfield was properly served and was fully aware of the need  
12 to take action. See Affidavit of Marshal Butterfield, November 17, 2023 (Butterfield Aff. 1), ¶  
13 39; see also Certificate of Costs and Return of Service, Doc # 4. There is also no dispute that  
14 Butterfield did not answer or otherwise defend against the Complaint. See Brief in Support of  
15 Motion to Set Aside Default and Default Judgment, § I(A), Doc # 13. Rather, within his brief,  
16 Butterfield argues that his default was not willful because:

17 "Marshal did not ignore the Summons. Marshal contacted five different law firms  
18 seeking representation. His inability to find someone to represent him was not  
willful."

19 This is the totality of Butterfield's argument, that contacting five law firms, then taking  
20 no other action, makes his default not willful. The Montana Supreme Court has upheld the  
21 setting aside of entry of default, when pro se defendants have misunderstood communications  
22 from the opposing attorney or were misled into believing that a cause of action would not be  
23 pursued, or that they did not need to file an answer. *Robinson*, at ¶ 18. However, that is not the  
24

1 facts before the Court today, Butterfield acknowledges that he was properly served and that he  
2 knew that action must be taken but did nothing.

3 In *Engelsberger v. Lake County*, 2007 MT 211, ¶ 13, 339 Mont. 22, 25, 167 P.3d 902,  
4 905, 2007, the Montana Supreme Court looked to various facts when determining that Lake  
5 County's failure to appear was willful. First, the court noted that service was proper and the  
6 summons explicitly stated that failure to answer the complaint within twenty days could result in  
7 judgment by default and an award of the relief demanded in the complaint. The Court held this  
8 constituted willful action by Lake County, despite Lake County arguing that an internal error had  
9 caused the complaint and summons to never be delivered to Lake County Attorney's office. *Id.*  
10 Essentially, the Court held that office mismanagement, neglect, and inattentiveness constituted  
11 willful conduct.

12 Although this case involves an individual, the lesson from *Engelsberger* applies,  
13 Butterfield neglected to take any meaningful action, he did not reach out to this Court or PFH's  
14 counsel to make it known that he intended to defend against the complaint. Instead, he allegedly  
15 made five phone calls, then ignored the complaint altogether.

16 It was not until months later, after default judgment was awarded and PFH sought to  
17 enforce that judgment did Butterfield take the matter seriously. Following entry of the default  
18 and default judgment, PFH's counsel attempted multiple times to reach Butterfield but received  
19 no response. See Unsworn Declaration of David McCauley, December 1, 2021 (Dec.  
20 McCauley), ¶ 25, Doc. # 17. This left PFH with little option but seek a writ and attempt to  
21 enforce their judgment. Then and only then did Butterfield take action, and still it was another 33  
22 days before Butterfield filed his motion to set aside default and default judgment. It is clear that  
23  
24

1 Butterfield was content to ignore the legal action against him, until it directly impacted his bank  
2 account.

3 This is the very definition of willful conduct, and for this reason alone, the Court should  
4 not set aside the entry of default.

## 5 **II. PFH Would be Prejudiced If the Default is Set Aside**

6 The second factor to consider is the prejudice the plaintiff will suffer if the default is set  
7 aside. Prejudice caused by delay is measured at the time the defendants moved to set aside the  
8 default. *Cribb*, 236 Mont. at 31, 768 P.2d at 340; See also *Detmers v. Mousley*, 2007 Mont. Dist.  
9 LEXIS 434, \*17, Cause No. DV-07-143 (21th Jud. Dist. 2007). This element has not been fully  
10 examined by the Montana Supreme Court, but several lower and other courts have analyzed  
11 circumstances which do and do not constitute prejudice.

12 From these rulings the application of this factor appears to best summarized as “it is not  
13 enough for the Plaintiff-Appellant to say that lapse of time resulted in prejudice, nor is it  
14 sufficient for the Defendant-Appellee to sit back and claim that the delay in time was  
15 inconsequential and presume no prejudice resulted.” *Midsea Indus. v. HK Eng’G, LTD.*, 1998  
16 Guam 14, 16, 1998 WL 574317, citing *Cribb*, 768 P.2d at 340.

17 In his previous motions and briefs, Butterfield has merely asserted:

18 “Marshal (Butterfield) acknowledges that setting aside the Default may delay  
19 proceedings, but mere delay does not rise to the level of prejudice. *Cribbs*, at 31,  
768 P.2d at 340.”

20 Brief in Support of Motion to Set Aside, November 17, 2021, ¶ I(B), Doc. # 14.

21 As the moving party, Butterfield bears the burden of showing that PFH will not be  
22 prejudiced, and such a summary statement cannot suffice to make such a showing.

1 A review of many of the available cases supports the assertion that not only has  
2 Butterfield not shown that PFH will not be prejudiced, but PFH will be prejudiced if the entry of  
3 default is set aside.

4 In *Detmers*, the defendant's answer was due on August 6, but they did not answer, and  
5 the plaintiff sought an entry of default against them. Approximately two months later, five days  
6 after the court issued its memorandum on the default, the defendant moved to set aside the  
7 default. Critically, during the entirety of the two months, both parties continued to file motions  
8 and take action as if no default occurred. Additionally, the Detmers' court determined that at  
9 least a part of the delay was caused by the plaintiffs. Given this there was no prejudice to the  
10 plaintiffs and the court set aside the default.

11 *Super Wash Laundry, Inc. v. Bock Engineered Products, Inc.*, 2004 ML 3525, 20, (Mont.  
12 4th Jud. Dist. 2004) involved a finding of no prejudice after only a five-day delay of filing a  
13 motion to set aside after default was entered.

14 In another case, the 18th Judicial District Court found that a two-week period between  
15 entry of default and the motion to set aside was likewise not prejudicial. *Country Classic*  
16 *Dairies, Inc. v. B & B Delivery Inc.*, 2004 ML 4065, 12, DV-04-368 (Mont. 18th Jud. Dist.  
17 2004). The 4th Judicial District Court likewise found a one month delay nonprejudicial. *Baron*  
18 *Holding Co. v. G&R Properties*, 2004 ML 3154, 23, (Mont. 4th Jud. Dist. 2004).

19 Absent in all the cases reviewed was a showing of prejudice aside from the simple  
20 passage of time, and none of them involved a delay equal to the one in the present case. For  
21 instance, because Butterfield completely ignored all attempts to gain his cooperation, PFH was  
22 forced to seek a writ and execute that writ upon multiple banks in an attempt to recoup any of the  
23  
24

1 money owed to PFH. While this effort did bear some fruit, it was largely unsuccessful and cost  
2 nearly as much as was received in the end. To unwind this would certainly be prejudicial to PFH.

3         Additionally, PFH will be prejudiced not just by the passage of time but the destruction  
4 of evidence. During the pendency of this action PFH has been forced to redo the work performed  
5 by Butterfield, at additional expense and cost. This rework means that much, if not all, of  
6 Butterfield's original work is no longer available for examination. While it is likely this would be  
7 the eventual outcome, had Butterfield answered in a timely manner then no default would have  
8 been entered, and PFH would have had to prosecute this action in a completely different manner.  
9 Butterfield's default left PFH with two unworkable options, (1) hire experts to develop a case  
10 that would not be adjudicated on the merits, or (2) wait to complete the rework just in case  
11 Butterfield later decided to appear and defend the case. Neither is a logical business decision,  
12 leaving only the option to press forward with the rework after Butterfield defaulted. Now,  
13 allowing Butterfield to set aside the entry of default would put PFH in a position where much of  
14 the evidence needed to prosecute its case has been destroyed. The prejudice is apparent.

15         This factor weighs heavily in favor of allowing the entry of default to remain in place, as  
16 a result of Butterfield's neglect, evidence to prove or disprove the case before the Court has been  
17 lost. Although trial on the merits is favored, when that cannot be fairly accomplished, the  
18 defaulting party should bear the responsibility and not be allowed to profit from their neglect.

### 19         **III. Butterfield Has Not Presented a Meritorious Defense to Plaintiff's Claims**

20         This factor is the most favorable to Butterfield, but still the Court should find, on balance,  
21 that Butterfield has failed to show good cause to set aside the entry of default.

22         The requirement to determine if the defendant has presented a meritorious defense does  
23 not require a defendant to establish an ultimate likelihood of success on the merits. *Essex Ins.*

1 *Co. v. Jaycie, Inc.*, 2004 MT 278, ¶ 14, 323 Mont. 231, 237, 99 P.3d 651, 654. Rather, the party  
2 seeking to set aside the default must set forth the prima facie elements, which, if proven, would  
3 supply a defense. *Id.*

4 Within Butterfield's Answer, Butterfield has supplied a prima facie defense, which if  
5 proven, would supply a defense. However, this is because Butterfield's Answer is by and large a  
6 general denial of PFH's claims. Further, Butterfield was allowed to answer after the Court's  
7 previous order, which was appealed and remanded. In fairness, only Butterfield's filings made  
8 before the default judgment was set aside should be considered by the Court when determining if  
9 Butterfield has supplied a meritorious defense.

10 Looking to Butterfield's Brief in Support of Motion to Set Aside, Butterfield fails to do  
11 so. Butterfield first focuses upon the application of the Consumer Protection Act, this is an issue  
12 to be determined as part of the damages, not as part of a determination of the factual claims.  
13 Then Butterfield asserts that he believes he performed \$3,200 of unpaid work, but this is not a  
14 defense to PFH's claims, and again something that easily fits within a determination of damages.

15 Butterfield further argues that he provided evidence refuting the allegation of substandard  
16 work, while the mere denial is a defense of sorts, the facts provided do not support that denial.  
17 Butterfield argues he previously worked for PFH and PFH was satisfied on that project, but that  
18 assertion is irrelevant to the quality of work on the project at issue. Butterfield argues that PFH  
19 made multiple payments to Butterfield. Even if these allegations were proven true, neither  
20 support a determination that Butterfield's work was not deficient on the current project.

21 Finally, Butterfield alleges that PFH caused work stoppages, but work stoppages are not  
22 the basis of PFH's claim. PFH's claims are based upon the quality of work, not the timeliness of  
23 the work. So, this allegation is irrelevant.

1 Even if all of Butterfield’s factual allegations are considered true, Butterfield fails to  
2 establish a meritorious defense.

3 **CONCLUSION**

4 The *Cribb* factors weigh heavily in favor of allowing the entry of default to stand.  
5 Butterfield’s default was not only willful, but PFH will suffer great prejudice if the entry of  
6 default is set aside. While Butterfield’s general denial can be considered a defense, when taken  
7 in context, Butterfield fails to provide a meritorious defense. For these reasons, the Court should  
8 not find good cause to set aside the entry of default.

9 DATED this 30th day of June, 2023.

10 PEACE LAW GROUP, LLC

11 */s/ Rufus I. Peace*

12 Rufus I. Peace

13 *Attorney for Plaintiff*

## **CERTIFICATE OF SERVICE**

I, Rufus I. Peace, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Brief In Support of Motion to the following on 06-30-2023:

Joseph R. Nevin (Attorney)  
3624 Green Meadow Drive  
Helena MT 59602  
Representing: Marshal Ray Butterfield, The Tile Guys, LLC  
Service Method: eService

Electronically Signed By: Rufus I. Peace  
Dated: 06-30-2023

## Appendix B

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**MONTANA ELEVENTH JUDICIAL DISTRICT COURT,  
FLATHEAD COUNTY**

PERKINS FAMILY HOLDINGS, LLC, a Montana Limited Liability Company,	)	Cause No. DV-15-2021-0000853-BC  <b>CRIBB FACTORS BRIEF</b>
Plaintiff,	)	
v.	)	
THE TILE GUYS, LLC AND MARSHAL RAY BUTTERFIELD, an individual,	)	
Defendants.	)	

**BACKGROUND**

In its Opinion remanding Plaintiff's appeal, the Montana Supreme Court noted that Engelsberger v. Lake Cty., 2007 MT 211, 339 Mont. 22, 167 P.3d 902, was controlling yet completely unmentioned in either parties' briefing. The directive on remand is for the Court to consider and weigh all three factors enumerated in Cribb v. Matlock Communications, 236 Mont. 27, 768 P.2d 337 (1989). Factual support exists to justify this Court setting aside the entry of default.

**STANDARD OF REVIEW**

The proper consideration for setting aside a default is a three part balancing test in which the court must consider:

(1) whether the default was willful, (2) whether the plaintiff would be prejudiced if the default should be set aside, and (3) whether the defendant has presented a meritorious defense to plaintiff's claim. The court must also balance the interests of the defendant in the adjudication of his defense on the merits, against the interests of the public and the court in the orderly and timely administration of justice.

Essex Ins. Co. v. Jaycie, Inc., 2004 MT 278, ¶ 10, 323 Mont. 231, 99 P.3d 651 (quoting Cribb at 30, 768 P.2d at 339).

"We apply the M. R. Civ. P. 55(c) good cause standard flexibly and leniently because an entry of default is an interlocutory order that does not determine rights or remedies all by itself."

Hoff v. Lake Cty. Abstract & Title Co., 2011 MT 118, ¶ 20, 360 Mont. 461, 255 P.3d 137.

A district court's discretion to set aside an entry of default should be liberally exercised to facilitate a trial on the merits. Estate of Mills, 2015 MT 245, ¶ 12, 380 Mont. 426, 354 P.3d 1271.

## DISCUSSION

### I. Marshal's Default was Not Willful.

Marshal did not ignore the Summons. Marshal phoned David McCauley after receiving the Summons and Complaint, which prayed for over \$14,000 to be trebled and to be awarded attorney fees. Marshal asked how this mushroomed from \$1,213.07 and David indicated this is what he gets for daring to call him untrustworthy. (Butterfield Aff. ¶ 38). Marshal contacted five different law firms seeking representation. (Butterfield Aff. ¶ 39). His inability to find someone to represent him was not willful. Marshal's education is limited to a high school diploma. He has not taken any post-secondary business or legal courses. (Butterfield Aff. ¶ 2).

Estate of Mills was a case involving an unrepresented party. Admittedly, that unrepresented party did more than Marshal before default was entered. However, the Montana Supreme Court observed regarding the unrepresented party's efforts, "it is difficult to conclude that the "default" was willful or that he failed to raise a meritorious defense." Mills, ¶ 18. The court held the district court slightly abused its discretion in not setting aside the entry of default. Mills, ¶ 21.

Even if the Court determines Butterfield's default was willful, it is only one factor to be considered in the Court's analysis. Whether "good cause" to set aside an entry of default exists is an equitable determination. Mills, ¶ 17.

### II. Petitioners are Not Prejudiced.

Marshal acknowledges that setting aside the entry of default may delay the proceedings,

but mere delay does not rise to the level of prejudice. Cribb, at 31, 768 P.2d at 340. In the instant case, Plaintiff made the decision to appeal the entry of default. The default entry is simply an interlocutory order than in itself determines no rights or remedies. Cribb, at 30, 768 P.2d at 339. Plaintiff's decision to appeal is the major cause of delay in this case. In light of its decision to appeal the entry of default, Plaintiff's assertion it is prejudiced by setting aside the entry of default ring hollow.

Regarding the length of delay, In a factually similar case, the Montana Supreme Court went to great lengths to rescue a non-represented party from an oppressive adversary. In Hall v. Hall, 2015 MT 226, 380 Mont. 284, 354 P.3d 1224, the court ordered a default judgment be set aside *seven years* after default was entered. In doing so, the court noted the unrepresented party's lack of understanding of the entry of default. Id., ¶19. The court also noted there was no basis for liability. Id., ¶ 21. The court ultimately stated:

Saddling a retired contractor with a judgment ultimately totaling \$270,000, by sole virtue of the fact that he was the only defendant without the resources necessary to navigate the judicial system, ultimately driving him to bankruptcy as a result of a liability that, as a matter of law, did not exist in the first place, is a harsh result and indeed a miscarriage of justice.

Id., ¶ 24.

Plaintiff's judgment was based solely on the Consumer Protection Act. Plaintiff, as a business engaging with Marshal for a business purpose, could not avail itself of that remedy.

Accordingly, there was no basis for Marshal to be liable under the Consumer Protection Act and the length of delay in this case does not prejudice Plaintiff.

### **III. Marshal has Multiple Meritorious Defenses.**

The Montana Supreme Court has indicated that whether the party seeking to set aside entry of default has a meritorious defense is the most important factor to be considered. Legal Res. Agency, LLC v. Armstrong, 2008 MT 262, ¶ 23, 345 Mont. 115, 191 P.3d 368. Marshal has enumerated several meritorious defenses detailed below.

#### **1. The Consumer Protection Act does not apply to this case.**

“Consumer” means a person who purchases or leases goods, services, real property, or information primarily for personal, family, or household purposes. Section 30-14-102(1), MCA. Paragraph 1 of Plaintiff’s Complaint expressly states: “Plaintiff is and was at all times relevant hereto a Montana Limited Liability Company, organized under the laws of the State of Montana ...” Plaintiff has self-defined itself out of the purview of the Consumer Protection Act. Even in the case where an individual is named as plaintiff in the caption of the Complaint, if the individual is involved in a transaction for business purposes, the Consumer Protection Act does not apply. Doll v. Major Muffler Centers, Inc., 208 Mont. 401, 409-410, 687 P.2d 48, 52 (1984).

What remains is two businesses squabbling over an oral contract, with no provision for attorney fees, and no legal basis for seeking treble damages. By Plaintiff’s own pleadings, there is no basis in law or fact for an award of attorney fees, and there is no basis in law or fact for an award of treble damages. Plaintiff disregards the need for law or facts to support its claim for attorney fees and treble damages. Accordingly, there is something seriously wrong with Plaintiff’s Affidavit of Attorney Fees and Costs, as well as Plaintiff’s Affidavit in Support of Request for Entry of Default and Default Judgment wherein it requests treble damages. Where an attorney makes representations to the Court that have no basis in law or fact, the Court may on its own initiative inquire further. Rule 11(c)(3), M. R. Civ. P. Accordingly, the Order of Default and Default Judgment in this action, dated September 15, 2021, is unlawful and invalid.

**2. Marshal was underpaid for the work he performed.**

Marshal has asserted that he performed \$3000 of unpaid work for Plaintiff. (Butterfield Aff. ¶ 25). That is more than the \$1,213.07 Perkins Family Holdings, LLC assert was owed in paragraph 16 of its Complaint.

**3. Marshal asserts facts that refute allegations of substandard work.**

Marshal provides evidence of a previous job done for David McCauley, and that David McCauley sought Marshal out to do work on a subsequent project, the subject of the instant action. (Butterfield Aff. ¶¶ 4-9). Further, Plaintiff’s own facts establish it issued multiple

checks to Marshal in the instant action. If Marshal's work was substandard, David McCauley would not have sought him out for further work or made multiple payments to him on the project in the instant action.

**4. Marshal asserts facts that work stoppage was Plaintiff's fault.**

Perkins Family Holdings, LLC contracted with Marshal to do tile work, agreeing to front money for the tile materials. When Marshal got to the worksite and observed the structure was not ready for tile work, Perkins Family Holdings, LLC began modifying the agreement to have Marshal do the drywall work necessary for the tile work to be done, first by having Marshal use the amount fronted for tile materials to be used for drywall materials and labor. (Butterfield Aff. ¶ 14). When that money ran out, Perkins Family Holdings, LLC attempted to further modify the contract to have Marshal front the money for tile materials, in addition to being behind on paying Marshal for his labor. (Butterfield Aff. ¶¶ 25- 27). When Marshal refused to overextend himself financially, Perkins Family Holdings, LLC stopped payment on a check owed to Marshal for work already done, had the door lock entry code changed, and issued a Cease and Desist letter filled with false allegations. (Butterfield Aff. ¶¶ 30-32).

**CONCLUSION**

Balancing the Cribb factors, weighs in favor of setting aside the entry of default. While willfulness may be a toss-up or slightly favor Plaintiff, the other two factors, lack of prejudice and meritorious defense, favor Marshal. Especially weighing in Marshal's favor is the most important factor: that Marshal has meritorious defenses. The Court would not abuse its discretion in setting aside the entry of default. Conversely, the Court would at least slightly abuse its discretion in refusing to set aside the entry of default.

The Court got it right the first time; it just didn't explain its reasoning.

Dated this 11<sup>th</sup> day of July, 2023.



---

Joseph Nevin  
Attorney for Defendant

## **CERTIFICATE OF SERVICE**

I, Joseph R. Nevin, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Response Brief to the following on 07-11-2023:

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6 MONTANA ELEVENTH JUDICIAL DISTRICT COURT, FLATHEAD COUNTY

7 PERKINS FAMILY HOLDINGS, LLC, a ) Cause No. DV-15-2021-0000853-BC  
8 Montana Limited Liability Company )

9 Plaintiff,

10 vs.

11 THE TILE GUYS, LLC, AND MARSHAL  
12 RAY BUTTERFIELD, an individual,

13 Defendants.

) **AMENDED REPLY BRIEF IN SUPPORT**  
) **OF ENTRY OF DEFAULT**

14 COMES NOW, Plaintiff Perkins Family Holdings, LLC (“PFH”), by and through counsel,  
15 and respectfully provides its Amended Reply Brief to Defendant’s Cribb Factors Brief. After the  
16 initial Reply Brief was Filed and Approved, a mistake of fact was discovered and this  
17 Amendment corrects that error, the previous Reply Brief should be disregarded in its entirety.

18 Both parties agree the standard to set aside an entry of default is "(1) whether the default was  
19 willful, (2) whether the plaintiff would be prejudiced if the default should be set aside, and (3)  
20 whether the defendant has presented a meritorious defense to plaintiff's claim. The court must  
21 also balance the interests of the defendant in the adjudication of his defense on the merits,  
22 against the interests of the public and the court in the orderly and timely administration of  
23 justice." *Cribb v. Matlock Communications*, 236 Mont. 27, 30, 768 P.2d 337, 339 (1989)

24 When applying this standard, Defendant Marshall Butterfield’s (“Butterfield”) response brief  
demonstrates that Butterfield’s actions fail to meet the test.

1           **I.           Butterfield’s Default was Willful.**

2           As he has in previous briefs, Butterfield alleges he made five phone calls and when those  
3 five calls did not yield results, he took no further action. Butterfield believes this is enough to  
4 justify setting aside entry of default and relies upon *In re Estate of Mills*, 2015 MT 245, 380  
5 Mont. 426, 354 P.3d 1271 to support this contention.

6           However, there are critical differences in the present facts, as compared to those in *In re*  
7 *Estate of Mills*. As Butterfield acknowledges in his brief, the “unrepresented party did more than  
8 Marshal [Butterfield] before default was entered.” In fact, David Mills, the defaulted party in *In*  
9 *re Estate of Mills* took the most critical step to avoid default, he responded...in writing to the  
10 court and to opposing counsel. *In re Estate of Mills*, at ¶ 4. The facts in Estate of Mills show that  
11 David filed “a detailed letter in response to the petition” and that “the record contains a copy of  
12 the certified mail receipt to Howard’s counsel.” *Id.*

13           Additionally, in *In re Estate of Mills*, David was an active participant in the litigation,  
14 appearing at hearings and filing a motion to set aside default, in response to the motion for  
15 default, before the court even entered default. *In re Estate of Mills*, at ¶ 7. In other words, David  
16 Mills was proactively involved from the outset of the case, this is a far cry from making five  
17 phone calls and moving on with life.

18           There is little doubt that Butterfield’s lack of any meaningful action makes his default  
19 willful.

20           **II.           Petitioners Will Be Prejudiced if Entry of Default is Set Aside**

21           PFH does not argue that the mere passage of time is the cause of their prejudice, rather  
22 PFH asserts prejudice based on the destruction of evidence. Butterfield does not address this  
23  
24

1 argument in his brief, but simply restates the general axiom that “mere delay does not rise to  
2 the level of prejudice.” citing to *Cribb*, at ¶ 31.

3 PFH will be prejudiced because much or all of the evidence needed to prosecute its case  
4 was destroyed when the rework was completed. As stated in PFH’s initial brief, by failing to  
5 answer or otherwise respond, Butterfield forced PFH into a no-win situation. Following  
6 Butterfield’s default, PFH pressed forward with the rework destroying the evidence needed to  
7 develop its case. They did so because there was no longer a need to fully litigate the case, and  
8 to expend the resources to prepare for litigation when none was occurring makes no sense.

9 Butterfield ignores this in his brief but points to *Hall v. Hall*, 2015 MT 226, 380 Mont.  
10 284, 354 P.3d 1224 to support the contention that no matter the time that passed, an  
11 unrepresented party should have entry of default set aside. This reliance is extremely  
12 misplaced.

13 To begin with, *Hall v. Hall* does not analyze prejudice: “[U]nfortunately, the Court does  
14 not address whether setting aside the default judgment at this point will cause any prejudice to  
15 Gregory, probably an oversight.” *Hall*, at ¶ 48, Justice Rice Dissenting.

16 Moreover, *Hall v. Hall* was an out of time appeal granted by the Montana Supreme Court  
17 only in “the infrequent harsh case and under extraordinary circumstances amounting to a gross  
18 miscarriage of justice...” *Hall*, at ¶ 15; M. R. App. P. 4(6). The case involved claims based on  
19 allegedly undisclosed defects during a home sell and contained multiple defendants.

20 Don Hall, the home inspector and defaulted party, filed a letter with the court in response  
21 to the complaint. *Hall*, at ¶ 3. However, the court found the letter failed to comply with the  
22 rules of civil procedure and directed Don to file an answer within 10 days, Don did not file  
23 anything further. *Hall*, at ¶ 4. The court later entered default against Don.

1           Thereafter, all the remaining defendants moved for summary judgment. *Id.* The court  
2 determined that the alleged material defects were in fact disclosed to the plaintiff and awarded  
3 summary judgment to all defendants, except Don, meaning the plaintiff had no factual basis for  
4 any claim against anyone. *Hall*, at 5-6. Despite this, the plaintiff moved for final default  
5 judgment against Don and was awarded \$206,522.80. *Hall*, at ¶ 9. This was so shocking, that  
6 attorneys for the parties who had already won summary judgment objected on behalf of Don,  
7 despite not having standing or reason to do so. *Hall*, ¶ 7. As the attorneys pointed out at the  
8 time, “the damages sought by Plaintiff against Don Hall are not recoverable as a matter of fact  
9 or law.” *Hall*, at ¶ 7.

10           Hall was a rare and egregious case, one where the facts underlying the complaint were  
11 litigated and found to be without merit, yet using default judgment rules, the plaintiff was able  
12 to obtain a judgment. The present case is lightyears from the *Hall* case. And again, Don at least  
13 to the proactive step to send a letter to the court, unlike Butterfield.

14           In the present case, PFH has shown that it will be prejudiced, and Butterfield failed to  
15 provide any counterargument showing an absence of prejudice.

16       **III.       Butterfield Provides no Meritorious Defenses**

17           Butterfield provides the following arguments as a meritorious defense:

- 18           A. The Consumer Protection Act does not apply.
- 19           B. Butterfield was underpaid for the work he performed.
- 20           C. Butterfield asserts facts that refute allegations of substandard work.
- 21           D. Butterfield asserts PFH caused work stoppages.

22           Even if all of these were true, which they are not, then Butterfield has still failed to  
23 establish a meritorious defense.

1           **A. The Consumer Protection Act Might Apply**

2           The parties have differing opinions regarding the application of the Consumer Protection  
3 Act, but that is not relevant to the discussion at hand. The application or non-application of the  
4 Consumer Protection Act goes to the amount of damages awarded; not overall liability based  
5 upon substandard work. Besides, the Consumer Protection Allegation was only one of eight  
6 counts lobbied against Butterfield by PFH, even if it does not apply, liability still attaches.

7           **B. Butterfield was Not Underpaid for His Work.**

8           PFH emphatically denies that Butterfield was underpaid for his work and experience has  
9 demonstrated Butterfield does not shy away from telling untruths. However, if it were the case  
10 that Butterfield was underpaid, this again goes to damages, not liability. If Butterfield can show  
11 that PFH's damages should be offset by some underpayment then he may do so as part of a  
12 damages determination, but it is no defense against the allegations of substandard work.

13           **C. Butterfield Asserts No Facts that Refute Substandard Work.**

14           Butterfield alleges that he previously performed work for PFH and on that job, PFH was  
15 satisfied so it must be the case that PFH would be satisfied with the job at issue. As an initial  
16 matter, Butterfield did not work for PFH previously, but another entity entirely. Although he  
17 does not say so in the current briefs, in previous briefs, Butterfield alleged he did work for Three  
18 Bears RV Park, not PFH, completely separate entities. In any case, even if Butterfield had  
19 previously worked for PFH, the logical leap Butterfield attempts is just a bit too far, clearly PFH  
20 was not satisfied with the job at issue, it is the basis for this entire lawsuit. The alleged defense,  
21 that work on another, separate job was satisfactory, is totally irrelevant to the allegations in the  
22 present case, because they involve a completely different transaction and different parties.



## **CERTIFICATE OF SERVICE**

I, Rufus I. Peace, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Reply Brief to the following on 07-21-2023:

Joseph R. Nevin (Attorney)  
3624 Green Meadow Drive  
Helena MT 59602  
Representing: Marshal Ray Butterfield, The Tile Guys, LLC  
Service Method: eService

Electronically Signed By: Rufus I. Peace  
Dated: 07-21-2023

# Appendix D

FILED

09/12/2023

Peg L. Allison  
CLERK

Flathead County District Court  
STATE OF MONTANA

By: Brittney Colacino

DV-15-2021-0000853-BC

Ulbricht, Heidi J

50.00

1 Heidi J. Ulbricht  
2 District Judge, Department 3  
3 Flathead County Justice Center  
4 920 South Main Street, Suite 310  
5 Kalispell, MT 59901  
6 Telephone: (406) 758-5906

7 IN THE DISTRICT COURT OF THE ELEVENTH JUDICIAL DISTRICT  
8 OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF FLATHEAD

9 \* \* \* \* \*

10 PERKINS FAMILY HOLDINGS, LLC, a  
11 Montana Limited Liability Company,  
12 Plaintiff,

CAUSE NO. DV-21-853(C)

v.

FINDINGS OF FACT, CONCLUSIONS  
OF LAW AND ORDER ON MOTION  
TO SET ASIDE ENTRY OF DEFAULT

13 THE TILE GUYS, LLC, and MARSHAL  
14 RAY BUTTERFIELD, an individual,  
15 Defendants.

16 THIS CAUSE is before the Court on the remand of the Montana Supreme Court. The  
17 parties have briefed the matter and the Court makes the following:

**FINDINGS OF FACT**

18 1. Perkins Family Holdings, LLC, (“PFH”) filed a Complaint and Demand for Jury  
19 Trial on August 2, 2021. PFH alleges that it paid deposits to Defendants for tile and drywall work  
20 at 260 McMannamy Draw, Kalispell, MT, but that the Defendants abandoned the job site leaving  
21 defective and incomplete work. PFH brought claims for Breach of Contract (Count I), Breach of  
22 the Implied Covenant of Good Faith and Fair Dealing (Count II), Negligent Misrepresentation  
23 (Count III), Negligent Construction (Count IV), Unjust Enrichment (Count V), Violations of the  
24 Consumer Protection Act (Count VI), Unfair Trade Practices (Count VII), and Constructive Fraud  
25 (Count VIII). In part, PFH’s prayer for relief sought “an award to be determined at trial, but not  
26 less than Fourteen Thousand Thirteen and 07/100 Dollars (\$14,013.07),” treble damages pursuant  
27 to § 30-14-133, MCA, costs, and attorneys’ fees.

28 2. PFH served Defendant Butterfield individually and as agent of The Tile Guys,  
LLC with a copy of the Summons and Complaint on August 19, 2021. Service was proper.

1  
2 3. Defendants failed to plead or otherwise defend the case within the time allowed  
3 by M.R.Civ.P. 12(a).

4  
5 4. On September 13, 2021, Plaintiff requested that the Clerk of Court enter  
6 Defendants' default and default judgment. Plaintiff's request was supported by its counsel's  
7 affidavit in which he attested that Defendants owed Plaintiff \$14,013.07 and that Plaintiff was  
8 entitled to treble damages under § 30-14-133, MCA, along with attorney fees and costs for a total  
9 judgment of \$43,386.71.

10 5. On September 15, 2021, the Clerk of Court entered Defendant's default and  
11 default judgment for \$43,386.71.

12  
13 6. Defendant Butterfield moved to set aside the default and default judgment.

14  
15 7. The Court set aside the entry of default and default judgment.

16  
17 8. On appeal, neither party took issue with the propriety of setting aside the default  
18 judgment because it was void under Rule 60(b)(4). *Perkins Family Holdings, Ltd. Liab. Co. v.*  
19 *Tile Guys, Ltd. Liab. Co.*, 2023 MT 17N, ¶ 10, 411 Mont. 389, 523 P.3d 51.

20  
21 9. With respect to the setting aside of the entry of default, the Montana Supreme  
22 Court remanded the matter for consideration of the factors in *Cribb v. Matlock Communications*,  
23 236 Mont. 27, 768 P.2d 337 (1989) as applied in *Engelsberger v. Lake Cty.*, 2007 MT 211, 339  
24 Mont. 22, 167 P.3d 902. *Perkins Family Holdings, Ltd. Liab. Co. v. Tile Guys, Ltd. Liab. Co.*,  
2023 MT 17N, ¶ 15, 411 Mont. 389, 523 P.3d 51.

25  
26 10. Any of the following Conclusions of Law which may be deemed Findings of Fact  
27 are incorporated herein.  
28

1 Based upon the foregoing Findings of Fact, the Court makes the following:  
2

3 **CONCLUSIONS OF LAW**

4 i. An entry of default is simply an interlocutory order that determines no rights or  
5 remedies, whereas the default judgment is a final judgment that terminates the litigation and  
6 decides the dispute. The 'good cause' standard for setting aside a default entry is more flexible  
7 and lenient than the Rule 60(b) standard for setting aside a default judgment. There should be no  
8 rigid legal rule against late filings attributable to any particular type of negligence. Instead, the  
9 weighing of equitable factors is left to the discretion of the trial court in every case. *See*  
10 *Engelsberger v. Lake Cnty.*, 2007 MT 211, ¶ 16, 339 Mont. 22, 167 P.3d 902.

11 ii. To determine whether good cause exists to set aside an entry of default, courts  
12 should consider:

- 13 (1) whether the default was willful,  
14 (2) whether the plaintiff would be prejudiced if the default should be set aside, and  
15 (3) whether the defendant has presented a meritorious defense to plaintiff's claim.

16 The court must also balance the interests of the defendant in the adjudication of his defense on  
17 the merits, against the interests of the public and the court in the orderly and timely administration  
18 of justice. *Cribb v. Matlock Commc'ns*, 236 Mont. 27, 30, 768 P.2d 337, 339 (1989).

19 iii. In *In re Estate of Mills*, the Montana Supreme Court found that the willfulness  
20 factor was satisfied where a party appeared in the proceedings 18 days after their commencement  
21 by filing a detailed letter with the Court, with a copy to opposing counsel, explaining his concerns  
22 and objections to the Petition. *In re Estate of Mills*, 2015 MT 245, ¶¶ 4, 19, 380 Mont. 426, 354  
23 P.3d 1271. Marshal Butterfield argues that his default was not willful. He states in an affidavit  
24 that he phoned David McCauley (Plaintiff's manager, *see* dkt. 17) after receiving the Summons  
25 and Complaint and contacted five law firms seeking representation but the only firm that  
26 responded refused to get involved. *Butterfield Aff.* ¶¶ 38-39, dkt. 13. Unlike the appellant in  
27 *Estate of Mills*, Butterfield filed nothing with the Court before the time to file an answer expired  
28 or before his default. Both the time to file an answer and the threat of default if he did not file an

1 answer were specifically identified in the Summons he received with the Complaint. Instead,  
2 Butterfield's first filing and appearance occurred over two months after entry of default. While  
3 *pro se* litigants may be given a certain amount of latitude, that latitude cannot be so wide as to  
4 prejudice the other party, and it is reasonable to expect *pro se* litigants to adhere to procedural  
5 rules. *Neil Consultants, Inc. v. Lindeman*, 2006 MT 80, ¶ 8, 331 Mont. 514, 134 P.3d 43. Montana  
6 Rule of Civil Procedure 12(a)(1)(A) requires that a defendant serve an answer within 21 days  
7 after being served with the summons and complaint. Regardless of whether Butterfield was  
8 attempting to find counsel, he did not file anything with the Court that could be construed as an  
9 answer in the 21 days after service and the Court concludes that the failure to do so was willful.

10 iv. Butterfield contends that Plaintiff will not be prejudiced if the Entry of Default is  
11 set aside. He argues that mere delay alone is not prejudice and notes that much of the delay is  
12 attributable to the Plaintiff's own actions. Plaintiff counters in relevant part that it will be  
13 prejudiced because it destroyed much of the evidence needed to prosecute its case when it redid  
14 Butterfield's work after obtaining his default. However, Plaintiff asserted in ¶ 19 of its Complaint  
15 that:

16 Plaintiff expended an additional Five Thousand Eight Hundred and 00/100 Dollars  
17 (\$5,800.00) in order to remove and replace the faulty, improperly installed drywall.

18 Prejudice from delay should be measured at the time the party moves to set aside an entry of  
19 default. *Cribb v. Matlock Commc'ns*, 236 Mont. 27, 31, 768 P.2d 337, 340 (1989). The prejudice  
20 alleged by Plaintiff existed at the time it filed its complaint.

21  
22 v. The Montana Supreme Court has specifically stated that "resolution of doubt in  
23 finding a meritorious case should be resolved in favor of [the defendants]." *Cribb v. Matlock*  
24 *Communications, Inc.*, 236 Mont. 27, 31, 768 P.2d 337, 340 (1989). Butterfield has presented  
25 factual disputes going to whether the Consumer Protection Act, the source of Plaintiff's claim for  
26 treble damages, even applies to this case. Butterfield has further asserted that the work stoppage  
27 was because of Plaintiff's malfeasance. Plaintiff denies Butterfield's allegations and argues that,  
28 even if the Consumer Protection Act does not apply, that would only go to the amount of damages  
awarded. However, this argument begs the question of how the justiciability of the claim could

1 be litigated if the entry of default remained in place, given that “[i]f the District Court determines  
2 Butterfield's default should not be set aside after such consideration, the matter may proceed to  
3 trial on damages only.” *Perkins Family Holdings, Ltd. Liab. Co. v. Tile Guys, Ltd. Liab. Co.*, 2023  
4 MT 17N, ¶ 15, 411 Mont. 389, 523 P.3d 51 (emphasis added). Whatever the actual merits of  
5 Butterfield’s arguments, he has raised meritorious defenses, including whether the claim central  
6 to most of the damages in Plaintiff’s prayer for relief and request for attorney fees are justiciable.

7  
8 vi. Balancing the interests of the defendant in the adjudication of his defenses on the  
9 merits against the interests of the public and the court in the orderly and timely administration of  
10 justice, the Court concludes that the entry of default should be set aside.

11 vii. Any of the foregoing Findings of Fact which may be deemed Conclusions of Law  
12 are incorporated herein.

13  
14 Based upon the foregoing Findings of Fact and Conclusions of Law, the Court enters the  
15 following:

16  
17 ORDER

18 I. Defendant Butterfield’s Motion to Set Aside the Entry of Default is GRANTED.

19 ELECTRONICALLY SIGNED AND DATED BELOW.  
20  
21  
22  
23  
24  
25  
26  
27  
28