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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

* * * * *

In Re SRBA

) Subcase Nos. 36-00048A, 36-00049,
) 36-02169, 36-00039D, 36-04260B,
) 36-15168, 36-00051A, 36-00021 &
) 36-10283A

) **BRIEF RESPONDING TO**
) **MASTER'S QUESTIONS**

Case No. 39576

)
)

* * * * *

I. INTRODUCTION.

Claimants in these subcases submit this brief in response to two questions
posed by the Special Master. They are:

HLH

Chartered

Hepworth,
Lezamiz &
Hohnhorst

BRIEF RESPONDING TO MASTER'S QUESTIONS - 1

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1. Whether the standard for deciding whether to allow late pleadings requires the movant to prove the relevant facts or merely allege them.
2. Whether, given IDWR made its recommendations on "beneficial use," any new party to the subcase stepping into IDWR's shoes may add legal theories if allowed into the subcase.

The short answer to the first issue is the proponent must establish the relevant facts by competent evidence. The second answer is that any new party who relied on IDWR is stuck with IDWR's position and may not bootstrap new theories into a subcase on the basis of IDWR's loss of party status. The second issue is not discussed further here because the movants have admitted they are limited by IDWR's theories.

II. IN ORDER TO PREVAIL, A MOVANT MUST PROVIDE
THE COURT WITH COMPETENT AND PARTICULAR FACTS
ESTABLISHING GOOD CAUSE AND A MERITORIOUS POSITION.

Judge Hurlbutt had discretion to require a factual showing as the standard for late pleading. McFarland v. Curtis, 123 Idaho 931, 936 (Ct.App. 1993) (it is not reversible error for the trial court to require a showing of a meritorious defense under I.R.C.P. 55(c)). That standard establishing the showing necessary to prevail on a motion is set out in the July 28, 1995 order:

IT IS ORDERED that the following procedure shall apply . . .

1. . . . The moving party shall attach [to the motion] a completed *Objection or Response* which shall be signed by the party or counsel.

2. The court will review the motion . . . under a criteria similar to that contained in I.R.C.P. 55(c). The proponent . . . must show both good cause for untimeliness and the existence of a meritorious position . . .

That language mandates the proponent to "show" good cause and the existence of a meritorious position. Fairly interpreted, that means to prove or establish by fact, not merely to aver, assert, or speculate about what the facts might be. The word "show" is a term of art meaning "to prove." People v. Resolute Insurance Company, 46 Cal.App.3d 249, 120 Cal.Rptr. 17 (1975), (the word 'show' is synonymous with 'establish' or 'prove.');

Walker v. Department of Taxation, (In 2 Bouvier's Law Dict. Rawle's Third Revision, page 3067, the word, 'show,' is defined, 'to make apparent or clear by evidence; to prove.) (Citation omitted.)

That clear mandate is not diminished or changed, as the movants suggest, by other language in the July 28, 1995 decision. Although not in the operative and controlling "order" language of the document, it has been suggested the movants need only file an averment on account of the following statement: "Parties must allege facts which, if true, would constitute a meritorious position." That contention is unpersuasive for several reasons.

First, as a matter of construction, if an order or decision contains irreconcilably conflicting provisions, the provision in the "order" controls, as it is the more specific provision on what is required. Suchan v. Suchan, 113 Idaho 102 (1986) (rules of construction for contracts apply to interpretation of court orders); Twin Lake Village Property

1 Ass'n v. Aune, 124 Idaho 132 (1993) (specific provisions control).

2 However, there is no reason to conclude the language "must allege facts"
3 conflicts with the order requiring one to show the existence of a meritorious position. To
4 "allege" has more than one meaning: it means "to state as fact without proof;" or "to bring
5 forward as a reason or excuse." New Merriam-Webster Dictionary, p. 37 (Merriam-Webster,
6 Inc. 1989). Consequently, the clause may be reconciled with the operative language in the
7 order, and consistently with the decision as a whole: "Parties must bring forward as a
8 reason facts which, if true, would constitute a meritorious position." Thus read, one must
9 put admissible facts before the court, which will be assumed to be true for the purposes of
10 the motion.

11 Another reason the above is the proper construction is found in the directive
12 that the proponent "must show both" good cause and meritorious position. Certainly each
13 of the two elements must be established by the same showing. And there is no legitimate
14 argument for the proposition that good cause may be established by averment, either under
15 the decision and order or under I.R.C.P. 55(c) and case law.

16 Also, as pointed out during oral argument, the decision contemplated allowing
17 pleadings only to a limited class of those who are parties to the SRBA. Thus, the entire
18 decision and proceedings thereunder become a rather meaningless and wasteful exercise
19 if a simple averment mimicking IDWR's Response is all the order requires. Every indifferent
20 or ignorant party could photocopy IDWR's Response, file it, and satisfy a showing of
21 averring facts. As explained below, the purpose of the proceeding is to determine if there
22 is a factual basis for a real justiciable controversy. And that requires admissible facts, not
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1 simply the submission of hearsay in the form of IDWR's files, which offer conclusions based
2 on unspecified standards, not a factual basis.

3 Lastly, before turning from the order to the law relating to I.R.C.P. 55(c), it is
4 noteworthy that the sentence requiring the proponent to show good cause and the existence
5 of a defense is in addition to the sentence directing the court to review the matter under
6 criteria similar to Rule 55(c) and requiring a *Response* to be attached. Therefore, the
7 specific showing Judge Hurlbutt had discretion to require is not to be diminished by Rule
8 55(c) criteria nor is filing a *Response* enough. In fact, the extent of the showing required
9 by Rule 55(c), i.e. competent and particular facts beyond mere notice pleading in order to
10 "establish" good cause and a meritorious position, is entirely consistent with the Judge's
11 mandate.

12 As explained at § 2692, Vol. 10, p. 470 - 472, Fed.R.Civ.P., Wright & Miller
13 (1995) (emphasis added):

14 "Although it is important to recognize the differences between setting
15 aside the entry of a default and providing relief from a default judgment, there
16 are some similarities that bear mention. Of prime importance is the fact that
17 the elements advanced in support of a motion under Rule 55(c) will be the
18 same whether relief is sought from a default entry or from a default judgment.
19 As is discussed more fully later, the court may require a showing of an
20 appropriate excuse or explanation for the default, the existence of a
21 meritorious defense to the action, and the absence of any substantial prejudice
22 to the party not in default. On the other hand, how these factors will be
23 evaluated and weighed on a motion under Rule 55(c) lies within the
discretion of the trial court to a considerable degree, and, not surprisingly, the
federal courts are willing to grant relief from a default entry more readily and
with a lesser showing than they are in the case of a default judgment. The
greater lenience toward granting relief from default entries than default
judgments is evidenced by the fact that some courts only require proof of
some of the elements that must be shown on a Rule 55(c) application or are
less demanding concerning the manner and extent of the movant's showing."

1 Here, Judge Hurlbutt exercised that discretion by requiring proof of the two
2 mentioned elements. That discretion is properly exercised by requiring a showing of a
3 meritorious defense in order to establish good cause. McFarland v. Curtis, 123 Idaho 931,
4 936 (Ct.App. 1993); Sun Valley Shopping Center, Inc. v. Idaho Power Company, 119 Idaho
5 87 (1991).

6 As the above quote points out, the Rule 55(c) criteria include the elements of
7 Rule 60(b), although the showing may be persuasive in the more lenient default context than
8 in a default judgment context. But viewing the evidence more liberally should not be
9 confused with not requiring evidence to establish a factual basis. As the dicta of McFarland
10 explains, (123 Idaho at 934): the purpose and reasoning of the two rules is the same: it
11 would be an idle exercise to set aside either a default judgment or a default judgment "if
12 there is in fact no real justiciable controversy." (quoting Hearst Corp. v. Keller, 100 Idaho
13 at 12).

14 Consequently, the factual showing and determination required by Idaho case
15 law under Rule 60(b), e.g. Hearst Corp. v. Keller, Reeves v. Wisenor, 102 Idaho 271 (1979),
16 is applicable to Rule 55(c) cases, especially where the presiding judge orders such a
17 showing.

18 Lastly, the movants may argue that "alleging" facts by pleading satisfies the
19 meritorious defense element under either Rule. It would, however, defeat the purpose of
20 the rules to accept the proposition that simply filing a pleading satisfies the standard. Every
21 pleading filed in a lawsuit presumably is an allegation "well-grounded in fact" by the
22 necessary Rule 11 certification. Thus, all that would be required in every case would be
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1 the filing of an answer.

2 More is required. A movant must make proof by detailed facts. Reeves, 102
3 Idaho at 272; Hearst Corp., 100 Idaho at 11. Thus, the given criteria are that (a) the
4 purpose of the rule is to determine if, in fact, a real controversy exists, (b) facts not of record
5 which are necessary to make a factual determination are presented by affidavit, oral
6 testimony, or deposition testimony (I.R.C.P. 43(e); See Claimants' March 14, 1996 Reply
7 Brief, p. 12-14 citing cases requiring proof in that manner); and (c) the Rules of Evidence
8 apply to this proceeding (I.R.E. 101(b) and (d)(3). Accordingly, the better interpretation of
9 the cases which state that "facts" must be alleged or pled, which, if established would
10 constitute a meritorious position is clarified by analogy to summary judgment proceedings.
11 "Facts" come before a court only by admissible evidence. But once those facts are admitted,
12 they are assumed to be true for the purpose of deciding if there is a meritorious position.
13 Whether or not the trier of fact may later accept that proof as true is irrelevant. But the
14 threshold to determining if a controversy exists must depend on the "facts," not some
15 unmitigated averment lacking any particularity or basis for deciding if anyone may testify
16 to a factual basis for the averment.

17 III. CONCLUSION.

18 It is within the courts discretion to require a factual showing that both excuses
19 untimeliness and establishes the existence of a meritorious position, i.e. the factual existence
20 and not merely an allegation that one might exist. Judge Hurlbutt mandated that level of
21 proof. Further, in order to determine if a real controversy exists, proof by facts, though
22 liberally scrutinized, is the minimum standard. Anything less, including an averment of fact
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1 as in notice pleading, does not serve to achieve the purpose of the rules or the order.

2 Therefore, claimants respectfully request the Special Master to hold that it may
3 make the required "factual determination" only on facts of record, and not on averments
4 unaccompanied by a basis in fact.

5 Dated this 13th day of June, 1996.

6 HEPWORTH, LEZAMIZ & HOHNHORST,
7 CHARTERED

8 By: 

9 Patrick D. Brown
10 Attorneys for Claimants
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CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, with offices at 133 Shoshone St. North, P.O. Box 389, Twin Falls, Idaho 83303, and one of the attorneys for the claimants in this matter, certifies that on the 13th day of June, 1996, he served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

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