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Arizona Corporation Commission

DOCKETED

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Attorneys for Respondent Mark N. Ferguson

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**BEFORE THE ARIZONA CORPORATION COMMISSION**

In the matter of:

Docket No. S-03467A-01-0000

REPUBLIC CASH ADVANCE, INC.  
1616 East Main Street, Suite 226  
Mesa, Arizona 85203

**MOTION TO SET ASIDE  
JUDGMENT AGAINST MARK N.  
FERGUSON**

QUICK CASH ADVANCE, INC.  
1616 East Main Street, Suite 226  
Mesa, Arizona 85203

CURTIS J. BILLUPS  
51089 West Papago Road  
Maricopa, Arizona 85239

MARK N. FERGUSON  
15433 North 45<sup>th</sup> Street  
Phoenix, Arizona 85032

Respondents.

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Respondent Mark N. Ferguson ("Mr. Ferguson") is a former sales representative of co-respondents Republic Cash Advance, Inc. and Quick Cash Advance, Inc. (collectively "RCA"). Mr. Ferguson worked for RCA for, at most, three weeks. Mr. Ferguson had no knowledge of the alleged illegal activities being conducted by RCA, nor was he involved in the management of RCA's operations. Despite his short tenure with RCA and the fact

1 that he was not a management-level employee, Mr. Ferguson was named as a respondent  
2 in the Commission's securities fraud action against RCA and its president, CEO and  
3 principal shareholder, Curtis Billups ("Mr. Billups"). An RCA representative took Mr.  
4 Ferguson's copy of the Temporary Order to Cease and Desist and Notice of Hearing and  
5 told him that RCA would "take care of it" before Mr. Ferguson could read it. Mr.  
6 Ferguson was unaware of his right to request a hearing and the consequence for not doing  
7 so. The Commission defaulted Mr. Ferguson and held him jointly and severally liable for  
8 the judgment against Respondents in the amount of \$1,095,000 in restitution to investors  
9 and \$100,000 as an administrative penalty to the Commission, plus interest. For the  
10 reasons set forth below, Mr. Ferguson respectfully requests the Commission to set aside  
11 the default judgment entered against him, pursuant to Rule 60(c) of the Arizona Rules of  
12 Civil Procedure.

### 13 I. FACTUAL BACKGROUND

14 In or about early July 2001, Mr. Ferguson answered a classified ad for a position as  
15 a sales representative for RCA. Mr. Ferguson was interviewed and hired by Raleigh  
16 Nannestad, RCA's manager. Mr. Ferguson was given a brief training session and provided  
17 with a script to read to potential investors. Mr. Ferguson's primary duties were to place  
18 telephone calls to potential investors and solicit them to invest in RCA. Mr. Ferguson was  
19 not aware that RCA was conducting illegal activities. Mr. Ferguson worked for RCA for a  
20 period of approximately three weeks. During his short tenure with RCA, Mr. Ferguson  
21 earned one commission in the amount of approximately \$5,000.

22 On August 20, 2001, the Securities Division of the Arizona Corporation  
23 Commission ("Commission") issued a Temporary Order to Cease and Desist and Notice of  
24 Opportunity for Hearing ("Temporary Order") against RCA, Mr. Billups and Mr.  
25 Ferguson. The Order alleged that Mr. Ferguson was the "project manager" of RCA's  
26 telemarketing office, and that he was responsible for oversight of RCA's offering and  
27 selling activities.

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1 On August 20, 2001, Mr. Ferguson was served with the Temporary Order.  
2 Immediately upon receiving the Temporary Order, Mr. Ferguson approached Mr. Billups'  
3 assistant and office manager, Tracy, and asked her about the Temporary Order. Tracy  
4 informed Mr. Ferguson that "they've tried to do this before" and they would "take care of  
5 it." Tracy told Mr. Ferguson not to worry, and took Mr. Ferguson's only copy of the  
6 Temporary Order, which Mr. Ferguson had not read. On or about the following day, RCA  
7 closed its doors and informed Mr. Ferguson that he was terminated until further notice.

8 None of the Respondents requested a hearing in response to the Temporary Order.  
9 On July 18, 2002, the Commission entered a default judgment against Respondents. The  
10 Commission ordered Mr. Ferguson to pay, jointly and severally with the other  
11 Respondents, restitution in the amount of \$1,095,000 and an administrative penalty of  
12 \$100,000, plus interest. Mr. Ferguson did not receive notice of the judgment until nearly  
13 five years later, in March 2007, when a writ of garnishment was issued against him and  
14 served on his current employer Liberty Mutual Insurance Co. Upon learning of the  
15 judgment, Mr. Ferguson promptly sought legal counsel to seek relief from the judgment.

## 16 II. LEGAL DISCUSSION

17 Rule 60(c) of the Arizona Rules of Civil Procedure permits the court to set aside a  
18 judgment "upon such terms as are just" for a whole host of reasons, including mistake or  
19 excusable neglect of a party, the fact that the judgment is legally void, or for "any other  
20 reason justifying relief from the operation of the judgment." Ariz. R. Civ. P. 60(c)(1), (4)  
21 & (6). Rule 60(c) "is primarily intended to allow relief from judgments that, although  
22 perhaps legally faultless, are unjust because extraordinary circumstances cannot be  
23 remedied by legal review." *Panzino v. City of Phoenix*, 196 Ariz. 442, 445, 999 P.2d 198,  
24 201 (2000) (internal quotations omitted); *accord Hyman v. Arden-Mayfair, Inc.* 150 Ariz.  
25 444, 447, 724 P.2d 63, 66 (App. 1986). Where the question concerns default judgments,  
26 any doubts should be resolved in favor of setting aside the judgment and handling the case  
27 on the merits. *See Brown v. Beck*, 64 Ariz. 299, 301, 169 P.2d 855 (1946); *Hilgeman v.*  
28 *Am. Mortgage Sec., Inc.*, 196 Ariz. 215, 220, 994 P.2d 1030, 1035 (App. 2000).

1 Rule 60(c)(6) permits the Court to set aside a judgment for “any other reason  
2 justifying relief from the operation of the judgment.” Ariz. R. Civ. P. 60(c)(6). The  
3 purpose of this catch-all provision is “to enable trial courts to grant equitable relief from  
4 default whenever the circumstances are extraordinary and justice requires.” *Webb v.*  
5 *Erickson*, 134 Ariz. 182, 187, 655 P.2d 6, 11 (1982). In *Webb*, the lower court applied  
6 Rule 60(c) to set aside a default judgment against the defendant on a writ of garnishment.  
7 At the time of service, the defendant had just been released from a week-long hospital stay  
8 for a work-related accident. The defendant had been hospitalized several times over the  
9 course of two years for pain and depression related to the accident, and was also involved  
10 in divorce proceedings which resulted in the defendant losing custody of his children. The  
11 defendant claimed that, in light of these conditions, he did not clearly understand the  
12 process served upon him and thus did not answer the writ of garnishment. Several months  
13 later, a default judgment was entered against the defendant. The defendant did not learn  
14 about the judgment until nearly three years after it was entered against him when he was  
15 contacted regarding collection of the judgment. The lower court vacated the judgment  
16 under Rule 60(c)(6). The Court of Appeals held that the combination of circumstances in  
17 the case supported the lower court’s decision to vacate the judgment.

18 The courts have applied Rule 60(c) to vacate a default judgment against an  
19 employee who reasonably relied upon his employer’s representations that the employer  
20 would address the lawsuit on the employee’s behalf. *See Martin v. Rossi*, 18 Ariz.App.  
21 212, 501 P.2d 53 (1972). In *Martin*, the defendant police officer was served with a  
22 summons and complaint in an action arising from a car accident that occurred while the  
23 officer was acting within the scope and course of his employment. Upon receiving service  
24 of the complaint, the officer met with the legal advisor for the police department who  
25 advised the officer that he would probably be defended by the city. The legal advisor  
26 informed the officer not to worry and that he would be contacted if there were any  
27 problems. The officer did not hear anything for several months, until he was advised that a  
28 default judgment had been entered against him. The officer moved to set aside the

1 judgment and the lower court granted the officer's request. The Court of Appeals upheld  
2 the lower court's decision to set aside the judgment based upon the reasonableness of the  
3 officer's conduct.

4 Like in *Webb* and *Martin*, the circumstances here justify the setting aside of the  
5 judgment against Mr. Ferguson. Like the plaintiff in *Martin*, Mr. Ferguson reasonably  
6 relied on his employer's representations that they would "take care of" the Temporary  
7 Order on his behalf. At the time he was served with the Order, Mr. Ferguson had only  
8 worked for RCA for a period of approximately two weeks. Mr. Ferguson was not a  
9 management-level employee of RCA, but instead was a rank and file sales representative.  
10 Mr. Ferguson had no knowledge of alleged illegal scheme being conducted by RCA.  
11 Upon receiving service of the Temporary Order, Mr. Ferguson approached Tracy, the  
12 assistant to Mr. Billups, RCA's CEO, president and primary shareholder, and the office  
13 manager. Tracy informed Mr. Ferguson that "they have tried to do this before," and  
14 assured Mr. Ferguson that RCA would "take care" of the Temporary Order. Tracy also  
15 took Mr. Ferguson's only copy of the order before he had the opportunity to review it.  
16 Critically, Mr. Ferguson was not aware that he had a right to request a hearing, or that a  
17 default judgment could be entered against him if he failed to respond. Although  
18 admittedly naïve, Mr. Ferguson believed that RCA would handle the matter as promised.  
19 Mr. Ferguson was terminated by RCA the day after he was served with the Order.

20 Mr. Ferguson believed he was hired by RCA to work in a lawful and legitimate  
21 sales position. Mr. Ferguson was completely unaware of the alleged illegal scheme being  
22 conducted by RCA. Mr. Ferguson was not, as the Commission alleged, a project manager  
23 or management-level employee of RCA. Mr. Ferguson did not orchestrate the alleged  
24 telemarketing scheme, nor did he profit from the millions of dollars RCA and Mr. Billups  
25 allegedly stole from defrauded investors. Instead, Mr. Ferguson earned the gross sum of  
26 approximately \$5,000 during the three weeks he was employed by RCA. Despite Mr.  
27 Ferguson's low-ranking role within RCA, as well as the short tenure with the company, the  
28 Commission held Mr. Ferguson jointly and severally liable with RCA and Mr. Billups for

1 a judgment in the amount of \$1,195,000, plus interest. Under these circumstances, the  
2 Commission should exercise its discretion to set aside the judgment against Mr. Ferguson.

3 **III. CONCLUSION**

4 For the foregoing reasons, Mr. Ferguson respectfully requests that the Commission  
5 vacate the default judgment entered against Mr. Ferguson.

6 RESPECTFULLY SUBMITTED this 6th day of August, 2007.

7  
8 OGLETREE, DEAKINS, NASH, SMOAK &  
9 STEWART, P.C.

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11 By   
12 Tracy A. Miller  
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16 Attorney for Respondent Mark N.  
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CERTIFICATE OF SERVICE

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I hereby certify that on the 6th day of August, 2007, I sent a copy of the foregoing,  
via U.S. Mail, postage prepaid to:

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Geoffrey Butzine  
Arizona State Corporation Commission  
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Phoenix, Arizona 85007  
Attorneys for Claimant

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10 **BEFORE THE ARIZONA CORPORATION COMMISSION**

11 In the matter of:  
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21 MARK N. FERGUSON  
22 15433 North 45<sup>th</sup> Street  
23 Phoenix, Arizona 85032

24 Respondents.

Docket No. S-03467A-01-0000

**ORDER**

25 This matter came before the Commission pursuant to the Motion to Set Aside  
26 Judgment Against Mark N. Ferguson, and good cause appearing therefor,

27 IT IS ORDERED vacating the default judgment entered against Mark N. Ferguson  
28 on July 18, 2002.

DATED this \_\_\_\_\_ day of August, 2007.

ARIZONA CORPORATION COMMISSION

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