

2011

Utah Down Syndrome Foundation v. Utah Down Syndrome Association : Opening Brief of Appellant

Utah Supreme Court

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IN THE UTAH SUPREME COURT

UTAH DOWN SYNDROME
FOUNDATION, INC.,

Plaintiff/Appellee,

vs.

UTAH DOWN SYNDROME
ASSOCIATION, et al.,

Defendants/Appellants.

Third District Court No. 070902087

Appellate Case No. 20110205-SC

THE MEMBERS OF THE UPTOWN
DOWNS AND UP WITH DOWN, the Salt
Lake and Utah County Chapters of the
Utah Down Syndrome Foundation,

Intervener.

OPENING BRIEF OF APPELLANT

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FILED

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Current Parties

Utah Down Syndrome Foundation, Inc., a Utah non-profit corporation

Donald D. Gilbert, Jr., Judgment Debtor and Appellant

Former Parties

Eric Holman, Cathy Collard, Pam Holman, Jill Austin, Lisa Kingsbury,

Kara Olander and Mellanie Taylor

The Members of Uptown Downs and Up With Downs, the Salt Lake and Utah County

Chapters of the Utah Down Syndrome Foundation

Utah Down Syndrome Association (dismissed 6/15/09 w/prejudice) (R. 1171-76).

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JURISDICTIONAL STATEMENT

The Utah Supreme Court has jurisdiction in this case and appeal pursuant to Utah Code Ann. § 78A-3-102.

NOTICE OF RELATED AND COMPANION APPEAL

The Appellant Donald D. Gilbert, Jr. (“**D. Gilbert**”) respectfully notifies and asks this Court to take Judicial Notice under Rule 201(b) of the Utah Rules of Evidence that there is pending before this Court a related and companion appeal styled: *In the Matter of the Discipline of Donald D. Gilbert, Jr., SBN 6733, Respondent, Third-Party Plaintiff and Appellee v. Utah Down Syndrome Foundation, Inc., a Utah not for profit corporation, Appellant and Third-Party Defendant*, Appellate No. 20110004-SC.

STATEMENT OF ISSUES & STANDARD OF REVIEW

Issue No. 1. Whether the District Courts’ June 13, 2008 Order and Judgment of Disgorgement of Funds and January 14, 2011 Minute Entry Order reaffirming the July 13, 2008 Order are void as a matter of law because the district courts lacked *in personam* jurisdiction over D. Gilbert who was never named as a defendant or served personally with a summons and complaint in the action as required under Rule 4 of the Utah Rules of Civil Procedure and applicable case law.

Preservation of Issue No. 1 in the Trial Court and Standard of Review. Issue No. 1 was properly raised before and preserved in the trial courts. (R. 1299-1303). The district court’s denial of D. Gilbert’s Rule 60(b) Motion to Vacate the Court’s January 14, 2011 Order denying D. Gilbert’s Rule 60(b)(4) Motion to Vacate, Expunge and Set Aside an Order and Judgment is reviewed for legal and constitutional correctness. The

Appellate Court in this appeal is not required to defer to the discretion of the district court under the abuse of discretion standard when *in personam* jurisdiction is properly raised below. The trial courts' orders are reviewed for legal correctness. *Jackson Construction Co., Inc. v. Marrs*, 100 P.3d 1211, 1214 (Utah 2004); *State Dep't. of Soc. Servs. v. Vigil*, 784 P.2d 1130, 1132 (Utah 1989); *Garcia v. Garcia*, 712 P.2d 288, 290 N.4 (Utah 1986).

Issue No. 2. Whether the District Courts' entry of the June 13, 2008 Order and Judgment of Disgorgement of Funds against D. Gilbert and the January 14, 2011 Minute Entry Order Denying D. Gilbert's Rule 60(b)(4) Motion to Vacate, Expunge and Set Aside the June 13 Order violated D. Gilbert's Utah State and United States Constitutional Procedural Due Process Rights that he be properly informed and served with legal process of a pending legal action against him and provided an opportunity to defend himself against the action.

Preservation of Issue No. 2 in the Trial Court and Standard of Review. Issue No. 2 was properly raised before and preserved in the trial courts. (R. 1299-1303). The court's denial of D. Gilbert's Rule 60(b) Motion to Vacate the District Court's January 14, 2011 Order denying D. Gilbert's Rule 60(b)(4) Motion to Vacate, Expunge and Set Aside an Order and Judgment is reviewed for legal and constitutional correctness. The Appellate Court in this appeal is not required to defer to the discretion of the district court under the abuse of discretion standard when *in personam* jurisdiction is properly raised below. The trial courts' orders are reviewed for legal correctness. *Jackson Constr.*, 100 P.3d at 1214; *Vigil*, 784 P.2d at 1132; *Garcia*, 712 P.2d at 290 N.4.

**CONSTITUTIONAL AND APPLICABLE UTAH
RULES OF CIVIL PROCEDURE**

ISSUE NO. 1 – DETERMINATIVE LAW

Utah R. Civ. P. 60(b)(4). Relief from Judgment or Order.

.....
(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

.....
.....
(4) the judgment is void;
.....
14th Amendment to the United States Constitution, § 1 (Due Process Clause); and
Utah State Constitution, Art. I, § 7 (Due Process Clause).

Utah R. Civ. P. 4. Process.

(a) Signing of summons. The summons shall be signed and issued by plaintiff or plaintiff's attorney.

(b)(i) Time of service. In an action commenced under Rule 3(a)(1), the summons together with a copy of the complaint shall be served no later than 120 days after the filing of the complaint unless the court allows a longer period of time for good cause shown. If the summons and complaint are not timely served, the action shall be dismissed, without prejudice on application of any party or upon the court's own initiative.

.....
(b)(ii)(A) the plaintiff may proceed against those served, and

.....
(c) Contents of summons.

(c)(1) The summons shall contain the name of the court, the address of the court, the names of the parties of the action, and the county in which it is brought. It shall be directed to the defendant, state the name, address and telephone number of the plaintiff's attorney, if any, and otherwise the plaintiff's address and telephone number. It shall state the time within which the defendant is required to answer the complaint in writing, and shall notify the defendant that in case of failure to do so, judgment by default will be rendered against the defendant. It shall state either that the complaint is on file with the court or that the complaint will be filed with the court within ten days of service.

.....

ISSUE NO. 2 – DETERMINATIVE LAW

14th Amendment to the United States Constitution, § 1 (Due Process Clause); and Utah State Constitution, Art. I, § 7 (Due Process Clause).

STATEMENT OF THE CASE

Nature of the Proceedings. This is an appeal from a final Order entered as a Minute Entry on January 14, 2011 by the Honorable Judge Paul G. Maughan, reaffirming the June 13, 2008 Order and Judgment of Disgorgement of Attorney Fees entered by the Honorable Judge Robert Faust against D. Gilbert and denying D. Gilbert's motion to vacate and expunge or set aside an order and judgment entered against him by Judge Faust's June 13, 2008 Minute Entry Order, this latter order is also appealed here. The June 13, 2008 and January 14, 2011 Minute Entry and Orders were entered in the Third District Court, Salt Lake County, State of Utah.

Course of Proceedings. This action was originally commenced by the Utah Down Syndrome Foundation, a Utah not for profit corporation ("UDSF") by filing a complaint on February 5, 2007 in the district court. (R. 1-11). The complaint named as defendants Utah Down Syndrome Association, Eric Holman, Cathy Collard, Pam Holman, Jill Austin, Lisa Kingsbury, Kara Olander, and Mellanie Taylor. (R. 2). The complaint asserted several claims, including: (1) an accounting; (2) conversion; (3) misappropriation of confidential/proprietary information; (4) breach of fiduciary duty; (5) an injunction for unauthorized and deceptive use of the names "Utah Down Syndrome Foundation", "Up With Downs", and "Uptown Downs" or similar names; and (6) injunctive relief to enjoin defendants from using USDF's mailing lists, business materials

and any related UDSF proprietary forms and materials. (R. 1-11). The defendants were originally represented by legal counsel, Mr. Graham H. Norris only. (R. 12). D. Gilbert, at all relevant times, has been and is a member in good standing of the Utah State Bar (“USB No. 6733”). D. Gilbert is not and has never been a party to this action.

Mr. Norris withdrew as counsel for the defendants on June 14, 2007. (R. 55-56). D. Gilbert entered an appearance of counsel of record for certain Interveners in this action, the members of Uptown Downs (“**Uptown**”) and Up With Downs (“**Up**”) on July 13, 2007. (R. ____). Various motions were filed involving disputes between the various parties that included claims to certain funds Uptown and Up had in the bank account and that they had paid to D. Gilbert for legal services rendered. (R. 150-196: 835-850; 956-965). Later, during the course of these proceedings in the district court, this ended the case (R. 1312-14) and certain individual defendant members of Uptown and Up were dismissed as parties. (R. 919, 1115-19; 1173-80).

UDSF filed a motion in this case claiming the monies paid by Uptown and Up to D. Gilbert for attorney fees were their funds and sought an order against D. Gilbert (not a party) for disgorgement of the funds. (R. 835-850). Another concurrent motion also sought the same relief against Uptown and Up claiming these entities were fictitious business names of UDSF. (R. 150-156).

D. Gilbert did not respond individually to the disgorgement motion but did for Uptown and Up. Throughout the filing of these motions seeking disgorgement of attorney fees from D. Gilbert and the lower courts’ hearings on these motions, D. Gilbert had never been named as a party nor served process pursuant to Rule 4 of the Utah Rules

of Civil Procedure. The Court, Judge Robert Faust presiding, entered an Order of Disgorgement against seven individuals in an open court proceeding held on March 10, 2008 and directed D. Gilbert should disgorge the funds. (R. 1336; Tr. at 76). Judge Faust further ordered during the March 2008 hearing that if D. Gilbert did not disgorge the funds, then his individual clients must make the necessary disgorgement. (R. 1336; Tr. at 86). At no time during these March 10, 2008 proceedings before Judge Faust, did his Honor ever address or consider the fundamental constitutional principals of *in personam* jurisdiction. That is, the Court did not address the glaring and undisputed procedural facts that D. Gilbert had not been served Rule 4 process nor named as a party defendant at any time in the case while it was pending before Judge Faust. Although the Court did suggest the possibility of entering a contempt order against D. Gilbert during this hearing, the court chose to give Mr. Gilbert a “free pass”. (R. 1336; Tr. at 54, 89). The Court’s March 2008 bench hearing rulings against the defendants and D. Gilbert were followed-up by a March 11, 2008 Minute Entry. (R. 907-911).

Following the Court’s hearing in March 2008, Mr. Gilbert was terminated by his clients and withdrew on April 14, 2008, (R. 920-21) UDSF’s counsel then submitted a proposed order on June 12, 2008 based in part upon Judge Faust’s March 2008 oral argument and hearing comments and order, without providing a copy to D. Gilbert. (R. 1078-81). Thus, denying D. Gilbert the most basic procedural rights of an opportunity to review and, if necessary, oppose the proposed order as required under Rule 7(f)(2) of the Utah Rules of Civil Procedure, which order included a judgment against D. Gilbert that he must disgorge the funds. This order was entered by the Court on June 13, 2009

without any consideration by Judge Faust of D. Gilbert's various due process rights. (R. 1078-81; 1127-29). D. Gilbert in November 2010 filed a motion to vacate the June 2009 judgment and expunge it from the record based on *in personam* jurisdictional grounds. (R. 1187-90). This motion was assigned to Judge Paul Maughan in the Third District Court. (R. 1299-1303). Judge Maughan denied the motion to vacate, relying in part upon Judge Faust's June 13, 2008 Order and Judgment against D. Gilbert. Similar to Judge Faust's actions in entering his June 13, 2008 Order, Judge Maughan patently ignored D. Gilbert's most basic *in personam* and constitutional rights in ruling upon D. Gilbert's motion to vacate. (R. 1187-90). It is from Judge Maughan's Minute Entry Order of January 14, 2011 denying D. Gilbert's motion to vacate and expunge Judge Faust's June 13, 2008 Order and Judgment and Judge Faust's June 13, 2008 Order to disgorge entered against D. Gilbert that this appeal is filed. (R. 1299-1303).

STATEMENT OF THE FACTS

1. On or about January 31, 2007, Appellee UDSF filed and served this action. Named as defendants were Eric Holman, Cathy Collard, Pam Holman, Jill Austin, Lisa Kingsbury, Kara Olander, and Mellanie Taylor. D. Gilbert was never named or served as a defendant in this action. (R. 1-11).

2. The named defendants initially were represented by Graham H. Norris, Jr., who filed and served an answer on behalf of the defendants on or about March 6, 2007. (R. 12-18).

3. Subsequently, on or about March 29, 2007, UDSF moved for Partial Summary Judgment and Injunctive Relief against the named defendants, but not against D. Gilbert, who was neither a party nor counsel to any party in this case. (R. 25-47).

4. Graham H. Norris, Jr., who was then counsel for the defendants, failed to timely file and serve properly an opposition to the Summary Judgment Motion. (R. 48-49). On or about May 3, 2007, Partial Summary Judgment and Injunctive Relief was entered by a default order (hereinafter referred to as the “**Default Order**”) against the named defendants, Eric Holman, Cathy Collard, Pam Holman, Jill Austin, Lisa Kingsbury, Kara Olander and Mellanie Taylor by UDSF. (R. 51-54).

5. It should be noted that D. Gilbert was not a defendant in the action at any time including when the March 10, 2008 Order was entered against him (R. 1187). The proposed Default Order was never presented to or served upon defense counsel of record, Graham H. Norris, Jr. (R. 51-54). Mr. Norris was never provided a copy of the Default Order required by Rule 7(f)(2) of the Utah Rules of Civil Procedure by UDSF’s counsel to approve the form and content of the proposed Default Order. (R. 51-54). There was no signature line on the Default Order where Mr. Norris was to sign the proposed order for his required approval. (R. 53). Nonetheless, counsel for UDSF presented to the district court the improper proposed Default Order, without the foregoing Utah Rules of Civil Procedure requirements, which was signed by Judge Maughan on April 30, 2007 and entered on May 3, 2007. (R. 51-54).

6. The relief granted by the Default Order is different than and more expansive than the relief requested in UDSF’s Motion. (R. 51-54). Paragraph 2(a) of the

Default Order prepared by UDSF's counsel and submitted to the district court for signature contains the words "Return all funds taken from **or on deposit in** Zion's Bank... and First American Credit Union." (R. 52). (Emphasis added). The words "**or on deposit in**" do not appear in the Motion. (R. 46). (Emphasis added). This particular phrase "**or on deposit in**" comes only from the Default Order and was never reviewed or approved by Norris as required by procedure. (R. 53).

7. The District Court, either by mistake or in reliance on the errors and omissions contained in the proposed Default Order, entered by default, significant and expansive relief which was never raised in or requested in the motion. (R. 46). By adding the foregoing particular phrases, referenced in paragraph six above, UDSF's counsel made the Default Order contradict itself. The contradictions are contained in the Default Order's paragraphs 2(a) and 2(h). As paragraph 2(a) of the Default Order reads, the individual defendants are to return all funds on deposit in the accounts, but paragraph 2(h) of the Default Order then purports to restrain the same defendants from accessing those accounts, which access would be necessary for defendants to return the funds on deposit. (R. 52-53).

8. On or about July, 2007, D. Gilbert then retained by UPTOWN DOWNS and UP WITH DOWNS, two Chapters of UDSF, moved to intervene in the action as legal counsel only in an attempt to correct the record and rectify the clear improprieties of the Default Order filed *ex parte* in this action. (R. 78-92). Judge Maughan granted the motion for intervention. (R. 752-756). However, after multiple motions were filed but before they could be heard, the case was thereafter administratively reassigned to Judge

Faust, who was not presiding when the Default Order was entered by Judge Maughan. (R. 871). No correction to this improperly prepared and *ex parte* filed Default Order was ever made. (See Court's Docket, R. 878-881; 899-901).

9. Before the reassignment of the case, on or about September 21, 2007, UDSF filed and served a "Motion for Entry of Judgment and For Order to Show Cause" seeking an order requiring the named defendants to repay, among other things, the legal fees that had been paid to D. Gilbert from the named Chapter defendants' accounts for services rendered. (R. 150-196). As well as to require D. Gilbert to show cause why he should not be held in contempt for not releasing funds held in his attorney trust account. (See UDSF's Motion for Entry of Judgment and For Order to Show Cause filed September 21, 2007, R. 150-196).

10. On or about November 1, 2007, after multiple delays by UDSF, but before UDSF's Motion for Entry of Judgment and For Order to Show Cause could be heard or decided, it then filed a "Motion for Disgorgement of Funds" requesting the district court order D. Gilbert, who was not a party to the action, to disgorge the funds he had received from his clients, UDSF chapters UP WITH DOWNS and UPTOWN DOWNS, which were the self-same funds UDSF had asked the individual defendants be required to "repay" to UDSF in its Motion for Entry of Judgment and for Order to Show Cause. The apparent grounds these Chapters were only fictitious business names of UDSF and the funds used by the Chapters to pay fees to D. Gilbert actually belonged to UDSF and not to the Chapters represented by D. Gilbert. (R. 150-196). (See also proof of Chapter independence/autonomy copies, R. 349-370; 1243-45).

11. Historically, the UDSF Chapters had always raised their own funds and paid their own expenditures, which include attorney fees. (R. 336-370). UDSF admits these facts in its original complaint and several other pleadings. (*See* R. 1-11). Rule 17(d) of the Utah Rules of Civil Procedure provides that unincorporated associations, such as UP WITH DOWNS and UPTOWN DOWNS can sue and be sued. Rule 17(d) contemplates persons in unincorporated associations transact business. *Hebertson v. Willowcreek Plaza*, 923 P.2d 1389 (Utah 1996). Utah law allows for unincorporated associations to transact business in the State of Utah. *Id.*

12. D. Gilbert, who was not a party to the action, never personally responded to UDSF's Motion for Disgorgement of Funds, but only briefed and argued the issue in behalf of his clients, UP WITH DOWNS and UPTOWN DOWNS, the Chapter Interveners in the action. (*See* Memorandum in Opposition to Motion for Disgorgement of Funds, R. 872-877).

13. In the Minute Entry issued by the district court on March 11, 2008 (R. 907-911), the district court granted UDSF "[a]ny remaining issues regarding the disgorgement of funds" and at the same time entered a judgment against the seven (7) individual defendants for the self-same funds creating what might be construed as a double recovery for UDSF. Additionally, the Minute Entry states that it will stand as the order of the court. (R. 909).

14. In open court on March 10, 2008, Judge Faust stated that if D. Gilbert did not disgorge the funds, then the individual defendants would have to pay over the funds to the UDSF. (*See* Transcript of March 10, 2008, pp.s 85-87, R. 1336).

15. Pursuant to the Court's March 11, 2008 Minute Entry, without any direction to do so and in spite of the fact the Minute Entry states that it will be the order of the district court, UDSF's counsel prepared and submitted an order and judgment without any opportunity for D. Gilbert to review or oppose it required under Rule 7(f)(2), Utah R. Civ. P., and the District Court proceeded without *in personam* jurisdiction to enter a money judgment against D. Gilbert. (*See* Judgment, R. 1078-81).

16. D. Gilbert withdrew as counsel for the individual defendants and Uptown and Up on April 14, 2008. (R. 920-921).

17. D. Gilbert then filed a motion to vacate, expunge or other relief from the district court on November 29, 2010 setting aside any money judgment(s) against him as void for lack of jurisdiction. (R. 1187-1284).

18. When D. Gilbert disgorged the \$11,000.43 of remaining funds he held in trust, UDSF thought he should have returned a more significant amount, and a complaint was filed with the Utah State Bar against D. Gilbert by Suzanne Smith, who was then claiming to be UDSF's "president." (R. 1193). An action precipitated by Suzanne Smith is now proceeding in the Fourth Judicial District by the Utah State Bar (the "OPC case") as a result of her bar complaint. D. Gilbert's professional standing and right to practice law are now unjustly at stake as a result of this matter. The OPC case is now upon interlocutory appeal by third-party defendant UDSF, is pending in this Court and styled *In the Matter of the Discipline of Donald D. D. Gilbert, Jr., v. Utah Down Syndrome Foundation*, Utah Supreme Court, Case No. 20110004-SC.

19. On January 14, 2011 a final order was entered as a minute entry by the Honorable Judge Paul G. Maughan, reaffirming the June 13, 2008 Order and Judgment of Disgorgement of Attorney Fees entered by the Honorable Judge Robert Faust against D. Gilbert and denying D. Gilbert's Motion to Vacate and Expunge or Set Aside an Order and Judgment entered against him by Judge Faust's Minute Entry Order. The June 13, 2008 and January 14, 2011 Orders and Minute Entry were entered in the Third District Court, Salt Lake County, Utah. (R. 1078-81; 1299-1303). Both Orders are the subject of this appeal.

SUMMARY OF ARGUMENT

D. Gilbert is an active member of the Utah State Bar and practicing attorney in the courts of the State of Utah. The issues raised in this appeal are central to and underly critical facts and procedural and constitutional rights that may and will impact D. Gilbert's future status as to his ability to continue to enjoy the privileges and rights afforded him by this Court and the State of Utah to continue to practice law, his life's chosen profession. Based on the career continuation issues facing D. Gilbert in this and the companion appeal (referenced on p. 1 in this opening brief) before this Court are two of the most fundamental principles of law that are at the center of this appeal:

First, that a person may not be deprived of his property without first being afforded due process of law.

No principle is more fundamental to the integrity of a society that claims allegiance to the rule of law than the principle that a person may not be deprived of his property without first being afforded due process of law. This guarantee is enshrined in both the United States Constitution and the Constitution of Utah. U.S. Const. amend. XIV, § 1; Utah Const. art. I, § 7. That due process of law is owed in every instance is a self-evident

proposition. Measuring the amount of process that is due in any particular setting is more difficult. Nevertheless, “[w]e long ago succinctly summarized the fundamental features of due process, observing that it requires that notice be given to the person whose rights are to be affected. It hears before it condemns, proceeds upon inquiry, and renders judgment only after trial.” *Pangea Techs., Inc. v. Internet Promotions, Inc.*, 2004 UT 40, ¶ 8, 94 P.3d 257 (internal quotation marks omitted). The bare essentials of due process thus mandate adequate notice to those with an interest in the matter and an opportunity for them to be heard in a meaningful manner. See *Chen v. Stewart*, 2004 UT 82, ¶ 68, 100 P.3d 1177.

Brigham Young Univ. v. Tremco Consultants, Inc., 2007 UT 17 at ¶ 28, 156 P.3d 782.

Second, a money judgment may not, under most circumstances, be entered against a person who has not been named a party to an action and served process.

In most instances, the guarantee of due process prohibits the enforcement of a money judgment against a person who has not been designated a party or served with process. *Richards v. Jefferson County*, 517 U.S. 793, 798, 116 S.Ct. 1761, 135 L.Ed.2d 76 (1996). Absent due process, a court wields no power over an individual because a court only acquires jurisdiction over a party through proper service of process, which provides notice to the defendant that he is being sued and that he must appear and defend himself. *Meyers v. Interwest Corp.*, 632 P.2d 879, 880 (Utah 1981).

Id. at ¶ 31.

Under the compelling facts and circumstances of this case and the mandatory application of the foregoing two most critical doctrines in our legal system raised in this appeal, the orders of the District Court appealed to this Court and entered against D. Gilbert should be reversed, vacated and expunged. Only then, can it be respectfully said here that justice has been properly meted out in this appeal.

ARGUMENT

POINT I

THE TRIAL COURTS COMMITTED PLAIN REVERSABLE ERROR BY ENTERING ORDERS AGAINST D. GILBERT THAT WERE VOID AS A MATTER OF LAW BECAUSE THE COURTS LACKED *IN PERSONAM* JURISDICTION OVER D. GILBERT FOR THE FAILURE TO SERVE D. GILBERT WITH FORMAL PROCESS.

A. Rule 60(b)(4) of the Utah Rules of Civil Procedure Entitles D. Gilbert Relief From the District Court Orders and Judgments Where They are Void for Lack of *In Personam* Jurisdiction.

On November 29, 2010 D. Gilbert filed a motion under Rule 60(b)(4) of the Utah Rules of Civil Procedure to vacate, expunge or for other relief seeking to set aside the March 10, 2008 Order of Disgorgement of Fees based on the ground the District Courts lacked *in personam* jurisdiction.

Rule 60(b)(4) of the Utah Rules of Civil Procedure provides in relevant part:

On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (4) the judgment is void; A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

When a motion is based on subpart (4) of Rule 60(b) for lack of jurisdiction, the district court has no discretion and if jurisdiction is lacking, the judgment cannot stand without denying due process to the one against whom it runs. *See Franklin Covey Client Sales v. Melvin*, 2000 UT. App. 110, 8; 2 P.3d 451.

A denial of a motion to vacate a judgment under Rule 60(b) is ordinarily reversed only for an abuse of discretion. However, when a motion to

vacate a judgment is based on a claim of lack of jurisdiction, the district court has no discretion; if jurisdiction is lacking, the judgment cannot stand without denying due process to the one against whom it runs. **Therefore, the propriety of the jurisdictional determination, and hence the decision not to vacate, becomes a question of law upon which we do not defer to the district court.**

Id. At 454 (citing *State Dep't of Soc. Servs. v. Vijil*, 784 P.2d 1130, 1132 (Utah 1989))

(citations omitted) (emphasis added).

D. Gilbert has brought this motion under Rule 60(b)(4) of the Utah Rules of Civil Procedure because he was never made a party to the action, was never served with any summons and complaint and was never afforded the rights to defend himself which defendants in civil actions are to be afforded. This court denied his due process rights by entering a money judgment against him without jurisdiction to enter any judgment against him.

B. UDSF's Motions for Disgorgement of Funds Filed Against D. Gilbert and the District Courts' Orders of June 13, 2008 and January 14, 2011 Entered Against D. Gilbert are *Prima Facie* Void Because D. Gilbert was Never Served Under Rule 4 of the Utah Rules of Civil Procedure.

From the commencement of this case to the time of filing this appeal, D. Gilbert has never been served a summons and complaint in this case. Rule 4 of the Utah Rules of Civil Procedure governs service of process. *Jackson Constr. Co., Inc. v. Marrs*, 2004 UT. 89; 100 P.3d 1211, 1214.

For a court to acquire jurisdiction, there must be a proper issuance and service of summons. *Murdock v. Blake*, 26 Utah 2d 22, 484 P.2d 164, 197 (1971). This requirement ensures that an individual will not be deprived of "life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1; Utah Const. art. I, § 7. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an

opportunity to present their objections.” *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652 (1950); *see also Carlson v. Bos*, 740 P.2d 1269, 1271 (Utah 1987) (“Service of process implements the procedural due process requirement that a defendant be informed of pending legal action and be provided with an opportunity to defend against the action.”).

Id. at 1214. “Service of process implements the procedural due process requirement that a defendant be informed of pending legal action and be provided with an opportunity to defend against the action.” *Carlson v. Bos*, 740 P.2d 1269, 1271 (Utah 1987).

“Service of summons in conformance with the mode prescribed by statute is deemed jurisdictional, for it is service of process, not actual knowledge of the commencement of the action, which confers jurisdiction.” *Murdock v. Blake*, 484 P.2d 164, 167 (Utah 1971). “The proper issuance and service of summons is the means of invoking the jurisdiction of the court and of acquiring jurisdiction over the defendant; these cannot be supplanted by mere notice by letter, telephone or any other such means.”

Id.

“Personal jurisdiction . . . is the court’s ability to exercise its power over a person for the purposes of adjudicating his or her rights and liabilities. A lack of [personal jurisdiction] is fatal to a court’s authority to decide a case with respect to a particular litigant.” *State Dep’t of Soc. Servs. v. Vijil*, 784 P.2d 1130, 1132 (Utah 1989) (citations omitted).

The Utah Rules of Civil Procedure owe their existence to the constitutional guarantee of due process of law. They “[are] designed to provide a pattern of regularity of procedure which the parties and the courts [can] follow and rely upon.” *Gillett v.*

Price, 2006 UT 24, ¶ 8, 135 P.3d 861 (brackets in original) (internal quotation marks omitted).

In most instances, the guarantee of due process prohibits the enforcement of a money judgment against a person who has not been designated a party or served with process. *Richards v. Jefferson County*, 517 U.S. 793, 798, 116 S.Ct. 1761 (1996). Absent due process, a court wields no power over an individual because a court only acquires jurisdiction over a party through proper service of process, which provides notice to the defendant that he is being sued and that he must appear and defend himself. *Meyers v. Interwest Corp.*, 632 P.2d 879, 880 (Utah 1981).

POINT II

THE DISTRICT COURTS' ENTRY OF THEIR JUNE 2008 ORDER OF DISGORGEMENT AND JANUARY 2011 ORDER DENYING D. GILBERT'S RULE 60(b)(4) MOTION TO VACATE, VIOLATED D. GILBERT'S UTAH AND UNITED STATES CONSTITUTIONAL DUE PROCESS RIGHTS AND ARE VOID FOR LACK OF *IN PERSONAM* JURISDICTION.

The original complaint was filed in this case and did not name D. Gilbert as a party nor did it seek a legal or equitable remedy of disgorgement of funds from any of the named defendants. (R. 1-11). At no time throughout the entire proceedings was an amended complaint ever filed naming D. Gilbert as a party defendant. (R. 1187-1284). Without the requisite personal service of process upon D. Gilbert in this action, the two orders against D. Gilbert by the district court are invalid. (R. 1187-1284).

In support of the motion, the nonparties demonstrated without contradiction that they had not been named as defendants in the action, had not been served with process notifying them of any claim for money damages against them, and had not been afforded the opportunity to defend such claim. A court has no power to grant relief against an individual or entity not named as a party and not properly summoned before the court. . . .

“In challenge to service of process, the fact that a defendant has received prompt notice of the action is of no moment. Notice received by means other than those authorized by statute does not bring a defendant within the jurisdiction of the court.” (*Macchia v. Russo*, 67 N.Y.2d 592, 595, 505 N.Y.S.2d 591, 496 N.E.2d 680.)

Hartloff v. Hartloff, 296 A.D.2d 849, 850 (N.Y. App. Div. 2002) (citation omitted) (emphasis added).

D. Gilbert entered his appearance in this case as substitute counsel for the individually named defendants on September 26, 2007. (R. 280-281). He did so with the goal and scope of setting aside the District Courts' May 3, 2007 Order entered against the defendants. (R. 197-279). D. Gilbert filed a comprehensive combined motion and supporting legal memorandum to support his motion for the defendants. (R. 197-279).

On December 21, 2007 UDSF filed a motion for disgorgement of \$22,500.00 against D. Gilbert. He had been paid these sums by the defendants for the rendering of his legal services from the UDSF Chapter accounts after the May 3, 2007 District Court Order was entered. (R. 876). At the time of the filing of this motion to disgorge, again D. Gilbert was not a named party in the case and had not been served with proper process. (R. 873). The Interveners opposed the motion to disgorge by filing a memorandum in opposition to the motion on behalf of the defendants and Interveners. (R. 872-877).

An extensive oral argument was conducted before the Court on March 10, 2008, the Honorable Judge Robert Faust presiding, regarding UDSF's motion to disgorge together with certain other motions. (R. 1336).

On March 11, 2008 the District Court, the Honorable Judge Faust presiding made a Minute Entry in the case granting UDSF's motion for entry of judgment and motion for disgorgement of \$22,500.00 against D. Gilbert individually. (R. 907-910).

On April 14, 2008 D. Gilbert withdrew as counsel of record. (R. 920-921).

On May 12, 2008, after D. Gilbert was no longer counsel of record for the defendants, UDSF filed a second motion for disgorgement of funds against D. Gilbert requesting he be ordered to disgorge an additional \$7,500.00 he was paid by the UDSF Chapters, after the entry of the Court's May 3, 2007 Order. (R. 956-965). This motion did not raise any claims of or for sanctions or contempt against D. Gilbert. (R. 956-965). At the time of the filing of this second motion to disgorge, D. Gilbert was not a party to the action.

Diligent research has revealed no Utah case authority to allow a district court to disregard the constitutional underpinnings of *in personam* jurisdiction and *sua sponte* enter a money judgment against a non-party. Only when a lawyer acting as an officer of the court either in a judicial proceeding in the presence of the court or in some instances is engaging in contemptuous conduct outside the court's presence, may a court invoke its inherent contempt powers against an attorney or a party thereby circumventing the requirements of *in personam* jurisdiction. However, even when a court exercises its contempt powers, the court's inherent powers of contempt authority may be limited or restricted by due process protections.

A court's authority to sanction contemptuous conduct is both statutory and inherent. *See* Utah Code Ann. §§ 78-32-1 to -17 (2002) (detailing the procedures governing contempt); *In re Evans*, 42 Utah 282, 130 P. 217, 224 (1913) ("It is undoubtedly true that courts of general and superior

jurisdiction possess certain inherent powers not derived from any statute. Among these are the power to punish for contempt....”). . . . Rather, “to the extent the common law [governing contempt] [is] not inconsistent with the statutes, it survives and can continue to evolve.” *Von Hake v. Thomas*, 759 P.2d 1162, 1167 (Utah 1988); see also *People ex rel. Pierce v. Carrington*, 5 Utah 531, 17 P. 735, 737 (1888) (“[C]ourts may go beyond the power given by statute in order to preserve and enforce constitutional powers when acts in contempt invade them.”). This inherent authority, however, is not without limitation. A court’s authority to “hold any person in contempt, whether a party to a case before that court or a non-party, is subject to constitutional and statutory restraints regarding the process due to any person so accused.” *Crank v. Utah Judicial Council*, 2001 UT 8, ¶ 25, 20 P.3d 307.

The United States Supreme Court has recognized that the demands of due process may limit a court’s authority to sanction contemptuous conduct. In *Hovey v. Elliott*, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215 (1897), the Court held that the act of striking a defendant’s answer simply because he failed to comply with the court’s order to pay a certain sum into the court’s registry violated “an essential element of due process of law.” *Id.* at 444, 17 S.Ct. 841. In contrast, in *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 29 S.Ct. 370, 53 L.Ed. 530 (1909), the Court concluded that the district court did not violate due process when it struck the defendant’s answer after the defendant refused to comply with the court’s discovery order. *Id.* at 351, 29 S.Ct. 370. In distinguishing *Hovey*, the *Hammond* Court declared that “the preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense.” *Id.*

Chen v. Stewart, 123 P.3d 416, 427-28 (Utah 2005).

There is also no authority granted to a court to enter a money judgment against a person or even an officer of the court, here D. Gilbert, simply because he happens to be in the court at the time.

Although D. Gilbert had clearly been aware of the issues and claims asserted by UDSF at the time he entered his appearance as counsel in this case, he had never been served with process, or placed on proper notice that he was the subject of any actual or

potential personal judgments to be entered against him by the district court; or constitutionally allowed to defend his interests in the manner afforded a defendant in a civil action. *See Brigham Young Univ. v. Tremco Consultants, Inc.*, 2005 UT 19, 1128; 110 P.3d 678 (addressing due process concerns when a party sought to be issue precluded is not an actual party to the case).

[D]ue process concerns are present,” however, “when the party sought to be precluded was not an actual party in the first lawsuit.” *Tyus*, 93 F.3d at 454. Those concerns exist in part “[b]ecause preclusion based on privity is an exception to the ‘deep-rooted historic tradition that everyone should have his own day in court,’ ” *id.* (quoting *Richards v. Jefferson County*, 517 U.S. 793, 798, 116 S.Ct. 1761, 135 L.Ed.2d 76 (1996)), and because of the “general consensus in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process,” *Richards*, 517 U.S. at 798, 116 S.Ct. 1761 (internal quotations omitted). Therefore, “courts must ensure that the relationship between the party to the original suit and the party sought to be precluded in the later suit is sufficiently close to justify preclusion.” *Tyus v. Schoemehl*, 93 F.3d 449, 454 (8th Cir. 1996). “[T]he due process clauses prevent preclusion when the relationship between the party and non-party becomes too attenuated.” *Id.* (quoting *Southwest Airlines Co. v. Tex. Int'l Airlines, Inc.*, 546 F.2d 84, 95 (5th Cir.1977)). In addition, “we resolve all doubts in favor of permitting parties to have their day in court on the merits of a controversy.” *Baxter v. Utah Dep't of Transp.*, 705 P.2d 1167, 1169 (Utah 1985).

Brigham Young Univ., 2005 UT at ¶ 28.

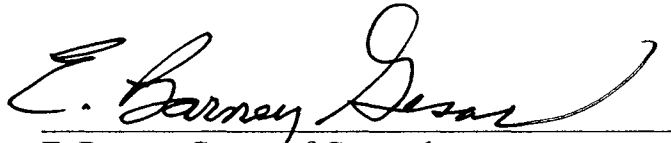
CONCLUSION

D. Gilbert throughout the proceedings in the District Courts was and now is entitled to due process of law, as is any other person pursuant to the 14th amendment of the U.S. Constitution, which is binding upon the courts of this State. He is similarly entitled to the same constitutional protections under the Utah Constitution, Art. I, § 7. [Due Process of Law]. *In personam* jurisdiction is an important part of the due process to

which D. Gilbert is constitutionally entitled. The District Court had no *in personam* jurisdiction to enter a money judgment against him at any time in the June 2008 Order and Judgment of Disgorgement of Funds and the January 2011 Order Denying D. Gilbert's Rule 60(b)(4) Motion to Vacate must be reversed as void for lack of *in personam* jurisdiction.

DATED this 16th day of August 2011.

RESPECTFULLY SUBMITTED,



E. Barney Gesas, of Counsel
Andersen & Karrenberg
50 West Broadway, Suite 700
Salt Lake City, Utah 84101-2035
Telephone: 801 534-1700
Facsimile: 801 364-7697

Lynn O. Poulson
Johnson, Poulson & Coons,
a Professional Corporation

**Attorneys for Judgment Debtor and
Appellant Donald D. Gilbert, Jr.**

ADDENDUM EXHIBITS

- A. Order and Judgment, June 13, 2008, R. 1078-1081.
- B. Minute Entry, January 11, 2011, R. 1299-1303.
- C. Notice of Appeal of Donald D. Gilbert, Jr., February 11, 2011, R. 1307-1311.

CERTIFICATE OF MAILING

I certify that two true and correct copies of the Opening Brief of Appellant were mailed on August 16, 2011 by first-class mail, postage prepaid, to the following:

Russell A. Cline
Crippen & Cline, L.C.
10 West 100 South, Suite 425
Salt Lake City, UT 84101

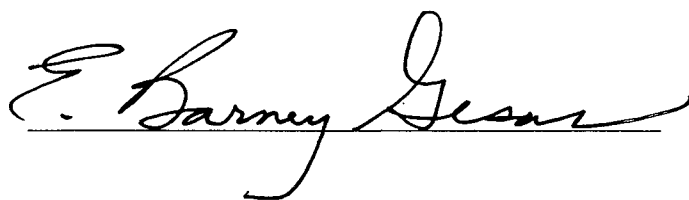
A handwritten signature in black ink, reading "E. Barney Geas". The signature is written in a cursive style and is positioned above a horizontal line.

Exhibit A

FILED DISTRICT COURT
Third Judicial District

JUN 13 2008

By RJ SALT LAKE COUNTY
Deputy Clerk

Russell A. Cline (4298)
Crippen & Cline L.C.
10 West 100 South, Suite 425
Salt Lake City, Utah 84101
Telephone (801) 539-1900
Telefax (801) 322-1054

Attorney for Plaintiff

ENTERED IN REGISTRY
OF JUDGMENTS
DATE 06/17/08

IN AND FOR THE THIRD DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

UTAH DOWN SYNDROME
FOUNDATION, INC.

Plaintiff,

vs.

UTAH DOWN SYNDROME
ASSOCIATION, ERIC HOLMAN,
CATHY COLLARD, PAM HOLMAN,
JILL AUSTIN, LISA KINGSBURY,
KARA OLANDER, and
MELANIE TAYLOR,

Defendants.

ORDER AND JUDGMENT
(DONALD GILBERT)

CIVIL NO. 070902087
JUDGE: Faust

Plaintiff's Second Motion for Disgorgement of Funds having come before the Court and there being no timely opposition thereto and good cause appearing it is hereby ordered, decreed and adjudged as follows.

1. Plaintiff's Second Motion for Disgorgement of Funds is granted.

Order and Judgment (Donald Gilbert) @J



JD28891071

070902087 GILBERT, DONALD

pages:

2. Utah Down Syndrome Foundation is granted judgment against Donald Gilbert in the amount of \$30,000.00, to accrue interest at the prejudgment rate of 10% per annum on the following amounts from the following dates: on \$6,000.00 from May 10, 2007, on \$9,000.00 from June 15, 2007, on \$7,500.00 from July 25, 2007, and on \$7,500.00 from January 31, 2008, and at the post-judgment rate of interest after entry hereof.

3. Utah Down Syndrome Foundation is awarded in attorneys fees against Donald Gilbert in the amount of \$2,453.00.

4. It is further ordered that this Judgment shall be augmented in the amount of reasonable costs and attorneys fees expended in collecting said judgment by execution or otherwise as shall be established by affidavit.

Dated this 31st day of June, 2008.


THE COURT



CERTIFICATE OF SERVICE

3 I hereby certify that I mailed a true and correct copy of the foregoing, postage pre-paid on this day of June, 2008 to:

Donald D. Gilbert
PO Box 335
American Fork, UT 84003

Kara Olander
7469 S. Locust St.
Midvale, UT 84047

Uptown Downs
c/o Wendy Hooton
3495 W. 8070 S.
West Jordan, UT 84088

Up With Downs
c/o Cherish Clements
76 S. State St.
American Fork, UT 84003

Eric Holman and Pam Holman
76 S. Center St.
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Cathy Collard
1032 N. Redwood Rd.
Saratoga Springs, UT 84043

Lisa Kingsbury
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3376 W. 8350 S.
West Jordan, UT 84088

David C. Lewis
c/o Novell Law Department
1800 South Novell Place, Ste. H-54
Provo, UT 84606

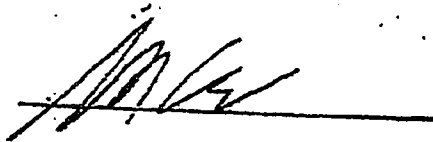
A handwritten signature in black ink, appearing to read "D. Lewis", is written over a solid horizontal line.

Exhibit B

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

UTAH DOWN SYNDROME FOUNDATION, INC.,	:	MINUTE ENTRY
Plaintiff,	:	CASE NO. 070902087
vs.	:	
UTAH DOWN SYNDROME ASSOCIATION, ERIC HOLMAN, CATHY COLLARD, PAM HOLMAN, JILL AUSTIN, LISA KINGSBURY, KARA OLANDER, and MELLANIE TAYLOR,	:	
Defendants.	:	
THE MEMBERS OF THE UPTOWN DOWNS AND UP WITH DOWNS, the Salt Lake and Utah County Chapters of the Utah Down Syndrome Foundation,	:	
Intervenors.	:	

This matter comes before the Court in connection with the plaintiff's request for decision on Donald D. Gilbert, Jr.'s Motion to Vacate, Expunge or Set Aside an Order and Judgment Against Him. Having reviewed the moving and responding Memoranda, the Court rules as stated herein.

Mr. Gilbert is an attorney who represented certain intervening parties in this action. Prior to Mr. Gilbert's representation, the Court entered an Order granting the plaintiff's Motion for Partial Summary

Judgment and Injunctive Relief with respect to the individual defendants in this matter. The Order, dated May 3, 2007, required the individual defendants to return various funds, including to "[r]eturn all funds taken from or on deposit in Zions Bank. . . ."

Subsequently, the plaintiff filed a Motion for Entry of Judgment and for Order to Show Cause pertaining to the individual defendants' failure to repay the funds which were the subject of the May 3rd Order. In that Motion, the plaintiff also sought to recoup funds which were paid to Mr. Gilbert as attorney's fees rather than returned to the plaintiff as contemplated in the May 3rd Order. The plaintiff subsequently filed formal Motions for Disgorgement of Funds, again seeking to recoup funds paid to Mr. Gilbert as fees.

On March 10, 2008, Judge Faust, who was previously assigned to this matter, considered the plaintiff's dual Motions. In a Minute Entry decision which followed, Judge Faust granted the plaintiff's Motions, including ordering disgorgement of funds paid to Mr. Gilbert. An Order, dated June 13, 2008, awarded Judgment to the plaintiff against Mr. Gilbert for funds he had received and included an award of attorney's fees against Mr. Gilbert directly.

Over two years after the entry of Judge Faust's Order, Mr. Gilbert has brought the presently pending Motion to vacate the Order on the grounds that the Court lacked jurisdiction to grant Judgment against him. The plaintiff maintains that this Motion is untimely and that the Court


did have jurisdiction because Mr. Gilbert, as an attorney, is an officer of the court.

After considering the parties' respective legal positions, the Court determines that Judge Faust had jurisdiction to enter Judgment against Mr. Gilbert because of his receipt of monies that were the subject of a Court Order requiring those funds to be returned to the plaintiff. The fact that Mr. Gilbert was not a party to this action is irrelevant. He is an attorney representing parties in this action and was clearly aware of the Court Order which was in place when he commenced representation. While the funds at issue were not formally frozen, they were clearly identified and earmarked for return to the plaintiff. Mr. Gilbert had a clear duty to ensure that the funds he was receiving for attorney's fees did not come from these pool of funds, a duty which he violated. Indeed, it appears that Mr. Gilbert was fully aware of the source for his payments, but nevertheless accepted these funds. Under such circumstances, both Mr. Gilbert and the funds he received fell under this Court's continuing jurisdiction.

Based on the foregoing, the Court determines that disgorgement of Mr. Gilbert's fees and the award of attorney's fees against him were appropriate measures, particularly given his notice of the Court's Order and the role he played in this action. Accordingly, Mr. Gilbert's Motion to Vacate, Expunge or Set Aside an Order and Judgment Against Him is denied.


This Minute Entry decision will stand as the Order of the Court, no additional Order is required.

Dated this 11 day of January, 2011.



PAUL G. MAUGHAN
DISTRICT COURT JUDGE

STAMP USED AT DIRECTION OF JUDGE



UTAH DOWN SYNDROME FOUNDATION
V. UTAH DOWN SYNDROME ASSOC.

PAGE 5

MINUTE ENTRY

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry, to the following, this 14 day of January, 2011:

Russell A. Cline
Attorney for Plaintiff
10 West 100 South, Suite 425
Salt Lake City, Utah 84101

Lynn O. Poulson
Attorney for Donald D. Gilbert, Jr.
1435 East 2000 North
Lehi, Utah 84043

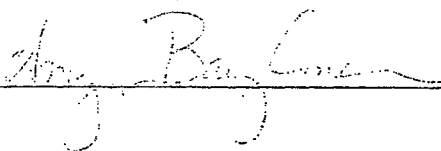


Exhibit C

COPY

FILED DISTRICT COURT
Third Judicial District

FEB 11 2011

SALT LAKE COUNTY

By _____ Deputy Clerk

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Attorneys for Judgment Debtor and Appellant
Donald D. Gilbert, Jr.

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

UTAH DOWN SYNDROME FOUNDATION,
INC.,

Plaintiff,

vs.

UTAH DOWN SYNDROME ASSOCIATION,
et al.,

Defendants.

THE MEMBERS OF THE UPTOWN DOWNS
AND UP WITH DOWN, the Salt Lake and Utah
County Chapters of the Utah Down Syndrome
Foundation,

Intervenor.

**NOTICE OF APPEAL OF DONALD D.
GILBERT, JR., JUDGMENT DEBTOR
AND APPELLANT**

Civil No. 070902087

Judge Paul G. Maughan

Judgment Debtor and Appellant in this action, Mr. Donald D Gilbert, Jr. (Mr. Gilbert), based on a special appearance made by representation of legal counsel, Lynn O. Poulson, hereby submits this Notice of Appeal pursuant to Rules 3(a), (d) and 4(a) of the Utah Rules of Appellate Procedure. Mr. Gilbert was never a party to the action. Mr. Gilbert was an attorney of record in the matter for a period of time. From July 2007 to April 2008, Mr. Gilbert represented the Intervenor who presently appear to still be parties in the action. From September 2007 to April 2008, Mr. Gilbert represented Eric Holman, Cathy Collard, Pam Holman, Jill Austin, Lisa Kingsbury, Kara Olander and Mellanie Taylor who now appear to be dismissed parties. Mr. Gilbert is former legal counsel of certain intervenors in the above-entitled action (presently non-dismissed as parties in this case), and for a relatively short time represented by Mr. Gilbert, otherwise now dismissed parties. However, Mr. Gilbert was never a party to the action.

Mr. Gilbert's appeal now is made based on a January 14, 2011, Minute Entry by the Honorable Paul G. Maughan, entered as an Order against Mr. Gilbert (the "Minute Entry Order") denying his motion to expunge or set aside, for lack of jurisdiction, an "Order and Judgment" against him signed by the previously assigned judge, the Honorable Robert Faust, on June 13, 2008 and entered in the Registry of Judgments June 17, 2008 (the "Judge Faust Order"). The Judge Faust Order states that it is based on a Second Motion for Disgorgement of Funds.

In the Minute Entry Order, the reassigned judge in this case, makes a finding that the trial court had "continuing jurisdiction" over Mr. Gilbert to enter the Minute Entry Order and reaffirms the Judge Faust Order, which includes an award of attorney fees against Mr. Gilbert. The Judge Faust Order awarded judgment to the plaintiff, Utah Down Syndrome Foundation directly against the appellant, Mr. Gilbert, for legal fees he had received from his intervenor clients while representing them in this matter.

When the Judge Faust Order was entered against Mr. Gilbert, he was then a non-party to the case, and no longer counsel of record for any of the parties in the case. The Court in both the Judge Faust Order and the Minute Entry Order make serious and adverse rulings impacting Mr. Gilbert's statutory, Utah Rules of Civil Procedure, constitutional procedural and substantive rights, defenses and claims. Accordingly, by operation of both law and equity, Mr. Gilbert has legal standing to preserve all of his legal rights, including but not limited to, the filing of this Notice of Appeal.

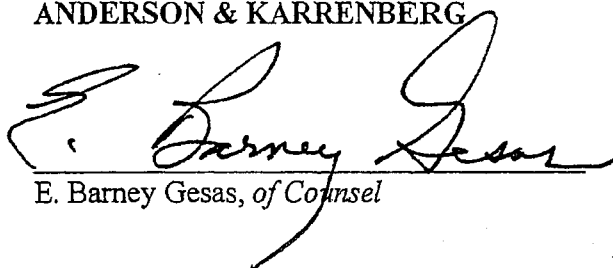
It is the Minute Entry Order appealed here by Mr. Gilbert, the Judgment Debtor, finding that Mr. Gilbert was subject to *in personam* jurisdiction, based upon the Judge Faust Order is appealed. The Minute Entry Order was made and entered in this case in the Third District Court, Salt Lake County, State of Utah, *Utah Down Syndrome Foundation, Inc. v. Utah Down Syndrome Association, et al.*, Civil Case No. 070902087. The Minute Entry Order, appealed here, adopted and reaffirmed the Judge Faust Order.

Note: On June 1, 2009, a Joint Motion to Approve Settlement Agreement and Stay this Case was filed by the defendants, including several of the defendants now dismissed from these proceedings, including Utah Downs Syndrome Association, Eric Holman, Cathy Collard, Pam Holman, Jill Austin, Lisa Kingsbury, Kara Olander and Mellanie Taylor based upon an executed approved settlement agreement and stay proceedings. The motion was approved and entered as an Order Approving the Settlement Agreement and Staying these proceedings was entered on June 3, 2009 in this case by the Honorable Judge Robert Faust (the "Stay Order"). (See this case's June 3, 2009 docket entry). Since June 3, 2009, the Stay Order has not been set aside, modified or otherwise vacated.

It is not clear whether the Minute Entry Order from which this appeal is filed, is a proper, valid or final order that can be procedurally appealed at this time or whether the Stay Order was otherwise altered, modified or vacated either expressly, by implication or operation of law because of the Minute Entry Order. Accordingly, this appeal is filed as a protective, prophylactic measure and procedural action to fully protect, preserve and reserve all procedural, legal and appellate rights in these proceedings of the Judgment Debtor and Appellant, Mr. Donald D. Gilbert, Jr.

DATED this 11th day of February 2011.

ANDERSON & KARRENBERG



E. Barney Gesas, of Counsel

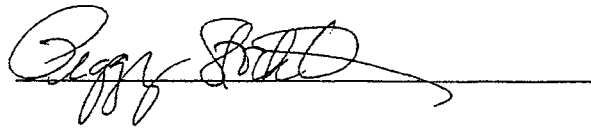
Lynn O. Poulson
JOHNSON, POULSON AND COONS,
A Professional Corporation

Attorneys for Judgment Debtor and Appellant
Donald D. Gilbert, Jr.

CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2011, I caused a true and correct copy of the foregoing **NOTICE OF APPEAL OF DONALD D. GILBERT, JR., JUDGMENT DEBTOR AND APPELLANT** to be served by first-class mail, postage prepaid, to the following:

Russell A. Cline
CRIPPEN & CLINE, LC
10 West 100 South, Suite 425
Salt Lake City, Utah 84101

A handwritten signature in black ink, appearing to read "Russell A. Cline", is written over a horizontal line.