

2015

**Transportation Alliance Bank, a Utah Banking Corporation,  
Plaintiff/Appellee, vs. International Confections Company, LLC, an  
Ohio Limited Liability Company; Ng Acquisition, LLC, an Ohio  
Limited Liability Company; And Michael D. Ryan, and Individual,  
Defendants/Appellants**

Utah Court of Appeals

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No. 20150784-CA

IN THE UTAH COURT OF APPEALS

TRANSPORTATION ALLIANCE BANK, ET AL.,  
*Plaintiffs and Appellees,*

v.

INTERNATIONAL CONFECTIONS COMPANY, LLC, ET AL.,  
*Defendants and Appellants*

APPELLEE'S BRIEF OF BANK OF AMERICAN FORK

On appeal from the Third Judicial District Court, Salt Lake County,  
Honorable Laura S. Scott, District Court No. 140907314

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## LIST OF ALL PARTIES

*Original Plaintiff:*

Transportation Alliance Bank

*Intervening Creditors(December 11, 2014)/Appellees:*

Arcacia Holdings LLC

Wasatch Peak Holdings LLC

Back Bay Investments

Dynamic Confections Inc.

Bank of American Fork

*Defendants/Appellants:*

International Confections, LLC

NG Acquisition, LLC

Michael D. Ryan

*Intervening Party/Appellee:*

Mrs. Fields Confections, LLC

*Receiver:*

Kent W. Goates

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## INTRODUCTION

Transportation Alliance Bank (“TAB”) filed suit against Defendants, International Confections Company, NG Acquisition, and Michael Ryan, and requested the immediate appointment of a receiver to preserve assets that served as collateral for TAB’s loan to Defendants. Bank of American Fork and other creditors intervened to support the appointment of a receiver and protect their interest in the collateral. In what is a recurring pattern in this case, Defendants *stipulated* to the intervention, but now argue that the district court erred by allowing intervention.

After a receiver had been appointed and the intervenors had entered the case, TAB sought to unilaterally dismiss the entire case, thereby terminating the receivership. Intervenors objected. Defendants then *stipulated* that the receivership would remain in place, that the intervenors could continue pursuing recovery from the receivership estate, and that the receiver could continue to pursue a sale of the receivership assets—many of which were perishable assets (chocolate, candy, confections, trail mix, and other perishable products) that had to be sold quickly or would be lost.

But Defendants now claim that the district court erred by leaving the receivership in place and allowing the case to move forward.

Defendants not only stipulated to the receivership continuing, they praised the receiver for his good work and pre-approved a sale of the receivership assets based on a pending offer, noting that they would also approve any “better offer” that came along. Having approved an acceptable offer, Defendants seemed to have no interest in the details. Just a few days later, even with an offer pending and time being of the essence, Defendants stipulated to their attorney withdrawing.

Their attorney attempted to withdraw (his notice of withdrawal was defective) on the same day the receiver filed a motion seeking expedited approval of a significantly better offer he had received. A hearing was held on the expedited motion. Defendants were aware of the hearing because their purportedly withdrawn attorney continued to receive all notices and the receiver had specifically notified Mr. Ryan about the hearing. But Defendants chose not to appear. To be sure, Defendants might have assumed that their attorney had properly withdrawn and that International Confections and NG Acquisition could not appear without an attorney, but

Mr. Ryan could have appeared on his own behalf and asked for time to retain a new attorney for his companies. But the reality is, Defendants obviously didn't care enough about the details to be concerned about the pending sale. They made absolutely no effort and showed no concern about the sale—at least there is nothing in the record. The evidence suggests that Defendants were simply content to let the sale move forward in their absence. At the hearing, the receiver told the court that the offer was for nearly \$1 million more than the previous offer and that time was of the essence because inventory was perishing and workers were leaving. The court approved the sale.

Defendants accepted the benefits of the sale while remaining silent. It was not until months later when a minor detail of the sale—some standard release language—came back to bite them that Defendants objected. As the district court found, “Defendants did not have any objection to the sale of the assets to Mrs. Fields until they were confronted with the release language ... months later,” a detail of the sale they did not bother to concern themselves with. (R.1455.) In essence, Defendants stipulated to the sale—not expressly as with their stipulation to

intervention, their stipulation to the receivership continuing, and their stipulation to their attorney withdrawing—but by remaining silent while the sale went forward. Now, they contend that the court erred by approving the sale.

The district court did not err in any aspect of this case. It did not lose jurisdiction when TAB attempted to unilaterally dismiss the entire case under Rule 41(a)(1). That rule was inapplicable because (1) Defendants had responded to the complaint by opposing the appointment of a receiver and allowing intervention; (2) the appointment of a receiver meant that only the court could dismiss the case and terminate the receivership; and (3) after intervention, TAB was not the only plaintiff in the case and could not dismiss the claims of the intervenors. The district court had jurisdiction and correctly concluded that the judgment was not void.

The district court's rejection of Defendants' other arguments is subject to an abuse of discretion standard. And the district court plainly did not abuse its discretion in finding that Defendants failed to establish "excusable neglect" or any other "reason justifying relief from the judgment." Finally, even if Defendants could establish grounds under

Rule 60 for reversal, they would also have to show that they had a “meritorious defense” that they would have raised. The district court did not abuse its discretion in finding that Defendants did not have a meritorious defense. Defendants’ “defense” is an unmeritorious objection to a single provision in an otherwise unobjectionable offer. Not only unobjectionable, but an offer that was for far more money than any other offer the receiver received.

The district court did not commit reversible error. Bank of American Fork asks this Court to affirm.

## STATEMENT OF JURISDICTION

Jurisdiction exists under Utah Code § 78A-4-103(2)(i).

## ISSUES PRESENTED

**Issue 1:** TAB filed a Notice of Voluntary Dismissal after (1) Defendants had responded to the complaint by opposing the appointment of a receiver, (2) a receiver had been appointed and, (3) several additional parties (secured creditors) had intervened. After the Notice of Voluntary Dismissal was filed, Defendants stipulated that the receivership would remain open and that the intervenors could continue as plaintiffs under the

original complaint filed by TAB. Did the Notice of Voluntary Dismissal deprive the district court of jurisdiction?

**Standard of Review:** “A denial of a motion to vacate a judgment under rule 60(b) is ordinarily reversed only for an abuse of discretion,” but when the motion is based on lack of jurisdiction, it “becomes a question of law upon which we do not defer to the district court.” *State Dept. of Social Servs. v. Vijil*, 784 P.2d 1130, 1132 (Utah 1989).

**Issue 2:** Defendants contend that the attempted withdrawal of their counsel and the failure of the other parties to send a notice to appear or appoint counsel as required by Rule 74(c) constitutes a “reason justifying relief from the judgment” under 60(b)(6). The district court rejected this argument because the notice of withdrawal was defective; Defendants continued to receive notice of pleadings and hearings and yet took no action; Defendants were aware of and accepted the benefits of the sale to Mrs. Fields; and the district court would have approved the sale even if Defendants had objected. Did the district court abuse its discretion by denying Defendants motion to set aside the judgment based on the withdrawal of Defendants’ counsel?

**Standard of Review:** “The district court judge is vested with considerable discretion under Rule 60(b) in granting or denying a motion to set aside a judgment.” *Katz v. Pierce*, 732 P.2d 92, 93 (Utah 1986). “A district court abuses its discretion only when its decision was against the logic of the circumstances and so arbitrary and unreasonable as to shock one’s sense of justice ... or resulted from bias, prejudice, or malice.” *Jones v. Layton/Okland*, 2009 UT 39, ¶ 27 (citation and internal quotation marks omitted).

**Issue 3:** Defendants contend that the judgment should be set aside under Rule 60(b)(1) because their failure to object to the Sale Order was the result of “excusable neglect.” The district court determined that Defendants neglect was not excusable because Defendants were aware of the receivership, aware of pending offers, aware that time was of the essence, and had both actual notice and notice through their counsel of the hearing at which the sale was approved. The evidence shows that Defendants simply chose not to object to the sale to Mrs. Fields and were unconcerned until they learned about a single provision in the sale agreement. The district court also found that even if Defendants had

objected, they did not have a meritorious defense. Did the district court abuse its discretion in refusing to set aside the judgment based on excusable neglect?

**Standard of Review:** “The district court judge is vested with considerable discretion under Rule 60(b) in granting or denying a motion to set aside a judgment.” *Katz v. Pierce*, 732 P.2d 92, 93 (Utah 1986). “A district court abuses its discretion only when its decision was against the logic of the circumstances and so arbitrary and unreasonable as to shock one’s sense of justice ... or resulted from bias, prejudice, or malice.” *Jones v. Layton/Okland*, 2009 UT 39, ¶ 27 (citation and internal quotation marks omitted).

## STATEMENT OF THE CASE

**Nature of the Case:** This case is a dispute between a creditor, Transportation Alliance Bank (“TAB”), and its debtors, International Confections Company, LLC and NG Acquisition, LLC, (the “Companies”), and Michael D. Ryan. (R.1-234.) After TAB filed its complaint, several additional creditors intervened: Back Bay Investments, LC; Dynamic Confections, Inc.; Wasatch Peak Holdings, LLC; Arcadia Holdings, LLC;



and Bank of American Fork (collectively the “Intervenors”). (R.422-30.) A receiver was appointed and given control of the Companies. (R.663-76.) Their assets were sold to Mrs. Fields. (R.928-32.) After the sale of the assets and the discharge of the receiver, Defendants moved to set aside the district court’s approval of the sale under Rule 60(b). (R.1016-32.) The district court denied their motion. (R.1451-59.) This appeal followed.

**Course of Proceedings and Disposition Below:** TAB’s complaint was filed on October 21, 2014. (R.1-20.) TAB’s third cause of action sought the appointment of a receiver. (R.12-13.) TAB requested the immediate appointment of a receiver to conserve the collateral that secured Defendants’ debt. (R.0238-41.) Defendants appeared through counsel, Mark James, and opposed the appointment of a receiver. (R.392, R.662.) Defendants stipulated to the Intervenors becoming parties to the case. (R.422-24; R.429-30.)

The court granted the motion to appoint a receiver and gave the receiver control over the Companies. (R.663-76.) Shortly thereafter, TAB filed a Notice of Voluntary Dismissal. (R.720.) The receiver and the Intervenors objected. (R.726-28; 734-37.) The district court held a hearing

at which Defendants stipulated that TAB's claims would be dismissed, but the receivership would remain in place, the Intervenor would continue as plaintiffs under the third cause of action in TAB's complaint, and the receiver could continue to pursue a sale of the Companies' assets. (R.1452-53.)

On December 17, 2014, the receiver accepted an offer to sell the Companies' assets to Mrs. Fields and signed an Asset Purchase Agreement, pending approval by the court. (R.798-800.) The next day, the receiver filed an Expedited Motion for Order of Sale of Receivership Assets and Related Issues ("Expedited Motion"). (R.792-93.) That same day, Defendants' counsel, Mr. James, filed a Notice of Withdrawal. (R.787-89.) A hearing was held on December 23, 2014, at which Defendants did not appear. (R.926-27.) That same day the court entered an Order Granting Expedited Motion for Sale of Receivership Assets and Approving the Sale of the Assets Free and Clear of all Encumbrances ("Sale Order"). (R.928-32.) It is undisputed that the Sale Order was served on Defendants' counsel. (R.935-37.)

On January 23, 2015, the court entered the Order on Motion to Approve Receiver’s Final Report and Accounting, Discharge Receiver, and Close Estate—the final order closing the case. (R.1009-12.) Two months later, March 23, 2015, Defendants filed a Motion for Relief from Judgment and Supporting Memorandum. (R.1016-32.) Defendants asked the court to “reactivate the case and allow Defendants to file objections to the Receiver’s December 18, 2014 Expedited Motion ....” (R.1016.)

In a careful and thorough Ruling and Order issued on August 21, 2015, which followed a lengthy hearing, Judge Laura Scott denied Defendants’ motion. (R.1450-59.) Defendants filed a timely notice of appeal. (R.1461-63.)

## **STATEMENT OF FACTS**

On October 21, 2014, Plaintiff Transportation Alliance Bank (“TAB”) filed suit against International Confections Company, NG Acquisitions (the “Companies”), and Michael D. Ryan (collectively “Defendants”), for breach of certain loan agreements and other related causes of action. (R.1-20.) TAB’s third cause of action sought the appointment of a receiver to take control of the Companies. (R.12-13.) On October 24, 2014, to avoid the loss

of certain collateral that secured TAB's loan to Defendants, TAB filed a Motion for Immediate Appointment of Receiver. (R.238-41.)

On November 4, 2014, Mark James of Hatch, James & Dodge, appeared as counsel for Defendants. (R.392.) A day later, TAB and Defendants stipulated to Bank of American Fork and several other of Defendants' secured creditors intervening as a matter of right under Rule 24(a).<sup>1</sup> (R.422-24.) The court granted the motion, declaring that the intervenors "are hereby deemed parties for all purposes." (R.429-30.) That same day, the court issued an interim order that immediately appointed a receiver. (R.432-36.) Nine days later, after a hearing, the court made the appointment of the receiver permanent. (R.663-76.)

The receiver was instructed by the court to "immediately have and take possession, custody, and control of the business and all of the assets of

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<sup>1</sup> Rule 24(a) provides: "Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Utah R. Civ. P. 24(a).

... the Companies ....” (R.664.) Among other things, the Receiver was given authority to “sell, transfer, and liquidate the Assets ....” (R.664-65.)

Shortly thereafter, TAB filed a Notice of Voluntary Dismissal with Prejudice, which purported to “voluntarily dismiss[ ] this action against Defendants ....” (R.720.) The notice made no mention of the receiver or the Intervenor. Bank of American Fork filed an objection the next day. (R.726-28.) Bank of American Fork pointed out that Rule 41(a) does not allow dismissal where: (1) a receiver has been appointed and the court has entered an order specifying the conditions under which the receiver could be relieved of his duties, (2) dismissal would not be in the best interest of the receivership estate, (3) creditors with an interest in the receivership estate have been allowed to intervene by stipulation of the parties; and (4) Defendants have made substantive filings in the case. (R.726-28.) Another intervenor also objected and added additional reasons why unilateral voluntary dismissal should not be allowed under Rule 41(a). (R.734-37.) Defendants filed their reply to these objections the next day. (R.750-54.)

The court held a hearing on the matter on December 3, 2014, at which Defendants appeared through their attorney, Mark James. (R.765.) At that

hearing, Defendants stipulated that the Intervenor would continue as plaintiff, the receiver would remain in place, and the Companies' assets could be sold. Defendants' counsel told the court:

What we have resolved – and what the motion – the objection to the dismissal revolved around was whether that would mean the receiver does or does not stay in place. The agreement we've reached is this: that Mr. Goates [the receiver], will stay in place, that my clients [Defendants] will support the sell [sic] of the assets at issue to a third party who has made an offer, a third party named BBX. Or if Mr. Goates receives a better offer from another third party, my client will support that. Otherwise, the parties reserve all other rights.

(R.1452.)

The court asked Defendants' counsel specifically what the parties' agreement does to the Notice of Voluntary Dismissal and whether the "motion to dismiss will take care of TAB but not the Intervenor." (R.1452.) Defendants' counsel responded that the case would remain pending with respect to the Intervenor:

I think that we would stipulate ... that the case is dismissed as with respect to the causes of action filed by TAB. We would agree that for purposes of the receivership the case can remain open as to the other intervening creditors.... As a

result of the good work by Mr. Goates. He's convinced us all he can do his job.

(R.1453.)

The court signed an order on December 11, 2014, that had been approved by Defendants which stated: "The intervening creditors in this case are substituted as plaintiffs under the third cause of action in the complaint only, and the case shall remain pending.... The November 11, 2014 Order Approving the Immediate Appointment of Receiver ... remains in full force and effect." (R.780.)

The receiver had already received one offer—from BBX Sweet Holdings. (R.798.) As noted, at the hearing on December 3, 2014, Defendants' counsel said Defendants "will support" a sale to BBX or any other "better offer." (R.1452.) A second offer soon came from Mrs. Fields Confections, LLC. (R.00798.) This offer was "nearly a million dollar increase" over the BBX offer. (R.1501.) In accordance with Defendants' stipulation, the receiver accepted the better offer from Mrs. Fields and on December 17, 2014, signed an Asset Purchase Agreement on behalf of the Companies. (R.798-800.)

The next day, December 18, 2014, the receiver filed an Expedited Motion for Order of Sale of Receivership Assets and Related Issues (“Expedited Motion”). (R.792-93.) The accompanying memorandum identified Mrs. Fields as the buyer and stated that a copy of the Asset Purchase Agreement would be provided upon request. (R.798.) The memorandum also summarized the terms of the agreement and explained that the Assets were encumbered by more than \$3 million in secured debt; that Mrs. Fields had agreed to pay \$2.15 million; and that this was “the highest and best offer he believes he could receive.” (R.799, R.801.) The Asset Purchase Agreement contained a standard release provision:

Effective upon the Closing of the sale that is the subject of this Agreement, Seller on his own behalf and on behalf of the Companies waives and releases any and all claims he or the Companies may have against the Buyer and its employees, officers, directors, members, affiliates, and agents except for claims arising under this Agreement.

(R.897.)

The Notice of Hearing that accompanied the Expedited Motion stated that objections must be filed by December 22, 2014, and that a hearing would be held on the Expedited Motion on December 23, 2014. (R.884-86.)



The same day the Expedited Motion and Notice of Hearing was filed, Defendants' counsel, Mark James, filed a Notice of Withdrawal of Counsel. (R.787-89.) The Notice of Withdrawal did not contain Defendants' current address, as required by Rule 74. (R.787-88.) It also does not state that no motions were pending, which Rule 74 also requires. (R.787-88.) The Notice of Withdrawal was filed at 2:42 p.m. (R.790.) Nothing in the record indicates precisely when the Expedited Motion was filed. The district court explained: "Although it is unclear which was filed first, the contemporaneous filing of the Motion to Expedite resulted in a pending motion that precluded counsel for Defendants from withdrawing without an order from the Court." (R.1456.) What is undisputed is that Defendants were aware of the receiver's efforts to market the Companies' assets and that an offer from BBX was pending—an offer Defendants had approved. It is also undisputed that Defendants' counsel received notice of the Expedited Motion and the Notice of Hearing, and therefore became aware that the receiver had accepted an offer from Mrs. Fields on the same day he attempted to withdraw. (R.888-89.)

On December 22, 2014, the receiver filed a proposed Order Granting Expedited Motion with the Asset Purchase Agreement attached. (R.917-21.) Defendants' counsel received this proposed order. (R.922-25.) A hearing was held on December 23, 2014. (R.00926-27.) Defendants received notice but did not respond to the Expedited Motion or appear at the hearing. (R.926; R.1499-1500.) Counsel for the receiver also told the district court that Mr. Ryan has "been in communication with the receiver ... so he does know that this was coming down today." (R.1500.) Having learned that Defendants were aware of the hearing and had chosen not to appear, the district court proceeded. (R.1499-1500.)

The receiver explained at the hearing the need for haste:

[W]e have a little bit of a melting ice cube issue here. The inventory is aging. It's seasonal. Employees are out of work. There's a concern that to get the most value from this company we do need to strike quickly to preserve the possibility of the employees coming back to work for the purchaser and the assets becoming productive once again.

(R.1502.)

Because of the need for speed, at the receiver's request the court entered the Sale Order that same day approving the sale. (R.928-32;

R.1503.) It is undisputed that the Sale Order was served on Defendants' counsel. (R.935-37.)

The receiver's final accounting was submitted to the court on January 7, 2015, along with a notice of hearing. (R.963; R.967-73.) On January 23, 2015, the court entered approved the receiver's final report, authorized payment of his fees, and closed the estate—effectively ending the case. (R.1009-11.) It is undisputed that Defendants' counsel continued to receive notice of all filings in the case until the very end. (R.966; 1006-08; 1012-15.)

On March 9, 2015, Defendants filed a complaint against Mrs. Fields Franchising, an affiliate of Mrs. Fields Confections (the purchaser) in the Southern District of Ohio alleging the unlawful termination of a licensing agreement. (R.1039-48.) Although Defendants' counsel had purportedly withdrawn from this case, Defendants' allegations in their lawsuit against Mrs. Fields make it clear that they continued to track this case and were aware of the sale to Mrs. Fields. Defendants' complaint in their lawsuit against Mrs. Fields Franchising alleged:

31. Mrs. Fields ... knew that International Confections was expanding its business and had a line of credit with TAB Bank. Mrs. Fields ... falsely notified TAB Bank that

International Confections had defaulted under the License Agreement, despite having no duty to notify TAB Bank of any alleged default.

32. As a result, TAB Bank petitioned to have International Confections taken into receivership in Utah. A receivership proceeding was opened.

33. Although International Confections was able to reach a resolution with and pay TAB Bank, another creditor [the Intervenor] of International Confections called its loan.

34. While International Confections had been effectively able to manage debt, it could not afford to pay all of its outstanding loan[s] at one time. Accordingly, the receiver put International Confections' assets up for sale.

35. Mrs. Fields' Confections, LLC, an affiliate of Mrs. Fields Franchising, purchased International Confections' assets through the receivership sale.

36. The defendants' actions have prevented International Confections from continuing its business operations, resulting in the loss of tens of millions of dollars in profits.

(R.1045-46.)

In response to the lawsuit, counsel for Mrs. Fields Franchising provided Defendants with a copy of the Asset Purchase Agreement and claimed that the release provision barred Defendants' claim. (R.1035-36.) Defendants dismissed their lawsuit against Mrs. Fields Franchising.

On March 23, 2015, Defendants filed, in this case, a Motion for Relief from Judgment and Supporting Memorandum. (R.1016-32.) Defendants asked the court to “reactivate the case and allow Defendants to file objections to the Receiver’s December 18, 2014 Expedited Motion ....” (R.1016.) In a careful and thorough Ruling and Order issued on August 21, 2015, which followed a lengthy hearing, Judge Laura Scott denied Defendants’ motion. (R.1450-59.) Defendants filed a timely notice of appeal. (R.1461-63.)

## SUMMARY OF ARGUMENTS

**The judgment is not void.** Defendants first contend that the judgment is void because the district court lost jurisdiction when TAB filed its Notice of Voluntary Dismissal, and should therefore be set aside under Rule 60(b)(4). TAB's attempted dismissal did not deprive the district court of jurisdiction for at least three reasons: First, Defendants had filed a "response" to the complaint, which is all Rule 41(a)(1) requires, meaning TAB could not withdraw without an order from the court. Second, the appointment of a receiver meant that the case could not be dismissed without an order from the court. Utah law makes clear that the court, not the parties, controls the discharge of a receiver. Third, a plaintiff cannot unilaterally dismiss if there are other plaintiffs in the case, and the Intervenor were plaintiffs in this case. With Defendants stipulation and approval, Intervenor were expressly recognized as plaintiffs and adopted TAB's pleading.

**The district court did not abuse its discretion when it concluded that the attempted withdrawal of Defendants' counsel is not a "reason justifying relief from the judgment."** Defendants second argument is that

a moratorium should have been imposed when their attorney attempted to withdraw and that the failure of the remaining parties to serve a notice on Defendants to appear or appoint counsel is a “reason justifying relief from the judgment” under Rule 60(b)(6). The Notice of Withdrawal was defective because it did not contain a forwarding address for Defendants and failed to state whether there were any motions pending. It is undisputed that Defendants’ counsel continued to receive notice of all motions and hearings. Additionally, the moratorium is not unbreakable— a court can set aside the moratorium and move forward if necessary. In this case, the receiver presented the best offer he was going to receive, Defendants had pre-approved the sale, and the sale had to happen quickly. Under these circumstances, the district court did not abuse its discretion when it refused to set aside the judgment because of the attempted withdrawal of Defendants’ counsel.

**The district court’s conclusion that Defendants did not exercise “excusable neglect” was not an abuse of discretion.** Defendants third argument is that their failure to object to the Sale Order was the result of “excusable neglect” under Rule 60(b)(1). The Defendants have to show that

they exercised due diligence under the circumstances. There is no evidence in the record that Defendants exercised any diligence, especially under these circumstances. Defendants were aware that the receiver had received an offer and was actively trying to sell the property. Defendants knew that a sale needed to happen quickly. Mr. Ryan was told by the receiver about the hearing at which approval of a sale would be sought, and Mr. Ryan did not appear or object. Defendants knew about the sale to Mrs. Fields, yet made no effort to discover the details. Defendants accepted the benefits of that sale without objecting. The district court did not abuse its discretion when it concluded that Defendants failure to object to the Sale Order was not the result of “excusable neglect.”

**The district court did not abuse its discretion in concluding that Defendants did not have a meritorious defense.** Unless the district court lacked jurisdiction, Defendants must also show that they had a “meritorious defense.” Defendants have offered no defense to the actual sale of the Companies’ assets. There is no dispute that Mrs. Fields offer was the best and highest offer based on arms’ length negotiations that resulted in a commercially reasonable sale. Even now, Defendants say



their only objection is to the standard release provision, but this is not a meritorious objection. There is no doubt the district court would have approved the sale even if Defendants had objected to this provision—and would have been correct to do so.

## ARGUMENT

Rule 60(b) offers parties a narrow path for escaping a final order or judgment:

On motion and upon such terms as are just, the court may in furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence ...; (3) fraud ...; (4) the judgment is void; (5) the judgment has been satisfied, released, discharged, or a prior judgment on which it is based has been reversed, or otherwise vacated ...; (6) any other reason justifying relief from the judgment.

Utah R. Civ. P. 60(b).

Defendants contend (1) that the judgment is void under 60(b)(4) because the district court lost jurisdiction when TAB filed its Notice of Voluntary Dismissal; (2) the continuation of the proceedings after the attempted withdrawal of Defendants’ counsel is a “reason justifying relief

from the judgment” under 60(b)(6); and (3) Defendants’ failure to object to the sale was the result of “excusable neglect” under 60(b)(1). None of these arguments has merit.

The jurisdictional issue is reviewed de novo. *See State Dept. of Social Servs. v. Vijil*, 784 P.2d 1130, 1132 (Utah 1989). The district court is granted substantial deference on the other two issues. “[T]he standard of review for the denial of [a Rule 60(b)] motion focuses heavily on the highly discretionary nature of such a decision.” *Asset Acceptance LLC v. Stocks*, 2016 UT App 84, ¶ 11. “The district court judge is vested with considerable discretion under Rule 60(b) in granting or denying a motion to set aside a judgment.” *Katz v. Pierce*, 732 P.2d 92, 93 (Utah 1986). “A district court abuses its discretion only when its decision was against the logic of the circumstances and so arbitrary and unreasonable as to shock one’s sense of justice ... or resulted from bias, prejudice, or malice.” *Jones v. Layton/Okland*, 2009 UT 39, ¶ 27 (citation and internal quotation marks omitted). Because of this broad discretion, “the outcome of rule 60(b) motions are rarely vulnerable to attack.” *Fisher v. Bybee*, 2004 UT 92, ¶ 7.

**I. The district court did not lose jurisdiction when TAB attempted to voluntarily dismiss the case.**

Defendants' first argument is that the judgment is void because the district court automatically lost jurisdiction when TAB filed a Notice of Voluntary Dismissal on November 24, 2014. "A judgment is void under rule 60(b)(4) if the court that rendered it lacked jurisdiction of the subject matter or parties ...." *Judson v. Wheeler RV Las Vegas, LLC*, 2012 UT 6, ¶ 18 (quotation marks omitted).

**A. Defendants responded to the complaint, making Rule 41(a)(1) inapplicable.**

Rule 41(a)(1) allows a plaintiff to dismiss the action without a court order only "before service by the adverse party of an answer *or other response* to the complaint permitted under these rules." Utah R. Civ. P. 41(a)(1) (emphasis added). Once a defendant has filed "an answer or other response," an order from the court is required. Defendants contend that TAB's attempted dismissal was effective because they had not filed an "answer or other response" to TAB's complaint.

But they had. In response to the complaint, on November 4, 2014, Defendants' counsel, Mark James, filed a notice of appearance.

Additionally, the third cause of action in TAB's complaint sought the appointment of a receiver. In response to the complaint, Defendants' counsel appeared at a hearing and contested the appointment of a receiver. (R.432-33.) And in response to TAB's third claim for relief requesting that a receiver be appointed, Defendants filed an objection and proposed changes to the proposed order appointing the receiver. (R.525-026.) Defendants' counsel then appeared at a hearing to argue over the objections to the proposed order. (R.662.) This was all in "response to the complaint" as contemplated by Rule 41(a).

Defendants also responded to the complaint by filing a stipulated motion to allow intervention. (R.422-23.) Intervention was sought "as of right" under Rule 24(a). By stipulating to intervention, Defendants acknowledged that Intervenor had "an interest relating to the property or transaction which is the subject of the action" as set forth in the complaint. Utah R. Civ. P. 24(a). Thus, the stipulation to allow intervention was very much a "response" to the allegations in the complaint.

Defendants suggest that these are not the type of "responses" required by Rule 41(a)(1). But Rule 41(a)(1) says "response" not "pleading"

as that term is used in Rule 7. And one reason Rule 41 cuts off the plaintiff's right to unilaterally dismiss a complaint when the defendant has filed an answer "or other response" is that many responses besides an answer require the defendant to incur costs and fees, and the plaintiff should not be able to unilaterally cut off the defendants right to seek recovery of costs and fees.

In short, a plaintiff cannot unilaterally dismiss a case if a "response" to the complaint has been filed. TAB responded to the complaint in several filings—not an answer or a motion to dismiss, but Rule 41(a)(1) does not require such a response. Thus, Rule 41(a)(1) was inapplicable when TAB attempted to unilaterally dismiss the entire case.

**B. The appointment of a receiver made Rule 41(a)(1) inapplicable by making it impossible for dismissal to occur without a court order.**

Over Defendants' objection, a receiver was appointed and instructed to "immediately ... take possession, custody, and control of the business and all of the assets of ... the Companies ...." (R.664.) The receiver was given broad authority over the Companies and their assets—essentially taking full control of the day-to-day operation of the Companies. (R.664-

68.) The receiver was instructed to file and serve upon the parties within 30 days an initial written report and then monthly reports thereafter “of operations reflecting income and expense, and including a summary of fees and administrative costs and expenses of Receiver and other professionals employed by Receiver ....” (R.670.) And all of the Receiver’s fees and expenses had to be “submitted to the Court for approval and confirmation” to be paid out of the Companies’ assets. (R.671.)

All of this made it impractical, if not impossible, for the receiver to be discharged without oversight and approval from the district court. The district court would have to receive a report of what actions the receiver had taken during his appointment, how those actions had affected the Companies, and what effect termination of the receivership would have. At the very least, the court would have to approve payment of the receiver’s costs and fees out of the Companies’ assets. If Defendants are correct that the district court immediately lost jurisdiction when the Notice of Dismissal was filed, then the receiver would not be able to submit a final accounting and receive authorization of payment.

Additionally, the order appointing the receiver specifically states the conditions upon which he would be discharged:

Receiver shall relinquish possession and control of the Companies and the Assets upon: (1) entry of an Order from this Court discharging Receiver from his duties; (2) upon the sale of substantially all of the Assets, pending approval of Receiver's final account and report to the Court; (3) a stipulation executed by all of the parties to this Action requesting that the Receiver relinquish possession and control of the Companies and the Assets; or (4) upon the Receiver filing a petition with the Court resigning his position [as] Receiver.

(R.675.) The order adds: "Receiver or the parties to this Action may at any time apply to this Court for any further orders, or relief, including an order to terminate the receivership ...." (R.675-76.) None of these conditions were met by TAB's Notice of Voluntary Dismissal.

Finally, Utah law makes it clear that the court, not the parties, controls the discharge of a receivership. In *Shaw v. Robison*, 537 P.2d 487 (Utah 1975), the plaintiff and defendant were equal owners of a corporation. When differences arose between them, one sued the other and moved for the appointment of a receiver. A receiver was appointed. "The two parties later settled their difficulties and jointly moved the court to

terminate the receivership.” *Id.* at 488. The court denied their motion allowing the receivership to continue, even though the parties had settled their dispute. The Utah Supreme Court affirmed because the termination of a receivership is within the court’s sole control and requires the court to consider the interests of all parties, which in this case would include the Intervenor:

A receivership is an equitable matter and is entirely within the control of the court. The fact that the parties requested a termination of the matter in the midst of the proceedings does not compel the court to “about face” and cease all matters instant.

In determining whether to continue a receivership or discharge the receiver the court will consider the rights and interests of all parties concerned, and will not grant an application for discharge merely because it is made by the party at whose instance the appointment was made.

*Id.* at 490 (internal citation omitted).

In other words, the court—not the parties—controls the discharge of a receiver. And once a receiver is appointed, the party that sought the



appointment cannot unilaterally discharge the receiver, which would be the effect of a Rule 41(a)(1) dismissal.<sup>2</sup>

In this case, the district court was within its right to refuse to terminate the receivership. The receiver had taken over control of the companies. Such an abrupt termination without court oversight could have prejudiced the Intervenor or others, and might have had serious consequences to the Companies. And, again, at the very least, the court needed receive a report from the receiver and a final accounting of costs and fees. In short, once a receiver was appointed, Rule 41(a)(1) no longer allows the plaintiff who requested and received appointment of the receiver to unilaterally terminate the case and, thereby, the receivership.

**C. Intervention made Rule 41(a)(1) inapplicable.**

The third reason that Rule 41(a)(1) was inapplicable when TAB attempted to terminate this case is that the Intervenor had joined the case. Defendants concede that “[i]f a case has multiple plaintiffs, one plaintiff

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<sup>2</sup> Defendants point out that the Federal Rules of Civil Procedure and the rules of some states expressly prohibit dismissal under Rule 41(a)(1) once a receiver has been appointed. Aplt. Br. at 24. These rules merely make express what is already the inherent result of the appointment of a receiver.

cannot terminate the whole case by a notice or stipulation of dismissal.” (R.1215.) Defendants assert that TAB “was the only plaintiff” when it filed the notice of voluntary dismissal. Aplt. Br. at 13. Defendants do not ignore the presence of the Intervenor, they argue that (1) the Intervenor did not file a pleading as required by Rule 24(c) and therefore were not “parties” in the case, and (2) even if Intervenor were parties, they had not been identified as *plaintiffs*. Neither argument is persuasive.

A plaintiff can dismiss a case under Rule 41(a)(1) “during the pendency of a motion to intervene” because “the proposed intervenors do not become parties within the meaning of [Rule 41(a)] until their motion is granted.” 8 James Wm. Moore et al., *Moore’s Federal Practice* § 41.34[4][b] (3d ed. 2013). But the calculation changes once the motion to intervene is granted. The intervenor “becomes a full participant in the lawsuit and is treated just as if it were an original party.” *Alvarado v. J.C. Penney Co.*, 997 F.2d 803, 805 (10th Cir. 1993); *see also Coal of Ariz./N.M. Counties for Stable Econ. Growth v. Dep’t of Interior*, 100 F.3d 837, 844 (10th Cir. 1996) (“If a party has the right to intervene under Rule 24(a)(2), the intervenor becomes no less a party than others and has the right to file legitimate motions ....”).

And there is a “strong policy ... not to allow the original parties in an action to effectively eliminate an intervenor’s claims when that intervenor has been made a party to the action as a matter of right.” *Steiner v. County of Marshall*, 568 N.W.2d 627, 635 (S.D. 1997).

Defendants argue that the Intervenor’s did not properly intervene because they “never filed a pleading as Rule 24 requires, and therefore never established themselves as plaintiffs.” Aplt. Br. at 13. Defendants are wrong for two reasons: First, viewed properly, what Defendants are appealing is the trial court’s decision to allow intervention in the first place. But Defendants *stipulated* to intervention without objecting to the absence of a pleading and are therefore prohibited from arguing that the order allowing intervention was in error. “[A] party cannot take advantage of an error committed at trial when that party led the trial court into committing the error.” *Pratt v. Nelson*, 2007 UT 41, ¶ 17 (quotation marks omitted).

Defendants will argue that their stipulation is irrelevant because jurisdiction cannot be stipulated to. But that puts the cart before the horse. TAB’s attempted dismissal deprived the court of jurisdiction only if intervention was improper. And because Defendants stipulated to

intervention without objecting to the absence of a pleading, they cannot object now that intervention was improper. Because intervention was proper, the Intervenor became full-fledged parties to the case.<sup>3</sup>

But even if Defendants did not waive their argument that intervention was improper because the intervenors did not file a pleading, abundant case law establishes that the failure to file a pleading is a technical defect that should be overlooked in the absence of prejudice. “An intervenor’s failure to comply with the requirement for filing a pleading is a purely technical defect which does not result in the disregard of any substantial rights.” 35A C.J.S. *Federal Civil Procedure* § 184. As a prominent treatise states: “If the intervenor is content to stand on the pleading an existing party has filed, it is difficult to see what is accomplished by adding to the papers in the case a new pleading that is identical in its allegations

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<sup>3</sup> Numerous courts have held unilateral voluntary dismissal under Rule 41(a) is not allowed after intervention by additional parties. See *Wheeler v. Am. Home Prod. Corp.*, 582 F.2d 891, 896 (5th Cir. 1977) (holding that Rule 41(a)(1) does not authorize dismissal of the entire case by the original plaintiff where intervening plaintiffs did not consent); *Univ. of South Alabama v. Am. Tobacco Co.*, 178 F.3d 405, 409 (11th Cir. 1999) (holding that attempted notice of voluntary dismissal under Rule 41(a)(1) was ineffective where “it was by no means clear that the proper plaintiff” filed the notice).

with one that is already in the file.” Wright & Miller, *Federal Practice & Procedure*, § 1914 (3d ed. 2009).

In *Barnes v. Harris*, 783 F.3d 1185, (10th Cir. 2015), the FDIC intervened in an action filed in state court and then, *without having filed a pleading*, removed the case to federal court based on a statute conferring federal jurisdiction over any case in which the FDIC was a “party.” The plaintiff objected that the FDIC could not be a party without having filed a pleading. The Tenth Circuit rejected that argument. “Treating an intervening entity as a party even if that entity has not filed a pleading is consonant with the Federal Rules.” *Id.* at 1191. *See also Alvarado*, 997 F.2d at 805 (intervenor did not file a pleading but was still considered “a full participant in the lawsuit” and had to be treated “just as if it were an original party”). This same permissiveness has been followed in numerous jurisdictions. *See United States v. Metro. St. Louis Sewer Dist.*, 569 F.3d 829, 834 (8th Cir. 2009) (intervenor “did not submit a pleading” but its motion to intervene “satisfied Rule 24(c) because it provides sufficient notice to the court and the parties of MIEC’s interests”); *United States v. State of Louisiana*, 543 F.2d 1125, 1128 n.4 (5th Cir. 1976) (failure to file complaint with motion

to intervene “did not prejudice the parties” where intervenor’s interest was clear).

In sum, courts do not require parties to “comply strictly with the requirements of Rule 24(c),” but rather, “the proper approach is to disregard non-prejudicial technical defects.” *Spring Constr. Co., Inc. v. Harris*, 614 F.2d 374, 377 (4th Cir. 1980) (holding that failure to file a pleading was not fatal where petition to intervene and accompanying affidavit “set forth sufficient facts and allegations to apprise Spring of LITC’s claims”); *see also Mass. v. Microsoft Corp.*, 373 F.3d 1199, 1236 n.19 (D.C. Cir. 2004) (“procedural defects in connection with intervention motions should generally be excused by a court”) (quotation marks omitted).

One more case solidifies the point. In *Westchester Fire Ins. Co. v. Mendez*, 585 F.3d 1183 (9th Cir. 2009), Northwest Airlines obtained a \$10 million default judgment against Phil Mendez. Mendez never notified his insurer, Westchester Fire Insurance Company, about the claim. When Westchester was notified, it filed a declaratory judgment action asking the court to declare that no coverage existed. Northwest intervened in that

lawsuit for the obvious reason of arguing that there was coverage so that it could collect its judgment from the proceeds of the insurance policy. But Northwest never filed a pleading. Mendez failed to answer an amended complaint and, over Northwest's objection, a default judgment was entered declaring that no coverage existed.

Northwest appealed. Westchester argued on appeal that "because Northwest did not file an answer or a complaint and did not adopt any pleading filed by another party, it had no interest to assert." *Id.* at 1888. The court said this argument was "both inconsistent with precedent and lacking in logic." *Id.* "Northwest's interest is obvious," the court explained,

It wants to be able to collect its judgment against Mendez from the Westchester insurance policy and it cannot do that if Westchester is not liable under that policy. That interest was explicitly identified in Northwest's motion to intervene.... The district court recognized Northwest's interest, and it granted the motion to intervene.

*Id.* The court of appeals reversed, holding that even though Northwest had not filed a pleading, the district court erred in granting default judgment against the named defendant and dismissing the case.

Likewise, in this case, Intervenor's interest was obvious: a receiver had been appointed to take control of the collateral that secured their loans to Defendants. The Intervenor wanted to get paid. Defendants obviously recognized this interest when they stipulated to the intervention, and the court recognized it when it granted the motion to intervene. As in *Westchester*, Defendants in this case "offer[ ] no substantive argument that [Intervenor] do[ ] not have an actual interest." *Id.* They "simply seek[ ] to capitalize on [Intervenor's] failure to file a pleading ...." *Id.* But the "failure to comply with the Rule 24(c) requirement for a pleading is a 'purely technical' defect which does not result in the 'disregard of any substantial right.'" *Id.* (quoting *Shores v. Hendy Realization Co.*, 133 F.2d 738, 742 (9th Cir. 1943)).<sup>4</sup>

This leads to Defendants last argument, which is that even if intervention was proper, Intervenor had not identified themselves as

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<sup>4</sup> The federal court cases cited in this section obviously are not controlling, but Utah's appellate courts "recognize the persuasiveness of federal interpretations when state and federal rules are similar and few Utah cases deal with the rule in question." *Barton v. Utah Transit Auth.*, 872 P.2d 1036, 1039 n.5 (Utah 1994).



*plaintiffs* and, therefore, TAB was still the only one plaintiff and could unilaterally dismiss under Rule 41(a)(1). This argument also fails.

Intervenors quite obviously intervened as plaintiffs. They supported TAB in its efforts to have a receiver appointed. And there is no conceivable reason why they would have intervened as defendants in an action filed by TAB. Finally, any possible confusion was clarified when Defendants *stipulated* that Intervenors were plaintiffs in the case and could continue to pursue the third cause of action in TAB's complaint. (R.780, R.1453.)

The failure to attach a pleading is a technical defect that "may easily be resolved." *Diagnostic Devices, Inc. v. Taidoc Technology Corp.*, 257 F.R.D. 96, 101 (W.D.N.C. 2009). It was easily resolved in this case. In fact, Defendants stipulated that Intervenors were plaintiffs and that they could adopt the third cause of action in TAB's complaint. That stipulation resolved any technical defects.

Plaintiffs support their position with *Thiele v. Anderson*, 1999 UT App 56, where this court explained that when Rule 41(a)(1) is "properly" invoked the action becomes "'a nullity'—it is as though 'the action had never been brought'" and the court "would lack jurisdiction to proceed any

further with the action.” *Id.* ¶ 24 (quoting *Barton v. Utah Transit Auth.*, 872 P.2d 1036, 1039 (Utah 1994)). But this only shows why Rule 41(a)(1) was not “properly” invoked in this case. By the time TAB attempted to invoke Rule 41(a)(1), Defendants had responded to the complaint by entering an appearance and opposing the appointment of the receiver; Defendants had stipulated to allowing several additional parties to intervene; and the receiver had been appointed and had assumed control over Defendants’ businesses and assets. A simple voluntary notice of dismissal could not render all of this a “nullity”—and especially not the appointment of a receiver, for the reasons explained.

At most, TAB’s notice of voluntary dismissal was effective only as to TAB’s claims, but not as to the interests of the Intervenor. Rule 41(a)(1) permits dismissal of less than an entire action, “‘whether it is fewer than all the defendants against whom a dismissal is sought to be taken, or fewer than all the plaintiffs who seek to withdraw from the action.’” *Pedrina v. Chun*, 987 F.2d 608, 610 n.2 (9th Cir. 1992) (quoting Moore’s Fed. Prac. ¶ 41.06-1 (2d ed. 1992)). And this is precisely what the end result was in this case. In fact, it is what Defendants stipulated to.

In sum, TAB's attempted dismissal under Rule 41(a)(1) was ineffective, at least as to Intervenor, because: (1) Defendants had responded to the complaint; (2) a receiver had been appointed and could only be discharged by an order from the court; and (3) TAB was not the only plaintiff in the case and had no right to dismiss the interests of the Intervenor.

**II. The district court did not abuse its discretion by refusing to reverse the judgment based on the attempted withdrawal of Defendants' counsel.**

Defendants next argue that the attempted withdrawal of their counsel and Intervenor's failure to send notice to Defendants of the need to retain new counsel provides a "reason justifying relief from the judgment" under 60(b)(6). The district court considered all of the circumstances and refused to reverse the judgment for this reason. That decision was far from an abuse of discretion. *See Jones*, 2009 UT 39, ¶ 27.

To withdraw without an order from the court, an attorney must serve on all parties a notice of withdrawal that "shall include the address of the attorney's client[s] and a statement that no motion is pending and no hearing or trial date has been set." Utah R. Civ. P. 74(c). The trial court

found that the Notice of Withdrawal “was defective, and therefore ineffective, because it did not include Defendants’ address(es).” (R.1458.) “This is not a mere technicality,” the court explained, “because the address requirement is directly tied to the other parties’ ability to comply with the notice to appear or appoint requirement and to communicate with Defendants during this critical period of time.”<sup>5</sup> (R.1458.)

Additionally, it was undisputed that Defendants’ counsel “continued to receive electronic notice of all pending motions and hearings as required by the rules” and there is “no evidence that Defendants did not receive actual notice of the Expedited Motion, the December 23rd hearing, and the Order of Sale or that Mr. James did not keep Defendants apprised of the proceedings in this case.” (R.1458.) In fact, there is indisputable evidence that Defendants did receive actual notice of the ongoing proceedings, including the sale to Mrs. Fields. The receiver told the court at the hearing to approve the sale that Mr. Ryan has “been in communication with the

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<sup>5</sup> The notice of withdrawal was also “ineffective,” the court said, “because the Expedited Motion was filed the same day,” and the essentially “contemporaneous filing of the Motion to Expedite resulted in [a] pending motion that precluded counsel for Defendants from withdrawing without an order of the Court.” (R.1459.)

receiver ... so he does know that this was coming down today.” (R.1500.) Further, Defendants were obviously aware of the sale because they referred to it in their complaint against Mrs. Fields Franchising in the Ohio litigation. (R.1045-46.) And at the hearing on their motion to set aside the judgment, Defendants conceded that they learned about the Sale Order and the termination of the receivership in January 2015. “And yet they took no action to object for approximately two months,” the district court explained. (R.1046.)

“By failing to object when the first learned of the Order of Sale and by accepting the benefits flowing from it, Defendants waived any rule 74 objection.” (R.1046.) And such an objection can be waived. *See Migliore v. Migliore*, 2008 UT App 208, ¶¶ 16-19.

Finally, even if Defendants’ counsel properly withdrew, the moratorium is not unbreakable. No further proceedings are allowed until 21 days after the notice to appear or appoint counsel is filed “unless otherwise ordered by the court.” Utah R. Civ. P. 74(c). In this case, the court decided to move forward.

In fact, in this case a moratorium was effectively impossible. A receiver had been appointed and had taken control of the Companies. The trial court could not simply put the receivership on hold; it had to keep supervising the receiver's work. And time was of the essence. As the receiver told the court when asking it to approve the sale, the ice cube was melting. The perishable assets at issue were perishing. (R.1502.) "[W]e do need to strike quickly," the receiver said. (R.1502.) The district court agreed and approved the sale.

And the district court was well within its powers of supervision over the receivership to approve the sale even in the absence of Defendants. "The receiver is an officer and arm of the court and acts under the direction and supervision of the court," not the parties. *Interlake Co. v. Von Hake*, 697 P.2d 238, 240 (Utah 1985).

A receiver has, under the direction of the court, the power to take and keep possession of property and generally do such acts respecting the property as the court may authorize. The possession by the court of the res in a receivership proceeding gives the court the power to determine all questions concerning the ownership and disposition of the property.

*Id.* at 239-40.

Additional facts make the district court's approval of the sale even more appropriate, even though Defendants did not appear at the hearing where approval was given. Defendants had stated on the record that they trusted the receiver and said they "will approve" approve the sale to BBX or to anyone else who made a "better offer." (R.1452.) It is undisputed that the offer from Mrs. Fields was a far better offer, and the receiver told the district court he didn't expect a better offer. This, plus the fact that time was of the essence, makes it clear that the district court did not abuse its discretion.

Plus, Defendants accepted the benefits of this sale without any objection. And Defendants have never argued that the sale was not "commercially reasonable" or was not in the best interests of the receivership. Instead, Defendants object only to a single provision in the sale agreement—a standard release provision—because it negatively affected their efforts to file a separate lawsuit. They do not dispute that the offer that was accepted was the best for the receivership estate.

For these reasons, the district court did not abuse its discretion when it refused to set aside the judgment based on the attempted withdrawal of Defendants' counsel.

**III. Defendants did not exercise due diligence—they exercised no diligence. The district court did not abuse its discretion when it found that Defendants failure to object to the Sale Order was not the result of “excusable neglect.”**

Defendants' final argument is that their failure to object to the sale was the result of “excusable neglect.” *See* Utah R. Civ. P. 60(b)(1). “A trial court has discretion in determining whether a movant has shown excusable neglect, and this court will reverse the trial court’s ruling only when there has been an abuse of discretion.” *Cadlerock Joint Venture II LP v. Envelope Packaging of Utah Inc.*, 2011 UT App 98, ¶ 9 (quotation marks, ellipsis, and brackets omitted).

Excusable neglect requires “the exercise of due diligence by a reasonably prudent person under the circumstances.” *Asset Acceptance LLC*, 2016 UT App 84, ¶ 16 (quotation marks omitted).

While a party need not be perfectly diligent in order to obtain relief, *some* diligence is necessary in order for the neglect to be considered excusable. In determining whether a party has exercised due diligence, the district court must consider



whether the actions of the party seeking relief were sufficiently diligent and responsible, in light of the attendant circumstances, to justify excusing it from the full consequences of its neglect.

*Id.* (internal brackets, quotation marks, and citation omitted). In other words, excusable neglect exists “where the failure to act was the result of ... the neglect one would expect from a reasonably prudent person under similar circumstances.” *Sewell v. Xpress Lube*, 2013 UT 61, ¶ 29 (citation and internal quotation marks omitted).

Defendants’ neglect is the opposite of what one would have expected under the circumstances of this case. Defendants knew the receiver was actively trying to sell the Companies’ assets. They knew an offer had been received. In fact, they had approved that offer. Yet, they consented to their attorney withdrawing and then did nothing. They made no discernible effort to follow what was happening. Mr. Ryan was told that a hearing was being held to approve the sale of the Companies’ assets, and yet he took no action on his own behalf or on behalf of the Companies. The only conclusion that can be drawn is that Defendants simply did not care about

the details of the sale until a minute detail – the release – came back to bite them.

The trial court carefully considered “the particular circumstances of this case” and “all relevant factors” and concluded that “Defendants have not shown that they exercised sufficient diligence ....” (R.1455.)

Defendants knew that Receiver had been appointed, BBX had made an offer, and timing was an issue given the nature of the inventory and the upcoming holiday season. Based on their counsel’s statements at the December 3rd hearing, Defendants also knew the Receiver might receive other offers. Importantly, there is no evidence in the record that Defendants did not have actual notice of the Expedited Motion or the Notice of Hearing or the proposed Order of Sale.<sup>[6]</sup> It is undisputed that all of the relevant pleadings and notices were served on Mr. James. Mr. Ryan never testifies that Mr. James did not provide him with copies of these pleadings and notices. Instead, Mr. Ryan testifies that he did not see the *Asset Purchase Agreement* before the Court entered the Order of Sale on December 23, 2014. There is also evidence in the record that Mr. Ryan was in communication with the Receiver during this period of time.

(R.1455.)

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<sup>6</sup> In fact, as we have shown, Defendants had specific notice of the pending sale to Mrs. Fields. The Receiver testified at the hearing to approve the sale that he had been in contact with Mr. Ryan “so he does know that this was coming down today.” (R.1500.)

Defendants note that the Companies could not appear without counsel, but the trial court rejected that argument because there was “nothing that prevented [Mr. Ryan] from attending the hearing [on December 23, 2014] and alerting the Court to Defendants’ concerns about the proposed sale to Mrs. Fields ....” (R.1455.) The evidence shows that Defendants were unconcerned about the sale to Mrs. Fields “until they were confronted with the release language during the Ohio litigation filed months later.” (R.1455.) “This, along with Defendants’ acceptance of the beneficial aspects of the sale, does not support a finding that they acted in good faith.” (R.1455-56.)

In short, due diligence is determined by the circumstances. Defendants exercised no diligence. The district court did not abuse its discretion when it concluded that Defendants’ failure to object was the result of excusable neglect.

**IV. The trial court did not abuse its discretion when it determined that Defendants did not have a meritorious defense.**

Finally, Plaintiffs also have to show that they had a meritorious defense. “Mere proof of surprise or excusable neglect would be insufficient

without some assertion of a meritorious defense ... as it would be an empty formality to set aside a default judgment for a defendant who had no chance of prevailing on the merits.” *Judson*, 2012 UT 6, ¶ 14. In this case, the district court concluded that even if Defendants had retained new counsel and timely objected to the sale to Mrs. Fields, their objection would have lacked merit and the court would have approved the sale anyway. (R.1456.)

As the district court pointed out, Defendants’ counsel expressed confidence in the receiver and approved of the offer from BBX or any other better offer. (R.1456.) A much better offer did come. In fact, the offer from Mrs. Fields was “nearly a million dollar increase” over the offer from BBX. (R.1501.) The district court held a hearing and concluded that the offer from Mrs. Fields was “the best and highest offer” and that “Defendants received significant benefits as a result” of the sale. (R.1456.) Additionally, the district court pointed out that Defendants said they would not have objected to the sale itself. In fact, Defendants have never contended that the sale was not an arm’s-length, commercially-reasonable sale. They have objected only to one provision that affected only them—the release that

prevented their attempt to sue Mrs. Fields in Ohio. The district court said it was “not persuaded that an objection to one provision of an otherwise unobjectionable Asset Purchase Agreement is a ‘meritorious defense’” and that it would not have rejected the sale to Mrs. Fields “because of an objection to the release language, particularly when the claim that Defendants want to assert against Mrs. Fields is a claim that was an asset of the receivership and was arguably being sold to either BBX or Mrs. Fields.” (R.1456.)

The district court’s determination that Defendants did not present a meritorious defense was not an abuse of discretion.

### CONCLUSION

Defendants’ arguments on appeal can be broken into two parts: Defendants first argument is that after TAB’s Notice of Voluntary Dismissal, the district court lacked jurisdiction. This argument, as Defendants correctly point out, is subject to *de novo* review and does not require Defendants to show a “meritorious defense” in addition to the lack of jurisdiction. But this argument fails on the merits. Rule 41(a)(1) was inapplicable when TAB filed its Notice of Voluntary Dismissal for several

independent reasons: (1) Defendants had responded to the complaint by entering an appearance through counsel, stipulating to intervention, and opposing the appointment of a receiver; (2) Rule 41(a)(1) became inapplicable when the court appointed a receiver because only the court could discharge the receiver; and (3) Defendants had stipulated to intervention, and the Intervenor was plaintiffs whose interest could not be dismissed by TAB. All three reasons provide an independent basis to affirm. Thus, even under de novo review, the district court's determination that TAB's attempted dismissal did not deprive the court of jurisdiction should be affirmed.

The second part of Defendants' appeal is even weaker because it is subject to an abuse-of-discretion standard of review. District courts "have 'broad discretion' in deciding whether to set aside a judgment" under Rule 60(b) for non-jurisdictional reasons. *Jones*, 2009 UT 39, ¶ 17. "A district court abuses its discretion only when its decision was against the logic of the circumstances and so arbitrary and unreasonable as to shock one's sense of justice or resulted from bias, prejudice, or malice." *Id.* ¶ 27 (internal quotation marks, ellipsis, and brackets omitted). And the district

court plainly did not abuse its discretion in this case. It exercised proper authority over the receivership and was well within its rights to approve the sale. It was the best offer the receiver could hope for, and time was of the essence. And Defendants were simply unconcerned with the details.

Bank of American Fork respectfully asks this Court to affirm the decision of the district court.

DATED this 2nd day of June, 2016.

KIRTON McCONKIE P.C.

By: 

Adelaide Maudsley

Justin W Starr

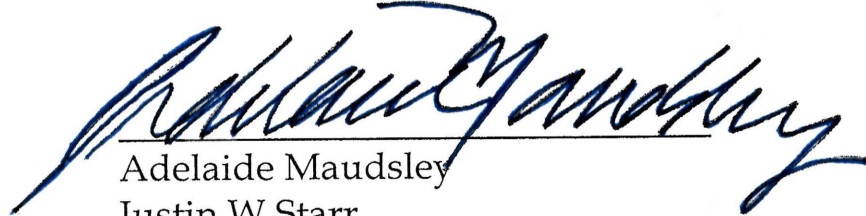
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## CERTIFICATE OF COMPLIANCE

Counsel for Appellee Bank of American Fork certifies that this brief contains 10,273 words, including headings and footnotes, but excluding the table of contents and table of authorities, is in Book Antiqua 14-point font, and is otherwise in compliance with all applicable rules.

DATED this 2nd day of June, 2016.

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2<sup>nd</sup> day of June, 2016, the foregoing

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No. 20150784-CA

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IN THE UTAH COURT OF APPEALS

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TRANSPORTATION ALLIANCE BANK. ET AL.,  
*Plaintiffs and Appellees,*

v.

INTERNATIONAL CONFECTIONS COMPANY, LLC, ET AL.,  
*Defendants and Appellants*

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APPELLEE'S BRIEF OF BANK OF AMERICAN FORK

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On appeal from the Third Judicial District Court, Salt Lake County,  
Honorable Laura S. Scott, District Court No. 140907314

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JUN 02 2016