MEMORANDUM IN SUPPORT OF MOTION TO VACATE JUDGMENT

STATEMENT OF FACTS

On December 24, 2012, a process server attempted to serve the Summons and Complaint in the above-captioned case on Defendant Arland Clean Fuels, LLC (ACF) at the offices of Arland Energy Systems, LLC (AES) located in Suite 300 at 630 Davis Street, Evanston, IL 60201. See Michael Bertogli Affidavit (hereafter "Bertogli Aff."). The office of AES is an informal space, with a large main area populated by six cubicle work stations and an analyst's table. See Office Lease, Exhibit A Floor Plan of Premises (hereafter "Exhibit B"). The only individual in the main area was Michael Bertogli, a twenty four year old analyst with no legal experience. Bertogli Aff. The process server asked whether Eric Decator was available, to which Michael responded in the negative. Bertogli Aff. The process server vaguely informed Michael that "you" are being served and that the summons would need to be signed for. Bertogli Aff. Michael innocently asked the process server whether he could sign for the document, to which the process server responded in the affirmative. Bertogli Aff. Michael signed for the summons and, because Mr. Decator was not in the office and because no one would be in the office the next day, which was Christmas Day, Michael placed the summons on his own desk for delivery on December 26, 2012. Bertogli Aff. On the December 26, 2012, Michael personally delivered the summons to Mr. Decator when they returned to the office. Bertogli Aff. Assuming that the service on ACF on December 24, 2012 was valid, the response date would have been January 13, 2013.

On January 10, 2013, Eric Decator, the General Counsel and Chief Financial Officer of ACF, contacted Plaintiff's counsel, Travis James West, to discuss the Complaint. See Eric Decator Affidavit (hereafter "Decator Aff."). During that call, Mr. Decator and Mr. West agreed

to an extension of time for ACF to file its answer or responsive pleading with the Court. Specifically, they agreed that ACF would have until February 11, 2013 to either file its answer or responsive pleading with the Court or provide Mr. West with an offer to settle the controversy. Decator Aff.

On February 11, 2013, in accordance with the agreement reached by Mr. Decator and Mr. West, Mr. Decator forwarded to Mr. West an offer to settle the controversy. Decator Aff. Mr. West did not respond to the settlement offer until 4:32 pm on Friday, February 15, 2013, at which time Mr. West informed Mr. Decator via e-mail that Plaintiff had rejected the settlement offer and that, contrary to his agreement with Mr. Decator, Mr. West had filed with the Court a Motion for Default Judgment. Decator Aff. In their subsequent telephone conversation, Mr. West informed Mr. Decator, whom Mr. West knew was not a litigator and not a member of the Wisconsin bar, that the Court would not rule on the Motion for Default Judgment for at least ten days, or prior to February 25, 2013. Decator Aff. Notwithstanding Mr. West's representation to Mr. Decator, this Court entered a Default Judgment on February 19, 2013 (just 2 business days after the Motion for Default Judgment was filed), prior to the time that Mr. Decator could arrange for Wisconsin counsel to draft and file a response to the Motion for Default Judgment. Decator Aff.

ANALYSIS

The decision to grant relief from a judgment under Wis. Stat. § 806.07 is a discretionary determination for the circuit court. Bank Mut. v. S.J. Boyer Const., Inc. 2009 WI App 14, 762 N.W.2d 826. Three factors should be considered when making this determination: First, that the statute is remedial in nature and should be liberally construed; second, the law prefers, whenever reasonably possible, to afford litigants a day in court and a trial on the issues; and third, default

judgments are typically regarded with particular disfavor. Miller v. Hanover Ins. Co. 2010 WI 75, 785 N.W.2d 493. A "default judgment is the ultimate sanction." Id. quoting Split Rock Hardwoods, Inc. v. Lumber Liquidators, Inc., 646 N.W.2d 19 (2002).

I. The court should vacate the default judgment against Arland Clean Fuels, LLC as void under Wis. Stat. § 806.07(1)(d) because personal jurisdiction was never attained following improper service.

When a motion to reopen a default judgment involves a question of proper service of process, the burden of proof is on the party seeking to set aside or vacate the default judgment. PHH Mortg. Corp. v. Mattfeld, 2011 WI App 62, 333 Wis.2d 129, 799 N.W.2d 455. According to Wis. Stat. § 801.11(5)(a) an LLC may be served by personally delivering the summons to "an officer, director or managing agent . . . either within or without this state." Wis. Stat. § 801.11(5)(a) (2012). If such officer, director, or managing agent cannot be found with reasonable diligence, the summons may be left "in the office of such officer with the person who is apparently in charge of the office." Id., see also Keske v. Square D. Co., 58 Wis.2d 307, 206 N.W.2d 189 (1973).

Actual knowledge and receipt of the summons is immaterial to the issue of valid service and personal jurisdiction. See Danielson v. Brody Seating Co., 71 Wis.2d 424, 238 N.W.2d 531, 533-34 (1976) ("The service of summons in a manner prescribed by statute is a condition precedent to a valid exercise of personal jurisdiction, even though a different method might properly have been prescribed, and notwithstanding actual knowledge by the defendant."). The fact that ACF eventually obtained the summons does not establish that ACF was properly served.

On December 24, 2012, the plaintiff failed to properly serve an officer or managing agent of ACF. Among the factors a court may consider in determining whether an individual is an officer of a corporation are: (1) The individual's managerial duties; (2) whether the position

occupied is one of authority; (3) whether the individual possesses superior knowledge and influence; and (4) whether the individual is in a position of trust. Richards v. First Union Securities, Inc., 2006 WI 55, 714 N.W.2d 913. Under this analysis, Mr. Bertogli, the employee who signed for the summons on December 24, is clearly not an officer or managing agent. Mr. Bertogli is an analyst who provides market research and financial information to the CEO of GCF Resources (formerly AES), Louis Stern. He is a young man with neither rank nor apparent authority to bind the company in any regard. Simply because he was the only individual in the process server's line of sight does not make him capable of signing for such a summons, nor does the process server have any authority to confer such powers upon Mr. Bertogli. Therefore, service was ineffective because no officer or managing agent signed for the summons.

Not only is Mr. Bertogli not a manager or officer of ACF, he also could not reasonably have been considered "apparently in charge of the office." Whether a party is "apparently in charge of the office" leads to a two pronged analysis: First, whether the location where the summons and complaint were presented was the office of such officer, director or managing agent, and second, whether it was reasonable for the process server to conclude that the person presented with the summons and complaint was the person apparently in charge of the office. Bar Code Resources v. Ameritech Info. Systems, Inc., 229 Wis.2d 287, 599 N.W.2d 872 (1999). In the analysis, the term "apparently" refers to what was apparent to the process server, but there must be more than the unsupported assumption of the process server that the person being served is the correct person. Horrigan v. State Farm Ins. Co., 106 Wis.2d 675, 317 N.W.2d 474 (1982).

Where an individual who is not authorized to accept service on behalf of a company volunteers to accept such service on behalf of the company and does, service fails despite this individual's apparent authority. Bar Code Resources, 599 N.W.2d at 872. In Bar Code

Resources v. Ameritech, Inc., a process server attempted to serve the defendant, Ameritech, Inc., with a summons. Ameritech was located on the twenty third floor of an office building and when the process server informed the lobby personnel on the first floor of his business with Ameritech, the receptionist called over the security officer, Mr. Kennedy, who then volunteered to accept the summons. Id. Mr. Kennedy bluntly stated, "I can accept service, we are always being sued." Id. Despite Mr. Kennedy's assertions, the court held that it was unreasonable for the process server to assume Mr. Kennedy was "apparently in charge of the office," because of the size of the building, the nature of his position, the locations where the service was received, and the various facts of case. Id.

In Horrigan v. State Farm, the Wisconsin Supreme Court also examined the meaning of "apparently in charge of" and held that where an office receptionist calls over someone to interact with a process server, depending upon the demeanor of this individual who arrives, it is reasonable for the process server to conclude that this individual in in charge of the office. Horrigan, 317 N.W.2d at 474. In Horrigan, a process server attempted to serve State Farm Insurance through one of its branch locations. A receptionist told the process server to have a seat while she found someone to receive service. Id. An individual appeared who accepted the service without complaint and the process server assumed the person was capable of receiving service "because of the manner in which he was approached by the recipient." Id. The court upheld the default judgment by simply recognizing that given the nature of the office interaction, it was reasonable for the process server to assume the recipient was in charge of the office. Id.

The case at hand demonstrates that ACF was not properly served because the summons was delivered to an individual who was not authorized to accept service and who could not reasonably be construed as "in charge of" the office. Unlike the transaction in Horrigan, Mr.

Bertogli never offered to get someone capable of accepting the summons. Unlike the unidentified recipient, Mr. Bertogli did not project authority when he accepted the summons. Mr. Bertogli is a young man who was working at the far end of a communal office space when the process server arrived. He was not in an office and was neither asked his title nor did he provide his title. In fact, like the security guard in Bar Code, Mr. Bertogli is not even an employee of ACF. Put simply, Mr. Bertogli was the only individual in the office who was on hand and he innocently relied on the expertise of the process server as evidenced by *Mr. Bertogli asking the process server whether he was permitted to sign for the summons.*

Like the process server in Bar Code, the process server who arrived on December 24, 2012 could not simply assume that whichever individual he happened upon could accept service. The process server arrived at an office that did not bear the name Arland Clean Fuels. He never asked Mr. Bertogli whether the offices of Arland Energy were related to ACF, nor did he ask Mr. Bertogli whether he was affiliated with ACF. Moreover, unlike the security officer in Bar Code, Mr. Bertogli offered no pretexts of authority for which the process server could base his assumptions.

Mr. Bertogli was not an officer, manager, or agent of ACF, nor was it reasonable for the process server to assume that he was "in charge of the office." Therefore, like the conclusion reached in Bar Code, the court should conclude that personal jurisdiction was never acquired because ACF was improperly served. As such, the court should vacate the default judgment entered against ACF.

II. Concurrently, and in the alternative, the default judgment should be set aside because defendant's actions amount to mistake and/or excusable neglect under Wis. Stat. § 806.07(1)(a).

A motion seeking judgment to be vacated for mistake, inadvertence, surprise, or excusable neglect of the aggrieved party, is addressed to the court's discretion. Siebert v. Jacob Dudenhoefer Co. 178 Wis. 191, 188 N.W. 610 (1922). The decision whether to deem a mistake as excusable, so as to justify setting aside the judgment, is encompassed within the meaning of "excusable neglect," which is that neglect which might have been the act of a reasonably prudent person under the circumstances. State v. Schultz, 224 Wis.2d 499, 591 N.W.2d 904 (Ct. App. 1999). Neglect in filing answer as result of agreement between counsels is clearly 'excusable neglect.' Wagner v. Springaire Corp. , 50 Wis.2d 212, 184 N.W.2d 88 (1971).

A party moving to vacate a judgment under § 806.07(1)(a) must: (1) demonstrate that the judgment against him or her was obtained as the result of mistake, inadvertence, surprise or excusable neglect, and (2) demonstrate that he or she has a meritorious defense to action. J.L Phillips & Associates, Inc. v. E & H Plastic Corp., 217 Wis.2d 348, 577 N.W.2d 13 (1998). The threshold of a meritorious defense is no greater than the barrier imposed by § 806.07 itself. Id. Therefore, where a movant can establish that failure to timely answer is the result of "excusable neglect," the meritorious defense requirement will be met. Id.

Wisconsin case law is littered with cases that stand for the proposition that miscommunications and misunderstanding between opposing parties and counsel can provide sufficient grounds for excusable neglect. In Stafford v. McMillan, the Wisconsin Supreme Court held that where defendants neglected to timely answer because they had relied on a plaintiff's promise to call the defendant "and fix the matter up," it was not an abuse of discretion for the trial court to set aside the judgment and hear the answer. Stafford v. McMillan 25 Wis. 566 (1870). In Heinemann v. Le Clair, the Court similarly concluded that where lawyers representing opposing parties differ in the interpretation of the oral agreements which they entered into,

sufficient grounds exist for a finding of excusable neglect so as to set aside a default judgment. Heinemann v. Le Clair, 82 Wis. 135, 51 N.W. 1101, (1892). Similarly, in Rutan v. Miller, the Wisconsin Court of Appeals held that excusable neglect may be found where opposing counsel fail to reduce to writing a courtesy agreement extending one party's time to answer. Rutan v. Miller, 213 Wis. 2d 94, 570 N.W.2d 54 (Ct. App. 1997).

In the present case, the general counsel for the defendant ACF, Eric Decator, and the counsel for the plaintiff, Mr. West, had reached an agreement on February 11, 2013 whereby Mr. Decator would either provide an answer to the plaintiff's complaint or provide an offer to settle. See Decator Aff. By submitting a settlement offer to Mr. West later that day, Mr. Decator understood that such a response foreclosed Mr. West from filing a Motion for Default Judgment. Decator Aff. Whether Mr. West ever intended to honor the initial offer and engage in settlement negotiations is unclear at this time, but at best this was a clear miscommunication between the parties. The current dispute between the parties involves a myriad of issues that need more time to establish the legal issues, so greater time and investigation is needed to properly litigate this dispute. The simple miscommunication between counsel and the failure to put oral agreements into writing should not bar ACF from an equitable legal outcome. Therefore, the default judgment should be vacated and twenty days should be granted in order to provide a sufficient answer.

III. Concurrently and in the alternative, the Court should vacate the default judgment under the catch-all clause of Wis. Stat. § 806.07(1)(h), because extraordinary circumstances exist that demands such action.

Wis. Stat. § 806.07(1)(h) is a catch-all provision granting trial courts broad discretionary authority to provide relief from default judgments for any reasons justifying such relief. Matter of Settlement for Personal Injuries of Konicki, 186 Wis. 2d 140, 519 N.W.2d 723 (Ct. App.

1994). A court appropriately grants relief from a default judgment under (1)(h) when extraordinary circumstances are present justifying relief in the interest of justice. Miller, 785 N.W.2d at 502. Extraordinary circumstances "are those where the sanctity of the final judgment is outweighed by the incessant command of the court's conscience that justice be done in light of all the facts." Id. quoting Mogged v. Mogged, 607 N.W.2d 662 (Ct. App. 2000) (further internal quotations and citations omitted).

In Miller v. Hanover Ins. Co., the Wisconsin Supreme Court enunciated a five factor test to consider in the analysis of § 806.07(1)(h) as follows:

> 'Whether the judgment was the result of the conscientious, deliberate and well-informed choice of the claimant; whether the claimant received the effective assistance of counsel; whether relief is sought from a judgment in which there has been no judicial consideration of the merits and the interest of deciding the particular case on the merits outweighs the finality of judgments; whether there is a meritorious defense to the claim; and whether there are intervening circumstances making it inequitable to grant relief.'

Id. quoting State ex rel. M.L.B. v. D.G.H., 363 N.W.2d 419 (1985). In applying the five factors to the facts in the case, the Court set aside a circuit court's ruling and vacated a default judgment. Id. at 509. The Court held that the circuit court failed to sufficiently justify its decision and because there were justiciable claims that had not been litigated on their merits, because of breakdowns in communications between interested parties, and because there had been timely communications between the parties, equity demanded a vacation of the circuit court's default judgment. Id. at 505-09.

Like the analysis in Miller, the extraordinary circumstances test and its five factor analysis strongly support vacating the default judgment entered against Arland Clean Fuels, LLC (ACF). ACF ownership had recently switched hands and deciphering the contractual obligations entered into by the previous regime is an ongoing process, one which Mr. Wolf is well aware of. Not only was there a failure to properly serve ACF, but there was ongoing communication

breakdown, where promises were made by the plaintiff to representatives of ACF and then suddenly broken. This change in posture can be characterized as confused at best and potentially fraudulent at worst. Moreover, there are many outstanding issues relating to the underlying claims that need further investigation, perhaps even discovery, and thus time is essential in order to reach an equitable outcome and provide real finality to this case. Therefore, extraordinary circumstances exist that call for this court to vacate the default judgment against ACF.

CONCLUSION

Based on the arguments presented above, ACF respectfully requests that the Court vacate the default judgment entered against ACF and grant the statutorily prescribed twenty days in which to provide an answer to the plaintiff's complaint. The default judgment is void for lack of personal jurisdiction, and the court has additional authority to vacate the judgment based on the excusable neglect and extraordinary circumstances of this dispute.

Date:

Signed: _____

Atty. Joseph A. Camilli
License Number: 1090039

GCF Resources, LLC
630 Davis St., Suite 300
Evanston, IL 60201