

Dan Alban*, VA Bar No. 72688
INSTITUTE FOR JUSTICE
901 N. Glebe Rd., Suite 900
Arlington, VA 22203
Tel.: (703) 682-9320
Fax: (703) 682-9321
Email: dalban@ij.org

Anya Bidwell*, TX Bar No. 24101516
INSTITUTE FOR JUSTICE
816 Congress Ave., Suite 960
Austin, TX 78701
Tel.: (512) 480-5936
Fax: (512) 480-5937
Email: abidwell@ij.org

*Pending admission *pro hac vice*

Thomas B. Jubin, WY Bar No. 5-2433
Jubin & Zerga, LLC.
2614 Pioneer Ave.
P.O. Box 943
Cheyenne, WY 82003
Tel.: (307) 637-4965
Fax: (307) 637-4788
Email: tom@jubinzerga.com

Counsel for Claimant Phillip Parhamovich III

FILED

NOV 16 2017

**DIANE SANCHEZ
CLERK OF THE DISTRICT COURT**

**IN THE DISTRICT COURT FOR THE FIRST JUDICIAL DISTRICT
STATE OF WYOMING, COUNTY OF LARAMIE**

IN THE REGARD TO U.S. CURRENCY)
TOTALING \$91,800.00)
)
)

Docket No. 187-824

**MOTION AND MEMORANDUM IN SUPPORT OF CLAIMANT PARHAMOVICH'S
MOTION TO SET ASIDE ENTRY OF DEFAULT, TO SET DATE FOR A REHEARING,
AND TO SET A DISCOVERY AND BRIEFING SCHEDULE**

COMES NOW Claimant Phillip Parhamovich III, by and through his counsel of record.

Mr. Parhamovich is a party in interest and the lawful owner of the \$91,800 in U.S. Currency ("seized cash"), which is the seized property at issue in this case. In anticipation of the scheduled December 1, 2017 Default Hearing in this matter, Mr. Parhamovich, consistent with Wyoming Rules of Civil Procedure 55(c), 60(b)(1), and 60(b)(6) ("Rules"), hereby moves this Court to set aside any entry of default in the case for good cause (and to decline to enter default if it has not yet been entered). Mr. Parhamovich also respectfully asks this Court to set a date for a rehearing on the Order to Show Cause and to set a discovery schedule, allowing at least ninety (90) days to conduct discovery before the rehearing.

I. SUMMARY OF THE ARGUMENT

Consistent with Rule 55(c) (governing default judgments) and Rules 60(b)(1) (relief from an order due to surprise) and 60(b)(6) (relief from an order due to any other reason that justifies relief), this Court should grant Mr. Parhamovich's Motion to Set Aside Clerk's Entry of Default. Mr. Parhamovich has good cause for failing to respond to the State of Wyoming's Petition for Order to Show Cause ("Petition") filed on May 4, 2017 and to appear at the Show Cause Hearing ("Hearing") held on July 5, 2017: He received no notice of the Petition or the Hearing until weeks after the Hearing was held. (*See* Declaration of Phillip Parhamovich III in Support of Motion to Set Aside Entry of Default ("Parhamovich Decl. #1") ¶¶ 25, 32-33.)

Well before the Wyoming Office of Attorney General ("AG's Office") filed the Petition on May 4, 2017, it (1) knew that Mr. Parhamovich claimed the seized cash, (2) knew Mr. Parhamovich's mailing address, email address, and phone number, (3) had corresponded with Mr. Parhamovich at his mailing address about the seized cash multiple times in March and April 2017, and (4) knew that Mr. Parhamovich had repeatedly requested notice of any court proceedings regarding the seized cash in each of three letters he sent the AG's Office in March and April 2017. Despite this, the AG's Office failed to notify Mr. Parhamovich of the filing of the Petition or that the Hearing had been scheduled on the matter. (Parhamovich Decl. #1 ¶¶ 25, 32-33.) Had Mr. Parhamovich been properly served and noticed—as required by Wyo. Stat. 7-2-105(d) and Wyoming Rule of Civil Procedure 4(k)-(l), as well as the Due Process clauses of the Wyoming and United States Constitutions—he would have responded to the Petition and appeared at the Hearing to defend his right to the return of his life savings. (Parhamovich Decl. #1 ¶ 26.) Instead, Mr. Parhamovich—unaware of these developments—was waiting to hear back from the AG's Office regarding evidence he provided in response to the AG's Office's inquiries about the source of the seized cash. (Parhamovich Decl. #1 ¶ 27.)

Because Mr. Parhamovich was not notified about the Petition or the Hearing—even though his mailing address, email address, and phone number were known to the AG's Office since March 2017—Mr. Parhamovich has good cause for failure to appear. For this reason, this Court should set aside the entry of default.

II. DESCRIPTION OF FACTS

a. During a traffic stop, Wyoming law enforcement officers seized Mr. Parhamovich's life savings.

On March 13, 2017, Mr. Parhamovich—a Wisconsin musician—was driving through Wyoming on a short concert tour. He was stopped by Wyoming Highway Patrol on I-80 in Laramie County for not wearing a seatbelt. (*See* Petition ¶ 3.) After detaining Mr. Parhamovich for over an hour and extensively searching his Honda Odyssey minivan, officers from the Wyoming Highway Patrol and Wyoming Division of Criminal Investigations (“Wyoming DCI”) discovered and seized Mr. Parhamovich’s life savings, totaling \$91,800 in cash. (*See* Petition ¶¶ 1, 3-9.) Prior to being allowed to leave, and while on the side of the highway and without the advice of an attorney, Mr. Parhamovich was pressured to sign a form purportedly “voluntarily” releasing his interest in his life savings (by “giv[ing] this property or currency . . . to the State of Wyoming, Division of Criminal Investigation, to be used for narcotics law enforcement purposes”), and purportedly waiving any opportunity to contest the seizure in formal forfeiture proceedings under Wyo. Stat. § 35-7-1049. (*See* Petition, Ex. 1.) After he signed the waiver form, he was permitted to leave and was not charged with any crime (he received a \$25 traffic citation for not wearing his seatbelt and a “lane use” warning). (Parhamovich Decl. #1 ¶¶ 3-4, Ex. A.) The officer did not give him a copy of this signed waiver form, and his attempt to obtain the form he had signed via public records requests on March 21, 2017 was denied by the AG’s Office. (Parhamovich Decl. #1 ¶¶ 5-6, Ex. B.)

b. Mr. Parhamovich was never notified of the Petition being filed against his property, nor of the Hearing, until well after both had occurred.

Since four days after the seizure, Mr. Parhamovich has been in regular correspondence with the Wyoming AG’s Office, using his address at [REDACTED] and his email address. (Parhamovich Decl. #1 ¶¶ 7-8.) Had the AG’s Office notified Mr. Parhamovich of the Petition or Hearing using either address, Mr. Parhamovich would not have failed to appear. (Parhamovich Decl. #1 ¶ 26.)

The correspondence between Mr. Parhamovich and the AG’s Office unfolded as follows. On March 17, 2017, just four days after the seizure, Mr. Parhamovich sent a letter to the Wyoming Highway Patrol and the AG’s Office, and a separate letter to the Wyoming DCI; in both letters, Mr. Parhamovich claimed the seized cash, asked for it to be promptly returned, disputed and revoked the roadside waiver, and asked to be provided notice regarding any court

proceedings regarding the seized property. (Parhamovich Decl. #1 ¶¶ 8-9, Exs. C-D.) Mr.

Parhamovich provided his mailing address at [REDACTED] in both letters. (Parhamovich Decl. #1 ¶ 8.)

A few days later, on March 21 and 22, 2017, Mr. Parhamovich also submitted electronic public records requests containing his mailing address, email address, and phone number to the Wyoming Highway Patrol, the AG's Office, and the Wyoming DCI. (Parhamovich Decl. #1 ¶¶ 10-11, Exs. E-H.) Kim McLees, the Custodian of Records for the Wyoming Highway Patrol, responded by email to Mr. Parhamovich's record request on March 21, 2017, and again exchanged emails with Mr. Parhamovich on March 22, 2017.¹ (Parhamovich Decl. #1 ¶¶ 12-13, Ex. I.) In all of his public records requests, Mr. Parhamovich used the same email address and phone number that he has continuously used since long before the traffic stop on March 13, 2017, which he monitors regularly and checks for messages on at least a daily basis. (Parhamovich Decl. #1 ¶ 17.)

The AG's Office wrote back to Mr. Parhamovich on March 24, 2017 at his mailing address at [REDACTED] regarding his March 17, 2017 letter, and asked for financial documents to confirm that Mr. Parhamovich is the true owner of the seized cash. (Parhamovich Decl. #1 ¶ 18, Ex. B.) Mr. Parhamovich responded with a letter on April 10, 2017, informing the AG's Office that he was in the process of collecting the financial documents, and again asking for the property to be returned and requesting any notice of court proceedings. (Parhamovich Decl. #1 ¶¶ 19-20, Ex. L.) The AG's Office responded again in an April 19, 2017 letter—also sent to Mr. Parhamovich's mailing address at [REDACTED]—setting a deadline to provide this documentation by May 1, 2017. (Parhamovich Decl. #1 ¶¶ 21-22, Ex. M.) On April 28, 2017, Mr. Parhamovich sent a package by overnight mail to the AG's Office, providing a substantial amount of financial documents demonstrating that the seized cash was his lawfully earned income and showing that Mr. Parhamovich was going to use approximately \$80,000 of the seized cash as a down payment for a recording studio in Madison, Wisconsin. (Parhamovich Decl. #1 ¶¶ 23-24, Ex. N.)

¹ Mr. Parhamovich also electronically submitted another set of public records requests containing his email address to the AG's Office and Wyoming Highway Patrol on June 7, 2017, and again exchanged several emails with Kim McLees from the Wyoming Highway Patrol in June 2017 regarding his second public records request to the Wyoming Highway Patrol. (Parhamovich Decl. #1 ¶¶ 14-16, Exs. J, K.)

Mr. Parhamovich not only met the AG's Office's deadline when he provided the documentation on April 28, 2017, he also requested (as he had in his previous two letters) that the AG's Office notify him of any hearings or other proceedings related to the seizure or forfeiture of the seized cash so he could contest such a seizure or forfeiture. (*See* Parhamovich Decl. #1 Exs. C, L, N.) In fact, in each of the three letters that Mr. Parhamovich sent to the AG's Office before May 2017, he specifically requested that:

[I]f you do not return my property immediately, please provide me notice of any hearings or other proceedings related to the seizure or forfeiture of this property as required by Wyoming law so that I may contest the seizure and forfeiture of my property.

(Parhamovich Decl. #1 Exs. C, L, N.)

All told, prior to May 4, 2017, when the AG's Office filed the Petition, it had received three letters from Mr. Parhamovich about his seized cash, all of which provided his mailing address, stated his claim to the seized cash, asked for the seized cash to be returned, and requested notice of any court proceedings about the seized cash. Prior to May 4, 2017, the AG's Office had already written two letters to Mr. Parhamovich at his mailing address in [REDACTED], [REDACTED] (and received responses to both). Prior to May 4, 2017, the AG's Office and Wyoming Highway Patrol had each received a public records request from Mr. Parhamovich regarding his seized cash which contained Mr. Parhamovich's mailing address, email address, and phone number. Prior to May 4, 2017, the Public Records Custodian for the Wyoming Highway Patrol exchanged several emails with Mr. Parhamovich regarding his public records requests for records related to his seized cash.

But despite knowing Mr. Parhamovich's mailing address, email address, and phone number, and despite repeatedly corresponding with him through that mailing address, the AG's Office claimed in its Affidavit for Service by Publication ("Affidavit") filed on May 4, 2017 that the address of any bona fide owners could not be ascertained, warranting notice via publication in a Wyoming newspaper. (Affidavit ¶ 2.) However, the very next paragraph of the Affidavit also stated that Mr. Parhamovich was a "contested owner" and correctly stated Mr. Parhamovich's "last known address was [REDACTED]" (Affidavit ¶ 3.) Notably absent from the Affidavit, however, is a claim that any attempt was made to serve Mr. Parhamovich at this (or any) address. (*See* Affidavit ¶¶ 1-5.)

Notice via publication in a local Wyoming newspaper was a completely inadequate measure that had no plausible chance of actually notifying Mr. Parhamovich about the Petition or

the Hearing. As the AG's Office knew from its correspondence with Mr. Parhamovich, he does not reside in Wyoming, nor even in an adjoining state; he lives nearly 1,000 miles away in Wisconsin. (Parhamovich Decl. #1 ¶ 28.) Mr. Parhamovich also does not know anyone who lives in Wyoming. (Parhamovich Decl. #1 ¶ 29.) He was simply driving through the state. In other words, publishing notice in a local newspaper was not a reasonable, let alone legally sufficient, way to inform Mr. Parhamovich of the Petition filed against the seized cash or of the Hearing regarding his seized cash.

The AG's Office could have quite easily provided notice to Mr. Parhamovich using the same address it had repeatedly used in its previous correspondence with Mr. Parhamovich—
[REDACTED]—to notify him of the Petition and the Hearing.² Although Mr. Parhamovich moved to a new home in Madison, Wisconsin in late June 2017 (and promptly alerted the AG's Office to the address change shortly thereafter, in early July), he continues to own the house at [REDACTED] (Parhamovich Decl. #1 ¶ 30.) He continues to receive mail there and checks the mail at his [REDACTED] house at least once per week, except when he is traveling. (Parhamovich Decl. #1 ¶ 31.) In other words, had the AG's Office simply notified Mr. Parhamovich via the [REDACTED] [REDACTED] mailing address they had already used to correspond with him (or his email address or phone number), Mr. Parhamovich would have both answered the Petition and appeared at the Hearing. (Parhamovich Decl. #1 ¶ 26.)

Mr. Parhamovich only learned of the Petition and the Hearing in late July 2017 after he mailed a letter to the AG's Office on July 7, 2017 regarding his change of address and inquiring about the status of its consideration of the financial documents he had provided in late April 2017. (Parhamovich Decl. #1 ¶ 32.) On July 24, 2017, Mr. Parhamovich received a response from the AG's Office dated July 13, 2017, which notified him that the Petition was filed in early May 2017, just after he submitted his financial documents, and that the Hearing had already taken place on July 5, 2017. (Parhamovich Decl. #1 ¶ 33, Ex. O.) This letter included copies of

² The AG's Office also should have known of Mr. Parhamovich's email address and phone number due to the public records requests he submitted to the AG's Office in March 2017 and June 2017, (*see* Parhamovich Decl. #1 ¶ 10, 14, Exs. F, G, K) and thus could have also reached him via his email address—as the Custodian of Records for the Wyoming Highway Patrol repeatedly did in March 2017 and June 2017—or at his phone number. (Parhamovich Decl. #1 ¶ 12, 14, 17, Exs. I, J.)

the filings by the AG's Office and the Show Cause Order in this case, which was the first time Mr. Parhamovich had seen any of these documents.³ (Parhamovich Decl. #1 ¶ 35.)

III. ARGUMENT

Consistent with Rule 55(c) (governing setting aside entry of default) and Rules 60(b)(1) (relief from an order due to “surprise”) and 60(b)(6) (relief from an order due to “any other reason that justifies relief”), and the Due Process clauses of the Wyoming and United States Constitutions, this Court should grant Mr. Parhamovich's Motion to Set Aside Clerk's Entry of Default.

The State of Wyoming failed to notify Mr. Parhamovich of the Petition filed against the seized cash and of the Hearing to be held regarding the seized cash despite the AG's Office being fully aware that Mr. Parhamovich claimed rights in the seized cash and that he could be reached at his mailing address: [REDACTED] (or by email or phone, both of which were also known to the State of Wyoming). *See* Part II.b *supra*. Rather than serve Mr. Parhamovich directly, such as by certified or registered mail, the State of Wyoming attempted service by publication in a local Wyoming newspaper, the *Wyoming Tribune-Eagle* on May 24 and 31, 2017. (*See* Proof of Publication, Docket No. 187-284 (filed July 12, 2017)). Mr. Parhamovich, who neither lives in Wyoming nor even knows anyone who does, had no chance of reading this publication. (Parhamovich Decl. #1 ¶¶ 28-29.) But even if he had miraculously seen this publication, the State's attempted service by publication was so flawed that he would not have even known the correct time for the hearing. (*See* Proof of Publication, (the “true copy” from the newspaper lists the hearing time as “2:00 o'clock a.m.”)).

As explained below in parts (a) and (b), the State's attempted use of service by publication was improper because (a) it failed to comport with several of the strict service by publication requirements under Rules 4(l)-(n) of the Wyoming Rules of Civil Procedure and, (b) it failed to satisfy the due process requirement that an interested party be provided with reasonably effective notice, because the State of Wyoming actually knew how to contact Mr. Parhamovich. Then, part (c) explains why Mr. Parhamovich had “good cause” for not attending

³ This was also the first time Mr. Parhamovich received a copy of the actual waiver form he had signed during the March 13, 2017 traffic stop—which was attached as an exhibit to the Petition—even though he had submitted two public records requests on March 21, 2017, for any “property waivers” or other “written records documenting the traffic stop.” (Parhamovich Decl. #1 ¶ 36, Exs. E-F.) Those public records requests were denied by the AG's Office in a March 24, 2017 letter. (Parhamovich Decl. #1 ¶ 5, Ex. B at 2.)

the Hearing as a result of the State’s failure to provide him with any service or notice prior to the Hearing. Because Mr. Parhamovich did not become aware of the Petition or the Hearing until well after the Hearing was held, he suffered from “surprise.” The service-of-process and constitutional notice violations are also independently “any other reason that justifies relief.” Either or both of these reasons constitute “good cause” to set aside entry of default (or not enter default) and thus are grounds to provide relief to Mr. Parhamovich under Rule 55(c) and Rules 60(b)(1) and 60(b)(6).

a. The State of Wyoming failed to comply with several of the strict requirements for service by publication under Wyoming Rules of Civil Procedure 4(l)-(n), and thus also failed to satisfy the notice requirements of Wyo. Stat. § 7-2-105(d).

The State of Wyoming failed to satisfy several of the strict requirements for service by publication under Wyoming Rule of Civil Procedure 4(l)-(n). By failing to properly make service by publication, the State of Wyoming also failed to comply with Wyo. Stat. § 7-2-105(d), which requires that “[n]otice and proceedings on the order to show cause shall be according to the Wyoming Rules of Civil Procedure.” Wyo. Stat. § 7-2-105(d).

The requirements for service of process under Rule 4 are strictly interpreted and enforced as a general matter, and even more so for service by publication, where “strict and full compliance . . . is demanded.” *Goss v. Goss*, 780 P.2d 306, 310 (Wyo. 1989) (“ . . . statutes permitting the service of process upon nonresidents, because those statutes are in derogation of the common law, are to be strictly construed. This is true as well of court rules permitting service by publication, and strict and full compliance with them is demanded.”) (citations omitted). Under Rule 4, service by publication is only allowed in discrete, narrow circumstances, and only when minimal-but-strict requirements, including an affidavit making specific statements, are satisfied. *See* Wyo. R. Civ. P. 4(k) (providing specific scenarios under which service by publication is allowed); Wyo. R. Civ. P. 4(l)(1) (providing requirements for service by publication, including an affidavit stating specific required items).⁴

⁴ Even though Mr. Parhamovich was not a defendant, these service requirements still apply to him as an interested party who claims a legal interest in the property at issue in this case. In *Matter of Adoption of CAM*, the Supreme Court of Wyoming held that then-Wyoming Rule of Civil Procedure 4(f)—now codified as Rule 4(l)—which required reasonable diligence in ascertaining a *defendant’s* address, applied to providing notice to a nonresident biological father in adoption proceedings—who was not a defendant, but rather an interested party—and that publishing a notice in a newspaper was not sufficient. 861 P.2d 1102, 1104-05 (Wyo. 1993).

The State of Wyoming failed to meet these strict requirements for service by publication under Rule 4(l). Specifically, and as explained in more detail below, the State of Wyoming: (i) failed to file an affidavit that satisfies each of the strict requirements of Rule 4(l)(1); (ii) apparently failed to follow the requirements of Rule 4(l)(2) regarding delivering a copy of the publication to the clerk to send to Mr. Parhamovich by certified or registered mail, and filing a second affidavit if that attempt at service was unsuccessful; (iii) published an inadequate notice that failed to state the correct time of the hearing (which it listed as “2 o’clock a.m.” on July 5, 2017) as required under Rule 4(m)(4)(C), failed to provide notice that judgment by default may be rendered for failure to appear as required under Rule 4(m)(4)(D), and failed to state Mr. Parhamovich’s address, as required by Rule 4(l)(2)(A); and (iv) never actually completed service by publication as a result of these many failures.

i. The State of Wyoming’s Affidavit is facially flawed and fails to satisfy each of the requirements of Rule 4(l)(1).

Rule 4(l)(1) requires that the affidavit filed prior to service by publication must include several specific statements. The Supreme Court of Wyoming has made clear that, “[w]ith respect to the filing of such an affidavit, our rule is that the requirements of [Rule 4(l)] are minimal and demand strict compliance.” *Goss*, 780 P.2d at 312. The Court explained that, “requiring such an affidavit, prior to permitting service by publication, assists in **assuring that service by publication will occur only where service by other means, more certain to give a party actual notice, is either unreasonable or impractical.**” *Id.* (emphasis added). With respect to this affidavit, “the requirements of the rule pertaining to service by publication are minimal, [such] that **any omission of statements which are requisite under the rule [are] fatal.**” *In re Lonquest’s Estate*, 526 P.2d 994, 998 (Wyo. 1974) (citing *National Supply Company v. Chittim*, 387 P.2d 1010, 1011 (Wyo. 1964) (emphasis added)). For example, “even where the affidavit states the last known address of the defendant, it is deficient if it does not also state a present address or that the present address cannot be ascertained through due diligence.” *Goss*, 780 P.2d at 312. In *Goss*, the Court held that an affidavit was invalid when it did not strictly comply with the requirements of Rule 4, even though it was “sufficient to establish that the mother could not be served within Wyoming and that the case was a proper case for service by publication.” *Id.* The State of Wyoming’s failure to comply with any of—let alone each of—the requirements of Rule 4(l)(1) here is likewise a fatal deficiency that invalidates the attempted service by publication.

The State of Wyoming's Affidavit for service by publication is facially flawed, failing to meet each of the requirements for such an affidavit under Rule 4(l)(1) of the Wyoming Rules of Civil Procedure. Specifically, it failed to make each of the four statements required under paragraphs (A), (B), (C), and (D) of Rule 4(l)(1).

First, the Affidavit fails to satisfy Rule 4(l)(1)(A) ("that service of a summons cannot be made within this state, on the defendant to be served by publication"), because it fails to make any such allegation or statement about service on Mr. Parhamovich or any other potential owner or claimant. (*See* Affidavit ¶¶ 1-5.)

Second, the Affidavit fails to satisfy Rule 4(l)(1)(B) ("stating the defendant's address, if known, or that the defendant's address is unknown and cannot with reasonable diligence be ascertained") with respect to Mr. Parhamovich because it does not claim to state Mr. Parhamovich's current address, but only his "last known address." (Affidavit ¶ 3.) While this may seem a minor difference, the Wyoming Supreme Court has held in the context of an affidavit for service by publication that "merely stat[ing] the last known address of [a] defendant . . . falls short of stating a present known address." *Emery v. Emery*, 404 P.2d 745, 747 (Wyo. 1965) (finding invalid an affidavit for service by publication that failed to specifically state either that the defendant's address was unknown and could not with reasonable diligence be ascertained, or what the defendant's current address is, rather than the last known address). The Affidavit fails to make any statement about Mr. Parhamovich's present known address, even though it was dated May 2, 2017 and filed on May 4, 2017, just a few days after the AG's Office would have received Mr. Parhamovich's April 28, 2017 letter. (*See* Parhamovich Decl. ¶¶ 23-24.)

Third, the Affidavit fails to satisfy Rule 4(l)(1)(C) ("detailing the efforts made to obtain an address"), because it only includes boilerplate language that fails to detail any specific efforts made to obtain an address: "That efforts of the Wyoming Division of Criminal investigation personnel have exhausted all reasonable means available to ascertain the identity of any possible owners and their respective addresses." (Affidavit ¶ 2.) Similar boilerplate language about generic efforts to obtain an address was found to be "so ambiguous and unintelligible as to be a nullity" in *Emery*, 404 P.2d at 747. Similar language about the efforts of people other than the affiant to locate the address was also rejected in *Emery* for failing to be a statement made by the affiant within his personal knowledge. *Id.*

Fourth, the Affidavit filed by the State of Wyoming is facially flawed under Rule 4(l)(1)(D), because it fails to state “that the case is one of those mentioned in subdivision (k).” Instead, the Affidavit only mentions paragraph (e) of Rule 4, which lays out four methods for “Serving an Individual Within the United States” by personal service, none of which was satisfied here.⁵ (Affidavit ¶ 4.) This flaw is also fatal for complying with the affidavit requirements of Rule 4(l).

ii. The State of Wyoming apparently failed to comply with the requirements for service by publication under Rule 4(l)(2) regarding providing a copy of the publication to the clerk to send by registered or certified mail, and filing a second affidavit if that attempt failed.

In addition to failing to comply with Rule 4(l)(1), it appears that the State of Wyoming also failed to comply with Rule 4(l)(2), which requires that the publication be delivered to the clerk for delivery to any defendant (or interested party) whose address is known, and that a second affidavit be filed if no such delivery has been made to the defendant (or interested) party by the clerk.

There is no mention in any of the papers filed by the State of Wyoming in the docket file for this case—nor in the letter written to this Court by the AG’s Office on July 13, 2017 by the AG’s Office after it became aware that Mr. Parhamovich had not received notice of these proceedings—of any effort made to comply with Rule 4(l)(2)(B), which requires that the serving party deliver copies of the publication to the clerk’s office for service on each defendant or interested party by registered or certified mail:

Immediately after the first publication the party making the service shall deliver to the clerk copies of the publication, and the clerk shall mail a copy to each defendant whose name and address is known by registered or certified mail and marked ‘Restricted Delivery’ with return receipt requested, directed to the defendant's address named therein, and make an entry thereof on the appearance docket.

Mr. Parhamovich did not receive any such delivery from the clerk. (Parhamovich Decl. #1 ¶¶ 25-27, 32-33.) Upon information and belief, no such entry was made in the appearance docket indicating that such a delivery was made.

Upon information and belief, there was also not a second affidavit filed by the State of Wyoming at the time of the Hearing as required by Rule 4(l)(2)(C) when “there has been no delivery of the notice mailed to the defendant by the clerk.” Accordingly, upon information and

⁵ Despite the citation to Rule 4(e), the Affidavit fails to identify any attempts to serve Mr. Parhamovich consistent with the personal service requirements of Rule 4(e).

belief, the specified requirements for this second affidavit were also not satisfied. *See* Rule 4(l)(2)(C)(i)-(iii).

iii. The actual newspaper publication was inadequate under Wyoming Rules of Civil Procedure 4(l) and 4(m).

The actual newspaper publication in the *Wyoming Tribune-Eagle* failed to satisfy at least three requirements of Wyoming Rules of Civil Procedure 4(l) and 4(m).

First, the publication incorrectly stated the time of the hearing and thus failed to “notify the person or persons to be served when they are required to answer” under Rule 4(m)(4)(C). Instead of stating the actual hearing time of 2 p.m. on July 5, 2017, as indicated by the Order to Show Cause, the publication incorrectly stated the hearing time as “2:00 o’clock a.m.” (*See* Proof of Publication (which includes the image of the “true copy” from the newspaper).) Therefore, even if Mr. Parhamovich had somehow received a copy of the publication, he would not have been notified of the actual hearing time when he was required to answer.

Second, the publication failed to provide any notice that would “notify the person or persons to be served that judgment by default may be rendered against them if they fail to appear,” as required by Rule 4(m)(4)(D). (*See* Proof of Publication (which includes the image of the “true copy” from the newspaper).) There is simply no mention of default or judgment by default in the newspaper publication.

Third, Mr. Parhamovich’s address does not appear in the publication, as required by Rule 4(l)(2)(A) (“In any case in which service by publication is made when the address of a defendant is known, it must be stated in the publication.”). In the Affidavit, Mr. Parhamovich is identified as a “contested owner” of the property and his address is listed. (Affidavit ¶ 3.) However, Mr. Parhamovich’s address does not appear in the publication, as required under Rule 4(l)(2)(A) for a claimant and interested party in this case whose address was known. *See* note 4, *supra*.

iv. Service was never completed because it was not made in the manner prescribed under Rule 4(n)(1).

Rule 4(n)(2) requires that “[s]ervice by publication shall be proved by affidavit.” The docket file for this case includes a July 12, 2017 affidavit by Gina Larsen of the *Wyoming Tribune-Eagle* labeled “Proof of Publication” regarding the newspaper publications on May 24 and 31, 2017.⁶ However, despite the implication of the Proof of Publication, service was never

⁶ Curiously, the Proof of Publication for the two newspaper publications on May 24 and 31, 2017 was not filed until July 12, 2017—one week after the Hearing. It is unclear why the filing of the

completed. Under Rule 4(n)(1), service by publication is only deemed complete “when made in the manner and for the time prescribed in the preceding sections.” Because of the numerous failures to comply with the requirements of Rule 4(l)-(m), as described above, service of publication was never completed and the Proof of Publication is therefore also invalid as proof of service by publication.

For all of the above reasons, the State of Wyoming failed to follow the strict requirements for service by publication under Rules 4(l)-(n) of the Wyoming Rules of Civil Procedure. Because of these many failures, the attempted service by publication was fatally flawed and wholly inadequate to provide service to Mr. Parhamovich under Wyoming law.

b. The State of Wyoming failed to fulfill its due process obligations to make earnest, reasonable efforts to provide actual notice to Mr. Parhamovich.

The constitutional requirement of due process mandates that those whose rights may be affected by a proceeding must receive notice and an opportunity to be heard regarding that proceeding. More specifically, when the government knows how to reach a person whose rights are affected by a court action, it must take action consistent with what a reasonable person would know to be an effective means to provide that person with notice. As the U.S. Supreme Court has held, “process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.”

Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950); *accord Jones v. Flowers*, 547 U.S. 220, 229 (2006); *Accelerated Receivable Solutions v. Hauf*, 350 P.3d 731, 740 (Wyo. 2015) (holding that even a statutorily mandated type of notice is not sufficient to satisfy constitutional due process requirements if the government “has knowledge that notice pursuant to its normal procedure was ineffective,” and defining the notice mandated under due process as one “reasonably calculated, under all the circumstances, to appraise interested parties of the pendency of the action and afford them an opportunity to present their objections”) (internal quotes and citations omitted); *see also Tate v. Wyo. Livestock Bd.*, 932 P.2d 746, 749 (Wyo. 1997) (applying *Mullane*’s notice rule and noticing that the Wyoming Supreme Court “ha[s] cited [*Mullane*] with approval on many occasions”). Relatedly, service by publication is constitutionally disfavored—even for providing notice to in-state residents—and should only be

Proof of Publication was delayed for so long after the actual publication dates, but was then filed one day before the AG’s Office sent letters dated July 13, 2017 to the Court and Mr. Parhamovich regarding the evident lack of notice to Mr. Parhamovich.

used when the subject's address is unknown and there are no other known means for providing notice to that person. *See Mullane*, 339 U.S. at 319 (reasoning that publication is not a method of choice for those "desirous of actually informing the absentee"); *see also First Wyo. Bank, N.A. Rawlins v. Trans Mountain Sales & Leasing, Inc.*, 602 P.2d 1219, 1225 (Wyo. 1979) (reasoning that "service by publication is a less preferred method of service" as compared to personal delivery); *Dishman v. First Interstate Bank*, 362 P.3d 360, 373 (Wyo. 2015) (same).

Here, the State of Wyoming completely failed to comport with these due process requirements, as it did not employ means reasonably calculated to provide actual notice to Mr. Parhamovich. Notably, the AG's Office actually had Mr. Parhamovich's mailing address, email address, and phone number, and had repeatedly corresponded with him over the preceding months. Sending notice to him at that same address would be the reasonable means for providing him notice of the Petition and the Hearing. Instead, the State of Wyoming published a notice in a local Wyoming paper. But not only is service by publication disfavored even for in-state residents, no reasonable person who actually desired to provide notice of a Wyoming court proceeding to a Wisconsin resident would think it likely that a Wisconsin resident would see a notice about the proceeding in a local Wyoming paper. For these reasons, the State of Wyoming failed to meet its constitutional requirement to select a means for noticing Mr. Parhamovich "such as one desirous of actually informing the absentee might reasonably adopt to accomplish it," *Mullane*, 339 U.S. at 315, thereby depriving him of his due process rights.

c. Under Wyoming Rules of Civil Procedure 55(c) and 60(b), "good cause" exists for the entry of default to be set aside (or not entered).

Consistent with Wyoming Rule of Civil Procedure 55(c), "good cause" exists to set aside the entry of default. Under Rule 55, "[t]he court may set aside an entry of default for good cause." Wyoming courts look to Rule 60(b) when determining whether good cause exists. *Fluor Daniel, Inc. v. Seward*, 956 P.2d 1131, 1134 (Wyo. 1998) ("Good cause for setting aside an entry of default, pursuant to WYO. R. CIV. P. 55(c), is to be found in the justifications for relief from a final judgment articulated in WYO. R. CIV. P. 60(b)"). Rule 60(b), in turn, enumerates six grounds that, if established, show "good cause." Among these grounds are (1) "surprise" and (6) "any other reason that justifies relief."

The State of Wyoming's failure to notify Mr. Parhamovich of the Petition being filed against the property to which he has a claim or of the Hearing regarding same constitutes "good cause" under Rule 60(b)(1) because Mr. Parhamovich was necessarily "surprise[d]" to learn

about the Petition and the Hearing. After all, he had not received any notice about either until well after the fact. *See* Part II.b, *supra*. It also constitutes “good cause” under Rule 60(b)(6) because the State’s failure to provide Mr. Parhamovich with both adequate service of process under the Wyoming Rules of Civil Procedure and reasonably effective notice in violation the constitutional requirements of due process, *see* Part III.a-b, *supra*, further provides “other reason[s] that justif[y] relief.”

Courts in Wyoming, including the Wyoming Supreme Court, have set aside default in similar situations, finding that lack of notice excuses a failure to timely appear or file. For example, in *Harris v. Taylor*, the Wyoming Supreme Court held that Rule 60(b) allowed for an extension of time to file a notice of appeal because Plaintiff was not notified of the motion for summary judgment granted against his claim. 969 P.2d 142, 143-44 (Wyo. 1998). In that case, a clerk of a district court in Wyoming failed to notify Plaintiff of the dispositive decision by the court, depriving him of an opportunity to appeal. *Id.* at 143. After the time for taking an appeal expired, Plaintiff contacted the court and was advised of the final judgment. *Id.* at 144. Plaintiff then filed a motion under Rule 60(b) asking the court to extend the time for taking an appeal due to the lack of notice provided to Plaintiff. *Id.* Both the trial court and the Supreme Court of Wyoming agreed that the lack of notice excused the failure to file a timely notice of appeal. *Id.*

Even in cases involving “excusable neglect,” the Supreme Court of Wyoming has found that lack of notice is “good cause” to set aside not just an entry of default, but a default judgment. For example, in *Largent v. Largent*, both the trial court and the appellate court agreed that failure to be notified constituted an appropriate excuse for setting aside a default judgment. 192 P.3d 130, 136 (Wyo. 2008). In *Largent*, a divorced father was not notified of a Motion for Confirmation and Enforcement of Child Support Order filed against him. *Id.* at 133. While the service of process did properly occur on an appropriate date, the divorced father personally never received the news. *Id.* He was in bed, recuperating from a severe heart attack, and it was the current wife who received the summons and dismissed them as related to a previous, already closed, lawsuit. *Id.* The Wyoming Supreme Court held that the trial court properly set aside the judgment of default in this case because the divorced father had “good cause” for failing to answer, namely excusable neglect under Rule 60(b)(1). *Id.* at 136.

Here, Mr. Parhamovich was completely “surprise[d]” due to lack of notice (because none was given, even though he repeatedly requested notice from the AG’s Office) and cannot be

blamed for any type of neglect. In addition, no default judgment has been entered in this case. Thus, there are even stronger grounds for finding “good cause” to set aside entry of default under Rule 60(b)(1) in the present case than in cases like *Largent*, where the moving party’s “excusable neglect” was nonetheless sufficient to find “good cause” for setting aside a default judgment.

Additionally, in *Claassen v. Nord*, the Wyoming Supreme Court found that because there was no proper notice of a filing, a Motion to Set Aside Entry of Default was properly granted. 756 P.2d 189, 194 (Wyo. 1988). In *Claassen*, a putative owner of an apartment building damaged by a gas explosion was sued for negligence. *Id.* at 192. He did not answer the complaint within the allotted time and an entry of default was set against him. *Id.* at 192-93. The owner subsequently claimed that he was never served with the complaint, even though a deputy sheriff eventually located him. *Id.* at 192. After the owner filed a Motion to Set Aside Entry of Default, the trial court found that good cause existed to set aside the entry. *Id.* at 193. The Wyoming Supreme Court agreed. *Id.* Given that the owner alleged that he was never served and given that his attorney subsequently asked opposing counsel for continuance and was denied, the Supreme Court reasoned the trial court was justified in setting aside the entry of default. *Id.*

Thus, in situations similar to Mr. Parhamovich’s, where a lack of notice caused parties to fail to react, the Wyoming Supreme Court has repeatedly found “good cause” under Rule 60(b), and allowed the affected parties the opportunity to litigate the lawsuit once they became aware of what had happened. In the interest of justice, this Court should do the same.

Despite knowing Mr. Parhamovich’s mailing address, email address, and phone number, and being aware that he claimed ownership of the seized cash, the State of Wyoming did not notify him of the Petition filed against his seized cash or of the Hearing regarding the seized cash until well after both had occurred. This absence of notice about the Petition or the Hearing constitutes “good cause” for Mr. Parhamovich’s failure to respond to the Petition or appear at the Hearing. As a result, any entry of default should be set aside (and, for the same reasons, this Court should decline to enter default if it has not yet been entered).

IV. MOTION TO SET A DATE FOR REHEARING AND SET A DISCOVERY AND BRIEFING SCHEDULE.

In addition to asking this Court to set aside the entry of default, Mr. Parhamovich also respectfully requests that this Court (1) set a date for a rehearing on the Order to Show Cause at least ninety days in the future, and (2) set a discovery schedule prior to this rehearing that allows at least ninety (90) days for Mr. Parhamovich’s counsel to conduct pre-hearing discovery.

Mr. Parhamovich seeks a discovery schedule so that discovery may proceed in an orderly manner and so that his counsel may have sufficient time to obtain documents and depose fact witnesses prior to the rehearing on the merits of the seizure of his life savings. Consistent with Wyoming law, Mr. Parhamovich is entitled to review the documents—including any photographs, videos, or audio recordings—related to the stop and its subsequent investigation, and to depose relevant parties, without having to wait for initial disclosures. First, *in rem* forfeiture actions arising from a Wyoming statute—as is the case here, since the Office of Attorney General filed the Petition under Wyo. Stat. § 7-2-105(c)—are exempt from the initial disclosure requirement under Wyoming Rule of Civil Procedure 26(a)(1)(B)(v). *See In re U.S. Currency Totaling \$7,209.00*, 278 P.3d 234, 239 (Wyo. 2012) (reasoning that in a forfeiture action claimants “were free at any time to conduct discovery”). Second, according to the Wyoming Rule of Civil Procedure 26(b)(1), “[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case.” Wyo. R. Civ. P. 26(b)(1).

Both the ability to depose individuals with direct knowledge of the stop and the case’s subsequent developments, and the ability to access the documents related to the stop—including photographs, videos, or audio recordings—are directly relevant to Mr. Parhamovich’s claim that his life savings in the amount of \$91,800 were unlawfully seized from him during the March 13, 2017 traffic stop. In addition, such discovery requests are not disproportional to the needs of the case, since they are limited in scope and should be readily accessible by the State of Wyoming. A period of at least ninety days (90) is a reasonable period of time to conduct such discovery, particularly since any depositions would need to be scheduled after parties have produced documents.

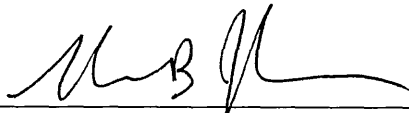
Accordingly, Mr. Parhamovich respectfully moves for this Court to set a date for a rehearing and to allow at least ninety (90) days to conduct pre-hearing discovery so his counsel may request, obtain, and review documents—including photographs, videos, or audio recordings—related to the March 13, 2017 traffic stop and its subsequent investigation, as well as depose relevant parties.

Mr. Parhamovich also respectfully requests that a briefing schedule be established to permit (1) memoranda of legal points and authorities to be submitted after discovery closes, but before the rehearing, and (2) for additional briefing to be submitted after the rehearing.

Dated this 16th day of November, 2017

Respectfully submitted,

By:



Thomas B. Jubin, WY Bar No. 5-2433
Jubin & Zerga, LLC.
P.O. Box 943
2614 Pioneer Ave.
Cheyenne, WY 82003
Tel.: (307) 637-4965
Fax: (307) 637-4788
Email: tom@jubinzerga.com

Dan Alban*, VA Bar No. 72688
INSTITUTE FOR JUSTICE
901 N. Glebe Rd., Suite 900
Arlington, VA 22203
Tel.: (703) 682-9320
Fax: (703) 682-9321
Email: dalban@ij.org

Any Bidwell*, TX Bar No. 24101516
INSTITUTE FOR JUSTICE
816 Congress Ave., Suite 960
Austin, TX 78701
Tel.: (512) 480-5936
Fax: (512) 480-5937
Email: abidwell@ij.org

*Pending admission *pro hac vice*

Counsel for Claimant Phillip Parhamovich III

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of November, 2017, a true and correct copy of the foregoing Motion to Set Aside Entry of Default was sent via United States Mail, postage prepaid, addressed to:

John A. Brodie
Senior Assistant Attorney General
2320 Capitol Avenue
Cheyenne, WY 82002

Hon. Thomas Campbell
Laramie County Complex
309 West 20th Street, Room 3205
Cheyenne, Wyoming 82003



Thomas B. Jubin