IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SECURITIES AND EXCHANGE COMMISSION,	§	
	§	
Plaintiff,	§	
	§	
vs.	§	**Civil Action No.:**
	§	**1:13-cv-1036-LY**
ROBERT A. HELMS, ET AL.,	§	
	§	**UNOPPOSED**
Defendants,	§	**MOTION TO SET ASIDE**
	§	**ENTRY OF DEFAULT**
and	§	**PURSUANT TO FED. R. CIV.**
	§	**P. 55(c)**
WILLIAM L. BARLOW, and	§	
GLOBAL CAPITAL VENTURES, LLC,	§	
	§	
Relief Defendants, solely for the purposes of equitable relief.	§	
	§	
	§	

TO THE HONORABLE COURT AND TO ALL PARTIES:

NOW COMES Defendant Janniece S. Kaelin ("Kaelin") and moves this Court to set aside the Clerk's Entry of Default as to Defendant Janniece S. Kaelin for good cause, pursuant to Rule 55(c) of the Federal Rules of Civil Procedure.

This motion is based on the attached Memorandum of Points and Authorities, Declaration in Support, the complete files and records in this action, and upon such oral and documentary evidence as may be allowed at the hearing of this motion.

The Defendant conferred with counsel for the SEC, counsel for Receiver Thomas Taylor, and the individual named defendants, none of whom oppose the relief requested herein.

DATED: 5/29/14

By: _____
Janniece S. Kaelin, Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SECURITIES AND EXCHANGE COMMISSION,	§	
	§	
Plaintiff,	§	
	§	
vs.	§	**Civil Action No.: 1:13-cv-1036-LY**
	§	
ROBERT A. HELMS, ET AL.,	§	
	§	**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO SET ASIDE ENTRY OF DEFAULT PURSUANT TO FED. R. CIV. P. 55(c)**
Defendants,	§	
	§	
and	§	
	§	
WILLIAM L. BARLOW, and GLOBAL CAPITAL VENTURES, LLC,	§	
	§	
Relief Defendants, solely for the purposes of equitable relief.	§	

Defendant Janniece S. Kaelin ("Kaelin") respectfully submits this Memorandum of Points and Authorities in Support of Defendant's Motion to Set Aside Clerk's Entry of Default as to Defendant Janniece S. Kaelin.

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I. INTRODUCTION

A review of the court's docket and pleadings on file in this action when the clerk entered its entry of default clearly demonstrate that Kaelin had not failed to plead or otherwise defend this action as alleged in Plaintiff's motion and supporting declaration, which precludes an entry of default pursuant to Fed. R. Civ. P. 55(a). As such, Plaintiff was not entitled to the relief given by default and the Court should set aside the Clerk's Entry of Default against Kaelin (Dkt. 45-3).

Additionally, the Court should set aside the Clerk's Entry of Default against Kaelin pursuant to Fed. R. Civ. P. 55(c) because good cause exists for Kaelin's delay in filing her answer to Plaintiff's complaint.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

Plaintiff filed suit against all defendants, including Kaelin on December 3, 2013. On December 4, 2013 Plaintiff served its complaint and related pleadings on the individual defendants including Kaelin. That day, he Court-ordered receiver Thomas L. Taylor ("Receiver") took possession of all of Kaelin's books and records, her personal and business bank accounts, as well as her office equipment, computer and electronic communications located at her office and her place of residence in Austin, Texas. (Kaelin Decl. ¶2). After service of Plaintiff's complaint, and prior to the due date for her answer, Kaelin took the following actions in response to the lawsuit:

Kaelin and the other named individual defendants appeared and participated through counsel in a telephonic hearing before the Court on December 10, 2013 (Dkt. 14). On December 11, 2013 Kaelin joined in Plaintiff's Unopposed Motion To Extend Temporary Restraining Order As To All Defendants (Dkt. 15) and requested that the Court reschedule the hearing to the

next available court date, specifically acknowledging the December 10, 2014 telephonic hearing before the Court and the relief requested by the parties including Kaelin. (Dkt. 15, ¶ 3, ¶ 4). The Court entered its Order Extending Temporary Restraining Order on December 11, 2013 (Dkt. 35), finding that Kaelin and the other named individual defendants consented through counsel on the record to the extension. Katherine Lunsford appeared for Kaelin for the limited purpose of obtaining the extension of date for the original TRO hearing. Since then, Kaelin has not been represented by counsel, and the seizure of her assets has prevented her from retain a lawyer. (Kaelin Decl. ¶3).

On December 17, 2013, Plaintiff's attorney Timothy S. McCole ("McCole) met with Defendant Robert A. Helms ("Helms") in person for a conference in Austin, Texas, and Kaelin participated via telephone regarding the pending TRO hearing, the scheduled depositions for individual defendants including Kaelin and other matters relating to the subject action. During that conference, Kaelin and the other defendants negotiated the terms of an agreed preliminary injunction with Plaintiff and resolved other pending pre-trial matters (Kaelin Decl. ¶4).

Importantly, Kaelin and the other individual defendants negotiated the right of any defendant to move the Court for relief from the receivership order and the asset freeze during the pendency of the action. (Dkt. 37, ¶VII, Kaelin Decl. ¶4) This additional concession provides the opportunity for significant relief to Kaelin and the other individual defendants during the pendency of this action and before the trial on the merits of Plaintiff's case. Also, Kaelin and the other individual defendants negotiated an agreement from McCole to withdraw Plaintiff's pending depositions scheduled for all individual defendants. (Kaelin Decl. ¶5). In fact, Kaelin was to be deposed by Plaintiff the very next morning on December 18, 2013 at 9:00 a.m. in

Austin, Texas. Further, this concession from Plaintiff protected Kaelin from being deposed without representation by counsel. (Kaelin Dec.¶5). Finally, the defendants including Kaelin negotiated with Plaintiff for an extension of the due date to prepare and file the sworn statements and accounting due pursuant to this Court's order until January 31, 2014. (Dkt. 37, ¶VI.) Kaelin understood that this extension would necessarily involve the Plaintiff or Receiver allowing her to access to books and records in the possession of Plaintiff and Receiver. Without that access Kaelin is unable to comply with the Court's order. (Kaelin Decl. ¶6).

In its Unopposed Motion to Enter Agreed Preliminary Injunction as to Each Defendant and to Cancel Preliminary Injunction Hearing filed on December 18, 2013, Plaintiff acknowledged that the defendants, including Kaelin, negotiated the agreement to resolve Plaintiff's motion (Dkt. 36, ¶ 4). Kaelin and the other defendants executed the Agreed Preliminary Injunction (Dkt. 37) which acknowledged Kaelin's consent to its terms, and that Kaelin and the other defendants had "agreed that this Court has jurisdiction and over the Defendant and over the subject matter of this action and has agreed to waive a hearing and the entry of finding of facts and conclusions of law." (Dkt 37, Page 2).

After the due date of Kaelin' answer, Plaintiff continued to communicate with Kaelin by using mail, Federal Express and Helms' Gmail account. The Receiver controls Kaelin's two email addresses and she has no access to them. (Kaelin Decl, ¶8). Kaelin never authorized such service or nominated Helms as her agent for any purpose. (Kaelin Decl, ¶10).

On February 21, 2014, Plaintiff filed its Motion for Clerk's Entry of Default as to Janniece S. Kaelin (Dkt. 43) but did not attempt electronic service of its motion to Kaelin as alleged in its certificate of service. Kaelin later learned that Plaintiff attempted electronic service to her by using

Helms' Gmail account, but failed to serve the motion to Helms' correct email address. Kaelin had already executed the agreed preliminary injunction (Dkt. 37) as a *pro se* defendant on December 17, 2013, and did not consent to have Helms or any other person accept electronic service as her agent. Plaintiff certified its electronic delivery of its motion to me via email which was an untrue statement. (*Id.* at Page 3.) The following February 24, 2014 Plaintiff attempted electronic service to Kaelin by using Helms' Gmail account for notice of the entry of default, and again failed to serve Helms' correct email address. As a result, Kaelin did not receive Plaintiff's notice that the motion had been filed or that that the entry of default had occurred until it was hand-delivered by UPS on February 26, 2014, at which time Kaelin learned that the attempted service was to Helms' incorrect email address, giving Kaelin no opportunity to discuss or resolve this matter with Plaintiff before the clerk's entry default. In response, Kaelin filed her answer as soon as possible after receiving Plaintiff's mailed notice of the entry of default, some eight days later on March 6, 2014. (Kaelin Decl. ¶10).

On April 17, 2014, Helms participated in a telephone conference with McCole to discuss a resolution of the clerk's entry of default against Helms and Kaelin. On April 21, 2014, Kaelin and McCole communicated by email to confirm the terms of the agreement with Plaintiff to resolve the clerk's entry of default by filing this motion. At that time Kaelin agreed to submit a draft of this motion by April 24, 2014 for McCole's review, but was unable to complete this motion as agreed due to circumstances beyond her control. Kaelin did not have access to her computer, office equipment, her books and records, or consistent access to her email account and the delay was not intentional or willful. (Kaelin Decl. ¶ 11).

Although Plaintiff has never *refused* my request for access to my books, records or other property, Plaintiff has not yet offered a specific time or place to access Kaelin's office, books, records and property. (Kaelin Decl. ¶ 9).

III. ARGUMENT

A. The Clerk's Entry of Default Is Not Supported By The Record in This Case

Although Kaelin did not timely file her answer, the actions taken by Kaelin since the inception of this action prior to Plaintiff's motion for entry of default demonstrate her ongoing participation in the litigation process, first by appearing through counsel at the December 10, 2013 hearing before this Court, her ongoing communications and negotiations with Plaintiff through its attorneys, her joinder in pleadings with Plaintiff and the other individual defendants, as well as her efforts which, taken as whole, show that she has actively defended this action which precludes an entry of default pursuant to Rule 55(a).

Plaintiff's Motion for Clerk's Entry of Default (Dkt. 43) depends on Plaintiff's declaration that Kaelin had not filed an answer to the Complaint or otherwise defended this case. The Clerk's Entry of Default states that "As of the date of this entry, no answer has been filed on behalf of the Defendant *nor has Defendant otherwise defended*." (Dkt.43-3). However, the record in this suit and the Plaintiff's own pleadings demonstrate that Kaelin did not fail to plead or otherwise defend as alleged in Plaintiff's Motion. (Dkt. 43-1 ¶4.) The actions taken by Kaelin show that she appeared, pled or otherwise defended this suit which refutes the necessary elements required for an entry of default pursuant to Rule 55(a). Therefore, Plaintiff is not entitled to the relief provided by the Clerk's Entry of Default as to Kaelin under Rule 55(a) and the Court should find that the clerk's entry of default was not supported by the evidence in the

record, and is void or in the alternative, the clerk's entry of default should be set aside for failing to meet the necessary elements for the entry of default.

Plaintiff's assertion that Kaelin failed to plead or otherwise defend in this case contradicts the plain language and intent of Rule 55(a). The Committee Notes on Rules- 2007 Amendment states in relevant part:

> Former Rule 55(a) directed the clerk to enter a default when a party failed to plead or otherwise defend "as provided by these rules." The implication from the reference to defending "as provided by these rules" seemed to be that the clerk should enter a default even if a party did something showing an intent to defend, but that act was not specifically described by the rules. Court in fact have rejected that implication. Acts that show an intent to defend have frequently prevented a default even though not connected to any particular rule.

Albeit late, Kaelin filed her answer to the complaint, and only eight days after learning that Plaintiff had obtained an entry of default. Before Kaelin's answer was due, she participated in the litigation and clearly demonstrated her intent to defend this suit.

In addition to appearing through counsel on December 10, 2014 before this court, Kaelin's other actions in defense of this litigation as detailed herein and reflected on the record should be found to be both an appearance and sufficient evidence that she has otherwise defended this action, both before and after the due date of her answer. The courts have determined that actions much less formal than those taken by Kaelin constitute an appearance preventing the court entering a default judgment under Fed.R.Civ.P. 55(b)(2), including finding that letters and phone calls from defendant's counsel constituted an appearance, *Charlton L. Davis & Co., P.C. v. Fedder Data Ctr., Inc.*, 556 F.2d 308, 309 (5th Cir. 1977) and that a defendant's letter to plaintiff constituted an appearance, *Dalminter, Inc. v. Jessie Edwards, Inc.*, 27 F.R.D. 491, 492 (S.D. Tex.1964), and that the movant's presence at two pre-trial conferences

was a factor influencing the court to find that an appearance had been made. *Collex, Inc. v. Walsh,* 74 F.R.D. 443, 446 (E.D. Pa.1977).

In a similar case before another court, the defendants, although failing to file their answer, had actively participated in the litigation process, and were granted relief due to the actions reflected on the record in defending the suit. As the Court observed in its order setting aside the clerk's entry of default, it was "puzzled why Plaintiff made no mention of Defendants' efforts to otherwise defend this action." *Winmark Corporation v. Todd A. Schneeberger and Patricia A. Scheeberger*, No. 13-CV-0274-WJM-BNB, 2013 WL 1154506 (D. Colo. March 19, 2013) * Footnote 3.

B. Good Cause exists to Set Aside the Entry of Default

In the alternative, Fed. R. Civ. P. 55(c) provides that an entry of default may be set aside upon a showing of good cause. The decision to set aside a default decree lies within the sound discretion of the district court. *United States v. One Parcel of Real Prop.*, 763 F.2d 181, 183 (5th Cir. 1985). The good cause standard is a liberal one. *Effjohn Int'l Cruise Holdings, Inc. v. A & L Sales, Inc.*, 346 F.3d 552, 563 (5th Cir. 2003). The 5th Circuit has recognized that good cause under Rule 55(c) "is not susceptible of precise definition, and no fixed, rigid standard can anticipate all of the situations that may occasion the failure of a party to answer a complaint timely." *In re Dierschke*, 975 F.2d 181, 183 (5th Cir. 1992).

In deciding whether a defendant has shown good cause, courts consider (1) whether the failure to respond was due to excusable neglect; (2) whether the plaintiff would suffer prejudice if the default was set aside; and (3) whether the defendant has presented a meritorious defense. These three factors are not "talismanic" and a court may choose not to consider all three factors,

or consider additional factors. *Id., CJC Holdings, Inc. v. Wright & Lato, Inc.*, 979 F.2d 60, 64 (5th Cir. 1992) (adopting excusable neglect inquiry in place of willfulness). These factors are nonexclusive; another factor often considered by the courts is whether the party acted promptly to correct the default. *Efffohn*, 346 F.3d at 563.

Excusable neglect is an "elastic concept" and is not limited strictly to omissions caused by circumstances beyond the control of the movant. *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380, 392 (1993). The term extends to simple, faultless omissions to act and, more commonly, omissions caused by carelessness." *Id.* at 388. Excusable neglect has been found to include late filings resulting from "mistake, inadvertence or carelessness..." *Mattress Giant Corp. v. Motor Adver. & Design Inc.*, No. 3:07-CV-1728-D, 2008 WL 898772, at *2 (N.D. Tex. Mar. 31, 2008). Default judgment "should not be granted on the claim, without more, that the defendant had failed to meet a procedural time requirement." *Mason & Harger-Silas Mason Co. v. Metal Trades Council*, 726 F.2d 166, 168 (5th Cir. 1984).

When a defendant files an answer subsequent to an entry of default, a court may construe the subsequently filed answer as a motion to set aside default. *E.E.O.C. v. Mothers Work, Inc.*, No. Civ. A. SA04CA0873-XR, 2005 WL 465400, at *2 (W.D. Tex. Feb 28, 2005). Therefore, the Court may also consider Kaelin's answer filed March 6, 2014 as her first request to set aside the entry of default, as well as this motion when considering Kaelin's request for relief.

(i) Kaelin's Delay in Answering was not Willful or Intentional

Kaelin's failure to timely file her answer was not intentional or willful, and under these circumstances the failure to timely file her answer clearly meets the "elastic" standard for excusable neglect. *Pioneer Inv. Servs. Co.*, 507 U.S. at 392. Kaelin believed that her appearance

through counsel at the December 10, 2013 hearing, her consent through counsel to Plaintiff's Unopposed Motion To Extend Temporary Restraining Order As To All Defendants, her negotiations with Plaintiff, including obtaining Plaintiff's withdrawal of Kaelin' pending deposition, and joining in Plaintiff's Unopposed Motion To Extend Temporary Restraining Order As To All Defendants precluded an entry of default pursuant to Rule 55(a). Kaelin filed her answer as soon as possible after receiving Plaintiff's notice of the motion and entry of default, only eight days after service of the pleadings.

The Receiver possesses all of Kaelin's assets, including the income from her assets, her business records, as well as her office equipment and computer. It has been virtually impossible to prepare pleadings and properly defend this action without access to these items. In addition, the Receiver has taken control of her husband Charles Martin Kaelin's property and income producing assets. (Dkt. 55).

Kaelin has been forced to rely on borrowed computers, printers and other office equipment necessary to prepare this motion and defense of this action. This borrowed equipment is not continuously available to her. Due to the seizure of her property, and the Receiver's claims against property owned by her husband, Kaelin has not had sufficient funds to retain counsel to represent her in this action.

(ii) Plaintiff Will Not Suffer Prejudice If Entry of Default is Set Aside

Plaintiff would not suffer prejudice if the default was set aside. Since the clerk's entry of default was entered, Plaintiff has not moved this Court for a default judgment, and the case is still in its early stages. In fact, other than the subject Motion for Clerk's entry of Default against Kaelin and the other named individual defendants, Plaintiff has not filed any substantive

pleadings since the inception of this suit. As recently as May 28, 2014, McCole sent an email to Kaelin that the Plaintiff would not oppose this motion. (Kaelin Decl. ¶ 11).

Since the inception of this action, Plaintiff and the Receiver have had exclusive possession and control of all of Kaelin's assets and documents potentially relating this case, and therefore no evidence could become lost or unavailable to Plaintiff. The parties negotiated and agreed to the terms of a preliminary temporary injunction which continues to protect Plaintiff's interests. No harm can come to Plaintiff if the entry of default is set aside, rather Plaintiff will simply have the burden of proving its case. Kaelin should be permitted to defend this case on the merits.

(iii) Defendant Has a Meritorious Defense to the Lawsuit

It would be inequitable to allow the Clerk's Entry of Default to stand as entered. An entry of default causes all well-pleaded allegations of fact to be deemed admitted. *J & J Sports Prods., Inc. v Papania*, 2010 WL 1191807, at*2 (W.D. La. Mar. 26, 2010), *see also* 10A Charles Wright, Arthur Miller & Mary Kane, Federal Practice & Procedure § 2688 (3d ed. 2010). "Even after default, however, it remains for the court to consider whether the unchallenged facts constitute a legitimate cause of action, since a party in default does not admit mere conclusions of law." 10A Wright & Miller § 2688, at 63. It would be particularly inequitable in this action, where Plaintiff's complaint, supporting exhibits and declarations contain material and substantial misstatements of facts, some even evident on the face of Plaintiff's pleadings, and other allegations that have no proof except from the testimony of declarants which Kaelin has denied is true.

Since Kaelin has not yet been allowed access to her Austin office to obtain the necessary information and documents to prepare her defense of Plaintiff's complaint, it is impossible for her to defend this action, let alone demonstrate that all of the material allegations supporting the complaint are untrue. Nonetheless, all of the material allegations contained in Plaintiff's complaint have been denied in Defendant Kaelin's Answer filed herein (Dkt. 52), putting at issue the facts Plaintiff must prove in its action. Kaelin did not simply file a "blanket denial" of Plaintiff's complaint, and Plaintiff should be required to prove its allegations to obtain the relief requested.

For example, Plaintiff simply omits millions of dollars in revenue and profits earned and received by defendant Vendetta Royalty Partners, Ltd. ("Vendetta") from the sale of a few of its mineral properties, from lease bonuses and other sources of income when describing "cash generated from legitimate royalty interests" at Paragraph 39 of its complaint. (Dkt. 1, ¶39; Kaelin Decl. at ¶15).

Kaelin can only demonstrate that some of Plaintiff's allegations are untrue by sworn denial. However, Plaintiff cannot prove these same allegations as the purported events, documents or facts simply do not exist to support its claims. By way of example, Plaintiff alleges that Kaelin controls various defendants, namely Lake Rock, LLC, G3 Minerals, LLC and Arcady Resources, LLC and used these entities to promote the Iron Rock offering. (Dkt. 1 at ¶6). This allegation is simply untrue, and Kaelin does not, nor did she ever control or operate those entities nor did Kaelin ever possess any ownership in them. (Kaelin Decl. at ¶13).

As another example, Plaintiff alleges that Kaelin offered and sold securities in the form of limited partnership interests in defendant Vesta Partners, L.P. ("Vesta"). (Dkt. 1 at ¶30). This

allegation is absolutely untrue, as Vesta *never sold or issued securities*, nor owned any assets, nor received property or cash from any person or entity. In fact, Vesta *never even opened a bank account*. (Kaelin Decl. at ¶15). Plaintiff's Declarant Emmanuel Salter avers that Kaelin "regularly instructed him to transfer funds to or among…other entities (*including*) Vesta Royalty Partners, L.P." (*See* Dkt. 5, Exhibits Appendix in Support of Plaintiff's Application for Ex Parte Temporary Restraining Order, Preliminary Injunction, and Other Emergency Relief ("Plaintiff's Appendix") at APP000248, ¶10.) The Plaintiff cannot identify any limited partner in Vesta that was "sold" an interest as it alleges, nor identify any transfer of funds to Vesta from any defendant or any other party, since these things do not exist and did not occur.

As a result of Plaintiff's allegations, the Receiver has been appointed over three entities (Lake Rock, LLC, G3 Minerals, LLC and Arcady Resources, LLC) that Kaelin does not own, operate or otherwise control, and two companies (Vesta Royalty Management, LLC and Vesta Partners, LP) that has never sold a security or received any cash or property.

Kaelin can also demonstrate that some of the allegations in the complaint are refuted by Plaintiff's own pleadings and exhibits. For example, Plaintiff alleges that Kaelin and other defendants offered to sell securities issued by Vesta, and at Kaelin's direction, Defendants "Sellers and Barrera emailed two prospective investors a Vesta Partners presentation describing the company and its offering" (Dkt. 1, ¶ 48) which Plaintiff alleges contained false representations, presumably relied on by the declarant Jamie Moore. Plaintiff supports this allegation with a copy of the presentation in Plaintiff's Appendix at APP000136 through APP000155, without noting the presentation, at APP000155 contains a full-page disclaimer which states in relevant part:

> "THIS SUMMARY IS FOR INFORMATION PURPOSES ONLY AND DOES NOT CONSTITUTE AN OFFER TO SELL OR A SOLICITATION OF AN OFFER TO BUY ANY SECURITES AND MAY NOT BE USED OR RELIED UPON IN CONNECTION WITH A NY OFFER OR SALE OF SECURITIES."

Clearly, the Vesta proposal was not an offer to sell securities nor could it reasonably be construed as an offering to sell securities. Similarly, Plaintiff alleges that defendants, including Kaelin offered securities in Defendant Iron Rock Royalty Partners, LP ("Iron Rock") to investors in California via a "proposal," supporting its allegations with an email dated March 1, 2013 and the alleged proposal (Dkt. 1, ¶52 and Plaintiff's Appendix at APP 000210 through APP000240) all of which was presumably relied on by declarant John Morally. Again, Plaintiff fails to note that the proposal, at APP000240 contains a full-page disclaimer which states in relevant part:

> "THIS SUMMARY IS FOR INFORMATION PURPOSES ONLY AND DOES NOT CONSTITUTE AN OFFER TO SELL OR A SOLICITATION OF AN OFFER TO BUY ANY SECURITES AND MAY NOT BE USED OR RELIED UPON IN CONNECTION WITH ANY OFFER OR SALE OF SECURITIES."

Clearly, the Iron Rock proposal is not an offer to sell securities nor could it reasonably be construed as an offering to sell securities. Importantly, Iron Rock Royalty Partners, Ltd. did not even exist when the proposal was emailed, *as Iron Rock was not legally formed until nearly two months later on April 25, 2013*. (Dkt. 1, ¶50).

Obviously, without access to her books and records, it is impossible for Kaelin to conclusively demonstrate that the Vesta presentation and the Iron Rock proposal do not contain false statements. However, Plaintiff has alleged that the two summary documents, both of which contained the above referenced disclaimer, are evidence of two offerings containing false information by Kaelin.

As another example, at Paragraph 37 of its complaint, Plaintiff alleges that the PPM failed to disclose "material pending legal proceedings," and asserts, among other things, "The Illinois EPA initiated action against Haley Oil in May 2012, alleging illegal release incidents." This is untrue, as the EPA "action" attached to Plaintiff's Appendix in Support of Plaintiff's Application for Ex Parte Temporary Restraining Order, Preliminary Injunction, and Other Emergency Relief ("Plaintiff's Appendix") was not an action, but was actually an *agreement* between Defendant Haley Oil Company, Inc. ("Haley") and the Illinois EPA. That agreement and its terms were initiated at the request of Haley in response to the Illinois EPA's notice, which allowed Haley Oil Company, Inc. to use an *administrative* procedure to allow sufficient time to remediate the release of oil from tanks used by wells it operated. Plaintiff's exhibit detailing the alleged "action" *explicitly states* in its first paragraph that "This Compliance Commitment Agreement ("CCA") is entered into voluntarily by the Illinois Environmental Protective Agency… and Haley Oil Company, Inc." (Plaintiff's Appendix at APP000075). The alleged "action" also acknowledges that Haley Oil proposed the terms of the Compliance Commitment Agreement. (Plaintiff's Appendix at APP000076, ¶4). The remediation described in the CCA was completed and Haley complied in full its terms. (Kaelin Decl. at ¶16).

As another example, at Paragraph 37 of its complaint, Plaintiff mischaracterizes litigation involving Kaelin and the IRS as an example of "material pending legal matters." The Plaintiff's exhibit shows otherwise. As part of its collection procedure, the IRS issued the summons to obtain information regarding the nature and value of Kaelin's assets and income. The IRS form used as financial statement described her assets, including her mineral properties and her interest in several partnerships. Those partnerships, being some of the defendants in this action, own

mineral properties in hundreds of counties and dozens of states in the U.S. A summary appraisal describing these properties was not available. Instead, Kaelin provided the IRS with all available third party reserve reports of the estimated value of her mineral assets, including the assets held in various defendant entities in which she owns an interest. A reserve report for mineral properties is complex and paper-intensive, and the IRS was not satisfied with the large, detailed documentation of the third-party reserve reports provided by Kaelin. The IRS complaint states that Kaelin appeared at the time and place required, but the documents were "in a non-retrievable file system and or is not readily accessible without undue administrative burden." However, *no shorter summary of the value of the mineral assets was available*. (Kaelin Decl. ¶ 17).

IV. CONCLUSION

Based on the above stated reasons, this Court should grant Defendant's motion to set aside the clerk's entry of default.

DATED: 5/29/14

By: _____

Janniece S. Kaelin
Pro Se Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SECURITIES AND EXCHANGE COMMISSION,	§	
Plaintiff,	§	
vs.	§	
ROBERT A. HELMS, ET AL,	§	
Defendants,	§	**Civil Action No.: 1:13-cv-1036-LY**
and	§	
WILLIAM L. BARLOW, and GLOBAL CAPITAL VENTURES, LLC,	§	
Relief Defendants, solely for the purposes of equitable relief.	§	

DECLARATION OF JANNIECE S. KAELIN IN SUPPORT OF MOTION TO SET ASIDE CLERK'S ENTRY OF DEFAULT PURSUANT TO FED. R. CIV. P. 55(c)

I, Janniece S. Kaelin do hereby declare under penalty of perjury, in accordance with 28 U.S.C. §1746, that the following is true and correct, that this declaration is made on my personal knowledge, and that I am competent to testify as the matters stated herein:

1. I am a defendant in the above-captioned civil action, and I submit this Declaration in Support of my Motion to Set Aside Clerk's Entry of Default as to the Defendant Janniece S. Kaelin. I am proceeding in this action pro se.

2. Plaintiff filed suit against all defendants on December 3, 2013. On December 4, 2013 Plaintiff served its *Complaint* and related pleadings on the defendants and the Court-ordered receiver Thomas L. Taylor ("Receiver") took possession of all of my personal and business bank accounts, my office and all of my books and records located in Austin, Texas and my place of residence in Austin, Texas. In response to Plaintiff's suit, and prior to the due date for my answer, I took the following actions:

3. I appeared and participated through counsel in a telephonic hearing before this Court December 10, 2013 (Dkt. 14). On December 11, 2013, I joined in Plaintiff's Unopposed Motion to Extend Temporary Restraining Order as to All Defendants (Dkt. 15) and requested that the Court reschedule the hearing originally set for December 14, 2013. That motion acknowledged my participation in the December 10, 2014 hearing before the Court and the relief requested by the parties including me. (Dkt. 15, ¶ 3 and ¶ 4). The Court entered its Order Extending Temporary Restraining Order on December 11, 2013 (Dkt. 35), finding that the named individual defendants including myself consented to the extension through counsel. Attorney Katherine Lunsford appeared for me and the other individual defendants for the limited purpose of obtaining the extension of date for the original TRO hearing. Since then, I have not been represented by counsel, and without access to my cash and property, I have been unable to retain an attorney to represent me in this matter.

4. On December 17, 2013, Plaintiff's attorney Timothy S. McCole ("McCole) met with Defendant Robert A. Helms ("Helms") in person for a conference in Austin, Texas and I participated via telephone with the other defendants. During that conference, we negotiated the

terms of the Agreed Preliminary Injunction filed herein (Dkt. 37) and resolved other pending pre-trial matters. In that conference we negotiated the terms for the preliminary injunction, including my right to move the Court for relief from the receivership order and the asset freeze during the pendency of the action. (Dkt. 37, ¶VII). This additional concession allows me to request important legal and economic relief prior to the trial on the merits of this action.

5. I also obtained concessions from Plaintiff during the December 17, 2013 meeting whereby Plaintiff agreed to withdraw its deposition scheduled for me as well as the other individual defendants. Defendant Roland Barrera and I were to be deposed by Plaintiff the very next morning on December 18, 2013 at 9:00 a.m. in Austin, Texas and in Newport Coast, California respectively. Helms and Defendant Deven Sellers ("Sellers") were to be deposed the following day on December 19, 2013 at 9:00 a.m. in Austin, Texas and in Denver, Colorado, respectively. At the time the Plaintiff withdrew my deposition, I was not represented by counsel and would have had no representation in my deposition.

6. Additionally, I obtained an extension from the Plaintiff for the due date to file my sworn statement and accounting as ordered by the Court's order. (Dkt. 37, ¶VI). At all times I understood that the extension would necessarily involve the Plaintiff and the Receiver allowing me to access to my books and records in their possession, without which I would be unable to comply with the Court's order.

7. In its Unopposed Motion to Enter Agreed Preliminary Injunction as to Each Defendant and Cancel Preliminary Injunction Hearing, Plaintiff acknowledges that the defendants, including myself, negotiated the agreement to resolve its motion (Dkt. 36, ¶ 4). I executed the Agreed

Preliminary Injunction, and the Court acknowledged my consent to the terms of the order, and noted that the defendants had "agreed that this Court has jurisdiction and over the Defendant and over the subject matter of this action and has agreed to waive a hearing and the entry of finding of facts and conclusions of law." (Dkt 37 at Page 2).

8. I was at my residence in Austin, Texas when served with the complaint, and therefore I have communicated with Plaintiff's counsel since that day regarding this suit, including the TRO, the asset seizure, the agreed temporary injunction, my scheduled deposition, and access to my office to recover my business and personal records and other property. Since this suit was filed, I have always timely responded to all communications from Plaintiff, and Plaintiff has always responded timely to my communications as well. Initially, Plaintiff contacted me using Helms' Gmail account. The Receiver controls my two other email addresses, and I have no access to them.

9. Plaintiff has never refused my request for access to my books, records or other property. However, Plaintiff has not yet offered a specific time or place to access my office, records and property.

10. On February 21, 2014, Plaintiff filed its Motion for Clerk's Entry of Default as to Janniece S. Kaelin (Dkt. 43) but did not attempt electronic service of its motion on me as alleged in its certificate of service. I later learned that Plaintiff attempted electronic service to me by using Helms' Gmail account, but it failed to serve the motion to Helms' correct email address. I had already executed the agreed preliminary injunction (Dkt. 37) as a *pro se* defendant on December 17, 2013, and at no time did I consent to have Helms or any other person accept electronic service as my agent. Plaintiff certified its electronic delivery of its motion to me via email which was an

untrue statement. (*Id.* at Page 3.) On February 24, 2014 Plaintiff again attempted electronic service to me for service of the executed entry of default by using Helms' Gmail account, and once again failed to serve Helms' correct email address. As a result, I did not receive Plaintiff's notice, even to the email address of Helms which was not been authorized by me that the motion, had been filed or that the entry of default had been entered until it was hand-delivered by to my residence via UPS on February 26, 2014, at which time I learned that Plaintiff had attempted electronic service to me by using Helms' incorrect email address, giving me no opportunity to discuss or resolve this matter with Plaintiff before the clerk's entry default. In response, I filed my answer as soon as possible after receiving Plaintiff's the entry of default 8 days later on March 6, 2014.

11. On April 21, 2014 I emailed McCole to confirm the terms of his offer to allow me to resolve the clerk's entry of default against me by filing this motion. McCole responded via email that same day, agreeing *in principle* that Plaintiff would not oppose my motion to set aside entry of default, and I agreed to submit a draft of my motion by April 24, 2014 for his review. In spite of my best efforts, I was unable to complete this motion within that time due to circumstances beyond my control. The delay was not intentional or willful. I do not have access to my office computer, other office equipment, nor my books and records, nor consistent access to my email account. Importantly, as recently as May 28, 2014, McCole sent an email to Kaelin that the Plaintiff would not oppose this motion.

12. I timely failed to file an answer in this cause, but my failure to file should be excused for the following reasons: Since the inception of this suit, I have not been permitted access to my office, my books, business records, personal and business accounting records, electronic

communication, personal and business computers, office equipment and other information necessary to prepare a complete a meaningful answer to Plaintiff's complaint; I am not licensed to practice law, and at the time my answer was due to be filed, I believed that my participation through counsel in the December 10, 2013 telephonic hearing before this Court, my act of joining in Plaintiff's Unopposed Motion To Extend Temporary Restraining Order As To All Defendants (Dkt.15) and participating in the negotiation of the terms of Plaintiff's Unopposed Motion for Preliminary Injunction as to Each Defendant and to Cancel Preliminary Injunction Hearing (Dkt. 36) and my execution of the Agreed Order (Dkt. 37) constituted my appearance and entitled me to notice of all of Plaintiff's pleadings, and further that such acts precluded a default under Fed. R. Civ. P. 55(a). All of these events took place before the due date of my answer.

13. I do not own, control or operate defendants Lake Rock LLC, G3 Minerals LLC and Arcady Resources, LLC nor have I ever used these entities to promote the Iron Rock offering as alleged in Plaintiff's complaint. (Dkt. 1 at ¶6). I have never possessed or exercised any ownership, control or operations over these three entities. No documents or facts exist which would show I ever possessed an interest in, controlled, operated or benefitted from these entities or used them as Plaintiff alleges in its complaint.

14. Neither myself nor any entity or affiliate I am associated with, have ever sold securities or any interest in defendant Vesta Partners, L.P. ("Vesta") as alleged in Plaintiff's complaint (Dkt. 1 ¶30). In fact, Vesta never sold or issued securities to any partner, nor owned any assets, nor received property or cash from any person. Neither Vesta nor its management company Vesta Royalty Management, LLC ever opened a bank account. Declarant Emmanuel Salter's sworn

statement that he was regularly instructed to transfer funds to and among Vesta Partners, LP is untrue. (Dkt. 5-21, APP 000248, ¶10.)

15. Without access to my books and records, I am unable to refute all of Plaintiff 's specific allegations regarding the cash Defendant Vendetta Royalty Partners, Ltd.'s ("Vendetta") generates from its royalty properties. However, while detailing cash receipts from its "legitimate royalty interests," Plaintiff's complaint *omits any mention of the millions of dollars in cash received by Vendetta*, representing revenue and profits earned from the sales of a small portion of its large portfolio of mineral properties, from lease bonuses and other sources of income associated with its ownership of mineral properties (Dkt.1, ¶32, ¶39). For example, in 2010 Vendetta sold its mineral interests in approximately 30 wells in a single transaction for $1.8 million dollars. Vendetta sold a small oil producing unit in Louisiana in 2012 or 2013 for $450,000.00, which unit contained a few oil wells. Notably, both of these transactions represented a significant profit for Vendetta, which participates in over 20,000 wells, and owns mineral interests in over 1.3 million acres spread throughout the United States.

16. In its complaint (Dkt. 1, ¶37) Plaintiff alleges that the PPM failed to disclose "material pending legal proceedings," asserting, among other things, "The Illinois EPA initiated *action* against Haley Oil in May 2012, alleging illegal release incidents." The EPA "action" attached to Plaintiff's Appendix in Support of Plaintiff's Application for Ex Parte Temporary Restraining Order, Preliminary Injunction, and Other Emergency Relief ("Plaintiff's Appendix") was not an action at all, but rather an *agreement* between Defendant Haley Oil Company, Inc. ("Haley") and the Illinois EPA, which agreement was initiated at the request of Haley in response

to the Illinois EPA's notice, which allowed Haley Oil Company, Inc. to take advantage of an *administrative* procedure which allowed additional time to remediate the release of a small amount of oil on a lease in Southern Illinois. In fact, the alleged "action" *explicitly states* in its first paragraph that "This Compliance Commitment Agreement ("CCA") is entered into voluntarily by the Illinois Environmental Protective Agency… and Haley Oil Company, Inc." (Plaintiff's Appendix at APP000075). The alleged "action" also acknowledges that Haley proposed the terms of the Compliance Commitment Agreement. (Plaintiff's Appendix at APP000076, ¶4). The use of this administrative procedure allowed Haley to complete the remediation as scheduled and was released from that agreement upon final inspection by the Illinois EPA later that summer. This remediation was accomplished by Gore Petroleum of Oklahoma.

17. In its complaint (Dkt. 1, ¶37), Plaintiff mischaracterizes the "material legal proceedings" I failed to disclose involving myself and the IRS. As part of its collection procedure, the IRS requested a financial statement from me, using IRS Form 433 to obtain information about the nature and value of my assets and income, which includes my interests in several of the defendant entities in this action. However, the IRS 433 form does not allow for sufficient detail to adequately describe my interest in those entities, which consist of mineral properties in hundreds of counties and dozens of states in the U.S. Additionally, both me and my husband own mineral properties on our individual names which are also under the Receiver's control. A summary appraisal does not exist for those mineral properties, so I provided the IRS with all available third-party reserve reports of the estimated value of my mineral properties. My

responsive documents to supplement Form 433, therefore, contained hundreds of pages of engineering data. Notably, many of the mineral properties in which I have an interest were not included since engineering data was simply not available, but my response contained all the information available at that time. The engineering and valuation process is complex, time-consuming and generates large quantities of documents, and the IRS was unhappy with the sheer volume of documents necessary to describe the value of my mineral interests. As detailed by the Plaintiff's own exhibit supporting its claim, the summons is a recitation by the IRS that states that I "appeared at the time and place designated by the summons" but that the documents were "in a non-retrievable file system and/or is not readily accessible without undue administrative burden." (Plaintiff's Appendix at APP000080, ¶4, ¶5).There was, however, *no shorter summary of the value of the mineral assets available.*

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 27, 2014.

Janniece S. Kaelin
11708 Rydalwater Lane
Austin, Texas 78754
(512) 554-2976
Email: janniecekaelin@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2014 I filed the foregoing document with the Clerk of the Court for the Western District of Texas, Austin Division and that I notified all parties in the manner listed below:

By Email:

Timothy S. McCole
Christopher Davis
801 Cherry Street
Fort Worth, Texas 76102
Counsel for the Securities and Exchange Commission

Thomas L. Taylor III Court-Appointed Receiver
4550 Post Oak Place Drive, Suite 241
Houston, Texas 77027-3117
info@vendettaroyaltyreceivership.com
Counsel for Defendants Vendetta Royalty Partners, Ltd., Vendetta Royalty Management, LLC, Vesta Royalty Partners, LP, Vesta Royalty Management, LLC, Iron Rock Royalty Partners, LP, Iron Rock Royalty Management, LLC, Arcady Resources, LLC, Barefoot Minerals, G.P., G3 Minerals, LLC, Haley Oil Company, Inc., Lake Rock, LLC, Sebud Minerals, LLC and Technicolor Minerals, G.P.

Robert A. Helms, Deven Sellers, Roland Barrera and Willliam Barlow
Pro Se Defendants

Janniece S. Kaelin
11708 Rydalwater Lane
Austin, Texas 78754
(512) 554-2976
Email: janniecekaelin@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of (title of document) Unopposed Motion to set aside was served by (method of delivery) e-mail on (date) 29 May 2014 to:

Name: Andrew Goforth
Fax/E-Mail goforth@taylorlaw.com
Address:

Name: Donald Littlefield
Fax/E-Mail dlittlefield@ballardlawfirm.com
Address:

Name:
Fax/E-Mail
Address:

Name:
Fax/E-Mail
Address:

Name:
Fax/E-Mail
Address:

Signed Name: Charles M Kaelin

Printed Name: Charles M. Kaelin

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SECURITIES AND EXCHANGE COMMISSION,	§	
	§	
Plaintiff,	§	
	§	
vs.	§	**Civil Action No.: 1:13-cv-1036-LY**
	§	
ROBERT A. HELMS, ET AL.,	§	
	§	**PROPOSED ORDER GRANTING DEFENDANT'S MOTION TO SET ASIDE ENTRY OF DEFAULT PURSUANT TO FED. R. CIV. P. 55(c)**
Defendants,	§	
	§	
and	§	
	§	
WILLIAM L. BARLOW, and GLOBAL CAPITAL VENTURES, LLC,	§	
	§	
Relief Defendants, solely for the purposes of equitable relief.	§	

ORDER GRANTING DEFENDANT'S UNOPPOSED MOTION TO SET ASIDE ENTRY OF DEFAULT PURSUANT TO FED.R.CIV.P. 55(c)

ON THIS DAY, having considered Defendant's Motion and finding good cause therefore, Defendant's Motion is GRANTED. IT IS HEREBY ORDERED that Defendant's Motion to Set Aside Entry of Default as to Janniece S. Kaelin (Dkt. 43) and Clerk's Entry of Default (Dkt. 45) is set aside. IT IS FURTHER HEREBY ORDERED that Defendant Janniece S. Kaelin's Answer to Complaint and Request for Jury Trial (Dkt. 52), filed after the Clerk's Entry of Default, is hereby deemed to be filed as of the date of this Order below.

DATED: _____, 2014.

_____
Honorable Judge Lee Yeakel
UNITED STATES DISTRICT COURT