APPENDIX TABLE OF CONTENTS

OPINION OF THE ELEVENTH CIRCUIT
(AUGUST 8, 2018)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NATIONAL LOAN ACQUISITIONS COMPANY,

Plaintiff-Appellee,

v.

PET FRIENDLY, INC.
n.k.a. Xena Express, Inc., et al.,

Defendants.

TERESA Y. WEINACKER,

Defendant-Appellant.

No. 17-12889

D.C. Docket No. 1:09-cv-00169-CG-B
Appeal from the United States District Court for the Southern District of Alabama

Before: JORDAN, Jill PRYOR and FAY, Circuit Judges.

PER CURIAM

Teresa Weinacker, proceeding *pro se*, appeals from the district court's denial of her Federal Rule of Civil Procedure 60(b) motion to vacate a default judgment

the district court entered against her. Weinacker argues the default judgment is void because the district court lacked personal jurisdiction and subject matter jurisdiction. After careful review, we affirm the district court's denial of Weinacker's Rule 60(b) motion.

I. Background

In 2009, National Loan Acquisitions Company ("National") filed a complaint against Weinacker, Charles Weinacker, Jr., and Xena Express, Inc., asserting a breach of contract claim based on a promissory note. National filed a proof of service that each defendant had been personally served. After the defendants failed to respond to the complaint, National moved for a default judgment. In support of its motion, National submitted several documents, including affidavits, a copy of the promissory note, a copy of a commercial security agreement, and a copy of a foreclosure deed. The district court granted the motion and entered a default judgment against all of the defendants.

National then moved for a writ of garnishment against Wal-Mart Stores, Inc., with whom it alleged Xena Express had been doing business. The district court initially granted the writ, but it subsequently entered an order stating the writ could not be enforced because Xena Express had filed for bankruptcy.[1]

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[1] In 2012, Weinacker was indicted in the Southern District of Alabama with several fraud offenses stemming from Xena Express's bankruptcy proceeding. *See* Indictment, *United States v. Weinacker*, No. 1:12-cr-00168-AK-C (S.D. Ala. July 26, 2012). She later pled guilty to falsifying records in connection with a bankruptcy proceeding after she transferred funds from Xena Express to her personal bank accounts and failed to disclose those assets

In 2017, Weinacker moved to vacate the default judgment pursuant to Rule 60(b), arguing that it was invalid. A magistrate judge recommended that Weinacker's motion be denied. The district court adopted the magistrate's recommendation over Weinacker's objection, and Weinacker appealed.

II. Standard of Review

Although we generally review a district court's denial of a Rule 60(b) motion to set aside a default judgment under an abuse of discretion standard, we review *de novo* a Rule 60(b) challenge to a district court's failure to vacate a void judgment. *Oldfield v. Pueblo De Bahia Lora, S.A.*, 558 F.3d 1210, 1217 (11th Cir. 2009).

III. Discussion

The exclusive method for attacking a default judgment in the district court is by way of a Rule 60(b) motion. *Gulf Coast Fans, Inc. v. Midwest Elecs. Imps., Inc.*, 740 F.2d 1499, 1507 (11th Cir. 1984). Rule 60(b)(4) "provides that a court may relieve a party from an order or final judgment that is void" where, for example, the district court lacked subject matter jurisdiction or entered the order in a manner inconsistent with due process. *Oakes v. Horizon Fin., S.A.*, 259 F.3d 1315, 1318-19 (11th Cir. 2001). Unlike other Rule 60(b) motions, motions filed pursuant to Rule 60 (b)(4) need not be filed within one year of entry of the judgment being challenged. *See* Fed. R. Civ. P. 60(c)(1).

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during Xena Express's bankruptcy proceedings. Plea Agreement, *Weinacker*, No. 1:12-cr-00168-AK-C (S.D. Ala. Oct. 17, 2012); *see* 18 U.S.C. § 1519.

Weinacker makes three arguments that the district court erred in denying her Rule 60(b) motion to vacate the 2009 default judgment entered against her. First, she argues that the district court lacked personal jurisdiction over her. Second, she argues that the district court lacked subject matter jurisdiction to enter the default judgment against her. Third, she argues that the default judgment does not comport with due process of law because she was entitled to a hearing prior to the entry of default judgment. We address each of these arguments in turn.

Weinacker argues the district court lacked personal jurisdiction over her because she was never properly served. A court lacks personal jurisdiction when the defendant has not been served. *Pardazi v. Cullman Med. Ctr.*, 896 F.2d 1313, 1317 (11th Cir. 1990). Objections to personal jurisdiction, however, are waived if a defendant fails to raise that objection in a timely manner. *Id.* In *Stansell v. Revolutionary Armed Forces of Colombia*, for example, we held that where a defendant "knowingly sat on his rights for nine months before filing anything at all with the district court, he waived his right to object to any defects in the service of process." 771 F.3d 713, 737 (11th Cir. 2014); *see United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 275 (2010) ("Rule 60(b)(4) does not provide a license for litigants to sleep on their rights.").

We reject Weinacker's argument the district court lacked personal jurisdiction over her for two reasons. First, the record reflects that service of process was proper; National filed a proof of service stating that Weinacker was served on April 8, 2009. Second, because National filed suit against Weinacker more than nine years ago, she has waived any challenge to personal

jurisdiction by failing to raise a defect in service of process until now. *See Stansell*, 771 F.3d at 737 (explaining that although jurisdictional defects are grounds for a Rule 60(b)(4) motion "there are limitations on this doctrine," because "objections to personal jurisdiction . . . are generally waivable." (internal quotation marks omitted)). We note that Weinacker does not argue that she was unaware of the lawsuit against her until she filed the Rule 60(b) motion. We thus reject her argument that the district court should have granted her Rule 60(b) motion on that basis.

Weinacker also argues that the district court lacked subject matter jurisdiction to enter the default judgment against her. For a district court to have subject matter jurisdiction, a plaintiff must allege facts supporting "complete diversity; every plaintiff must be diverse from every defendant." *Travaglio v. Am. Exp. Co.*, 735 F.3d 1266, 1268 (11th Cir. 2013) (internal quotation marks omitted). If there is a deficiency in subject matter jurisdiction, district courts are constitutionally obligated to dismiss the action. *Id.* at 1269. National's complaint adequately alleged diversity; it stated that National was an Oregon corporation whose principal place of business was in Oregon, Xena Express's principal place of business was in Alabama, and Teresa and Charles Weinacker were citizens of Alabama.[2] Additionally,

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[2] This Court issued the parties a jurisdictional question, asking whether Xena Express had sufficiently alleged the citizenship of Charles and Teresa Weinacker in its complaint. We issued an order construing Xena Express's response to that question as a motion to amend the complaint to correct any jurisdictional defect, granted the motion, and deemed the complaint as amended and sufficient to establish the district court's diversity-based subject matter jurisdiction over the case.

it stated the amount in controversy was greater than $75,000. *See* 28 U.S.C. § 1332. We thus reject her argument that subject matter jurisdiction was lacking.[3]

Finally, Weinacker argues the district court violated her due process rights by failing to hold a hearing prior to entering default judgment against her. Again, we disagree. First, the district court is not required to hold a hearing before entering a default judgment. Federal Rule of Civil Procedure 55(b)(2) provides that "[t]he court may conduct hearings . . . when, to enter or effectuate judgment, it needs to . . . determine the amount of damages." But "[g]iven its permissive language, Rule 55(b)(2) does not require a damages hearing in every case." *Giovanno v. Fabec*, 804 F.3d 1361, 1366 (11th Cir. 2015). The district court may forego a hearing, for example, "where all essential evidence is already of record." *Id.* (internal quotation marks omitted). Here, there was evidence in the record as to National's damages, including a copy of the promissory note. In any event, we have held a defendant who "knowingly sat on his rights for nine months before filing anything at all with the district court . . . waived his right to object to . . . any denial

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[3] In arguing subject matter jurisdiction was lacking, Weinacker contends the documents National submitted in moving for a default judgment were fraudulent. These arguments, though, are unrelated to the court's subject matter jurisdiction. Instead, they focus on "fraud . . . misrepresentation, or misconduct by an opposing party," which must be challenged through a Rule 60(b)(3) motion. Fed. R. Civ. P. 60(b)(3). Such a motion, however, must be made "no more than a year after the entry of the judgment or order or the date of the proceeding." Fed. R. Civ. P. 60 (c)(1). Because more than nine years have passed since the entry of default judgment against Weinacker, we reject her arguments related to purportedly fraudulent documents.

of his right to be heard." *Stansell*, 771 F.3d at 737. Similarly, here, by waiting more than nine years to argue that a hearing was required prior to the entry of default judgment, Weinacker has waived her right to object.

IV. Conclusion

For these reasons, we affirm the district court's order denying Weinacker's Rule 60(b) motion.

Affirmed.

ORDER OF THE DISTRICT COURT OF ALABAMA (JUNE 9, 2018)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

NATIONAL LOAN ACQUISITIONS COMPANY,

Plaintiff,

v.

PET FRIENDLY, INC., ET AL.,

Defendants.

Civil Action No. 09-00169-CG-B

Before: Callie V. S. GRANADE,
Senior United States District Judge

After due and proper consideration of all portions of this file deemed relevant to the issues raised, and a de novo determination of those portions of the Amended Report and Recommendation to which objection is made, the Amended Report and Recommendation of the Magistrate Judge made under 28 U.S.C. § 636(b)(1)(B) is ADOPTED as the opinion of this Court. It is ORDERED that Defendant Teresa Weinacker's Motions to Vacate the Default Judgment are DENIED.

DONE and ORDERED this 9th day of June, 2017.

/s/ Callie V. S. Granade
Senior United States District Judge

AMENDED REPORT AND RECOMMENDATION (MAY 26, 2017)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

NATIONAL LOAN ACQUISITIONS COMPANY,

Plaintiff,

v.

PET FRIENDLY, INC., ET AL.,

Defendants.

Civil Action No. 09-00169-CG-B

Before: Sonja F. BIVINS,
United States Magistrate Judge

This case is before the Court on Defendant Teresa Weinacker's motions to vacate a default judgment dated May 29, 2009. (Docs. 32, 33).[1] Upon consideration of all matters presented, the undersigned RECOMMENDS, for the reasons stated herein, that Defendant's motions be DENIED.

[1] Weinacker's motions have been referred to the undersigned magistrate judge for a report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B) and S.D. Ala. CivLR 72(a)(2)(S).

I. Background

Defendant Teresa Weinacker ("Weinacker"), proceeding *pro se*, alleges that the default judgment entered by the Court in this case on May 29, 2009 (Doc. 21), is void for "failure of adequate service,[2] no competent evidence or witness,[3] lack of subject-matter jurisdiction,[4] fraud upon the court, conflict of interest[,][5] violations of constitutional due process,[6] Uniform Commercial Code, and the Unclean Hands Doctrine" as a result of the "infectious actions" of Plaintiff, National Loan Acquisitions Company ("National Loan"), and its attorney, Henry Callaway ("Callaway"). (Doc. 33 at 1). Weinacker further states that the underlying complaint

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[2] Weinacker states that she was never personally served in this case and that she "recently obtained the complete court records through public access to court electronic records." (Doc. 33 at 5).

[3] Weinacker states that attorney Henry Callaway appeared at the hearing on the motion for a default judgment "without witnesses or any competent or admissible evidence to substantiate [National Loan's] claims. After hearing testimony, the Court entered a default judgment." (Doc. 33 at 7).

[4] Weinacker states that, because National Loan did not prove its claim, the Court lacked subject matter jurisdiction. (Doc. 33 at 11-14).

[5] Weinacker states that attorney Henry Callaway's law firm had represented her company in one or more matters immediately before it represented National Loan in the present action and that she owed the firm money for its representation at the time that Henry Callaway represented National Loan in the underlying action against her. (Doc. 33 at 21-22).

[6] Weinacker states that National Loan "failed or refused to inform" her of her "due process rights under the Fair Debt Collections Practices Act," thereby depriving the Court of subject-matter jurisdiction. (Doc. 33 at 17).

in this case was filed without supporting documentation and that it failed to state a claim upon which relief could be granted. (*Id.* at 2). Weinacker alleges that National Loan's attorney, Henry Callaway, was not "candid" with the Court during the 2009 default judgment proceedings in this case and that he "made material misrepresentations to the Court when he did not authenticate the debt, did not include any exhibits with the complaint validating the 'alleged' debt and produced no affidavit from the originator of the debt [Regions Bank] with an accounting of the 'alleged' debt." (*Id.* at 1, 14). Weinacker further states that Callaway "failed to provide sufficient evidence of Plaintiff's claim, and, if could be construed, were only presented in an attempt to confuse the issue at hand and to mislead the Court to believing the documents actually were evidence of the promissory note. It was his responsibility to validate the claims being made on the note and the amount owed." (Doc. 33 at 2).

A review of the docket in this case reflects that National Loan filed a complaint on March 27, 2009, against Defendant Weinacker, her husband, and their business, alleging breach of a promissory note and two guaranty agreements entered between Defendants and Regions Bank. (Doc. 1). National Loan was the holder of the promissory note and the obligee under the guaranty agreements at the time the lawsuit was filed. (*Id.*).

A proof of service reflecting personal service of the summons and complaint on Weinacker at 12025 County Road 1, Point Clear, Alabama, was filed on April 13, 2009. (Doc. 4). The proof of service was signed by a private process server and reflects that Weinacker

was personally served on April 8, 2009. (*Id.*).[7] On May 13, 2009, National Loan filed a motion for a default judgment against the Defendants (including movant), which was granted on May 29, 2009. (Doc. 11, 21).

On May 12, 2017, Weinacker filed the instant motions to set aside the Court's May 29, 2009, default judgment. (Docs. 32, 33). Upon review, the Court finds that Weinacker's motions to set aside the 2009 default judgment are misplaced and due to be denied.

II. Standard of Review

Under Rule 60 of the Federal Rules of Civil Procedure, a "court may relieve a party or its legal representative from a final judgment, order, or proceeding [.]" Fed. R. Civ. P. 60(b).[8]

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[7] The docket also contains proofs of service reflecting that the summons and complaint for Weinacker's husband and their business were likewise served on Weinacker on April 8, 2009. (Docs. 5, 6).

[8] Under Rule 60(b), the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

A Rule 60(b) motion must be made "within a reasonable time" and, in any event, not more than one year after judgment for reasons arising out of an opposing party's fraud, misrepresentation, or misconduct. Fed. R. Civ. P. 60(c). "The purpose of Rule 60(b) is to balance the principle of finality of a judgment with the interest of the court in seeing that justice is done in light of the facts." *Stansell v. Revolutionary Armed Forces of Colombia*, 2013 WL 12132057, *3 (M.D. Fla. Apr. 29, 2013) (citing *Hesling v. CSX Transp., Inc.*, 396 F.3d 632, 638 (5th Cir. 2005) (holding that the "desire for a judicial process that is predictable mandates caution in reopening judgments.").

Rule 60, however, does not limit the court's power to set aside a judgment for "fraud on the court"; therefore, a party may move to set aside a judgment for fraud on the court at any time. Fed. R. Civ. P. 60(d)(3); *see Travelers Indem. Co. v. Gore*, 761 F.2d 1549, 1551 (11th Cir. 1985). Fraud on the court constitutes "only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases." *Travelers*, 761 F.2d at 1551-52 (citations omitted). Stated differently, "[t]o prevail [on a motion to set aside a judgment for fraud on the court], the movant must show 'an unconscionable plan or scheme which is designed to improperly influence the court in its decision." *United States v. Wilkins*, 2015 U.S. Dist. LEXIS 98550, *6, 2015 WL 4571304, *3 (M.D. Fla. July 28, 2015) (quoting

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(6) any other reason that justifies relief.

Rozier v. Ford Motor Company, 573 F.2d 1332, 1338 (5th Cir. 1978)).

"Fraud *inter parties*, without more, should not be fraud upon the court, but redress should be left to a motion under Rule 60(b)(3) or to an independent action." *Travelers*, 761 F.2d at 1551 (citations omitted) (holding that perjury and fabricated evidence do not constitute fraud upon the court, because they "are evils that can and should be exposed at trial," and "[f]raud on the court is therefore limited to the more egregious forms of subversion of the legal process, . . . those we cannot necessarily expect to be exposed by the normal adversary process."); *Rozier*, 573 F.2d at 1338 ("Generally speaking, only the most egregious misconduct, such as bribery of a judge or members of a jury or the fabrication of evidence by a party in which an attorney is implicated, will constitute a fraud on the court.") (citations omitted).

Where relief from a judgment is sought for fraud on the court, the movant must establish by clear and convincing evidence the adverse party obtained the verdict through fraud. *Booker v. Dugger*, 825 F.2d 281, 283-84 (11th Cir. 1987). "Conclusory averments of the existence of fraud made on information and belief and unaccompanied by a statement of clear and convincing probative facts which support such belief do not serve to raise the issue of the existence of fraud." *Council v. Am. Federation of Gov't Employees (AFGE) Union*, 559 Fed. Appx. 870, 872 (11th Cir. 2014) (citations omitted).

III. Discussion

The undersigned finds, as a preliminary matter, that any motion for relief under Rule 60(b)(1)-(3) is clearly untimely. *See* Fed. R. Civ. P. 60(c) (providing

a motion under Rule 60(b)(1)-(3) must be made within one year after entry of the judgment). This Court entered a default judgment against Defendant Weinacker on May 29, 2009, and Weinacker filed her motions for relief from judgment approximately eight years later, on May 12, 2017. Thus, any relief under Rule 60(b)(1)-(3) is foreclosed.

Moreover, even if the Court construes Weinacker's motions as seeking relief under Rule 60(d)(3), which has no time limitation, she still is not entitled to any relief because her assertions fail to demonstrate, by clear and convincing evidence, that National Loan obtained its default judgment through fraud on the Court. Weinacker's factual assertions regarding fraud on the court consists of averments that National Loan's attorney was not "candid" with the Court during the 2009 default judgment proceedings in this case; that he "made material misrepresentations to the Court when he did not authenticate the debt;" that he "did not include any exhibits with the complaint validating the 'alleged' debt;" that he "produced no affidavit from the originator of the debt [Regions Bank] with an accounting of the 'alleged' debt;" that he "failed to provide sufficient evidence of Plaintiff's claim;" that he attempted to "confuse the issue at hand and to mislead the Court to believing the documents actually were evidence of the promissory note;" and that he failed in his "responsibility to validate the claims being made on the note and the amount owed." (Doc. 33 at 1-2, 14).

Weinacker's allegations do not rise to the level of fraud on the court because they are matters that could and should have been exposed during the court proceedings and they do not constitute "the more

egregious forms of subversion of the legal process." *Cf. Council*, 559 Fed. Appx. at 873 (holding that the plaintiff failed to establish fraud on the court by merely alleging that defendant's employees had committed perjury and fabricated evidence at trial, as such allegations do not constitute fraud on the court because they could have been exposed at trial and are not considered to be "the more egregious forms of subversion of the legal process."). Moreover, Weinacker provides no clear and convincing evidence that any attorney or judicial officer engaged in fraudulent misconduct, or that such misconduct caused injury to the public (the basis for a proper "fraud on the court" action). *See SEC v. ESM Group, Inc.*, 835 F.2d 270, 273 (11th Cir. 1988) ("The fraud alleged in the present case primarily concerns the two parties involved and does not threaten the public injury[,] which is the concern of fraud on the court.")(internal quotation marks omitted, alteration supplied).

Moreover, to the extent that Weinacker seeks to relitigate the merits of her case some eight years after a default judgment was entered against her by alleging fraud on the court, her argument is unavailing. *See Anderson v. Florida Dep't of Envtl. Prot.*, 2015 U.S. Dist. LEXIS 178790, *2, 2015 WL 10990264, *1 (S.D. Fla. Apr. 22, 2015), aff'd, 624 Fed. Appx. 734 (11th Cir. 2015)("to the extent that Plaintiff seeks to characterize as fraud Defense Counsel's arguments to the Court, Plaintiff is relitigating the merits of his case, which is barred by the law of the case doctrine.").

IV. Conclusion

For the foregoing reasons, it is hereby RECOMMENDED that Defendant Weinacker's motions to

vacate the default judgment entered in this case on May 29, 2009 (Docs. 32, 33) be DENIED.

NOTICE OF RIGHT TO FILE OBJECTIONS

A copy of this report and recommendation shall be served on all parties in the manner provided by law. Any party who objects to this recommendation or anything in it must, within fourteen (14) days of the date of service of this document, file specific written objections with the Clerk of this Court. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); S.D. ALA. L.R. 72.4. The parties should note that under Eleventh Circuit Rule 3-1, "[a] party failing to object to a magistrate judge's findings or recommendations contained in a report and recommendation in accordance with the provisions of 28 U.S.C. § 636(b)(1) waives the right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions if the party was informed of the time period for objecting and the consequences on appeal for failing to object. In the absence of a proper objection, however, the court may review on appeal for plain error if necessary in the interests of justice." 11th Cir. R. 3-1. In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the Magistrate Judge's report and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the Magistrate Judge is not specific. DONE this 26th day of May, 2017.

/s/ Sonja F. Bivins
United States Magistrate Judge

JUDGMENT OF THE DISTRICT COURT OF ALABAMA (MAY 29, 2009)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

NATIONAL LOAN ACQUISITIONS COMPANY,

Plaintiff,

v.

PET FRIENDLY, INC., n/k/a XENA EXPRESS, INC., CHARLES W. WEINACKER, JR. and TERESA Y. WEINACKER,

Defendants.

Civil Action No. 09-0169-CG-B

Before: Callie V. S. GRANADE, Chief United States District Judge

Judgment is hereby entered by default in favor of plaintiff against all the defendants. It is ORDERED that plaintiff National Loan Acquisitions Company recover from defendants Pet Friendly, Inc. n/k/a Xena Express, Inc., Charles W. Weinacker, Jr., and Teresa Y. Weinacker the amount of $160,731.22. This judgment amount includes prejudgment interest through May 28, 2009 and reasonable attorney's fees and costs of $25,000.

Judgment is also hereby entered in favor of plaintiff for possession of defendant Pet Friendly, Inc. n/k/a Xena Express, Inc.'s accounts receivable and inventory.

Costs are taxed against defendants.

DONE and ORDERED this 29th day of May, 2009.

/s/ Callie V. S. Granade
Chief United States District Judge

ORDER OF THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING EN BANC (OCTOBER 2, 2018)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NATIONAL LOAN ACQUISITIONS COMPANY,

Plaintiff-Appellee,

versus

PET FRIENDLY, INC.
n.k.a. Xena Express, Inc., et al.,

Defendants.

TERESA Y. WEINACKER,

Defendant-Appellant.

No. 17-12889-JJ

Appeal from the United States District Court for the Southern District of Alabama

Before: JORDAN, Jill PRYOR and FAY, Circuit Judges.

PER CURIAM

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en

banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Jill Pryor
United States Circuit Judge

AFFIDAVIT OF MICHAEL J. HENRY (MAY 5, 2009)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

NATIONAL LOAN ACQUISITIONS COMPANY,

Plaintiff,

v.

PET FRIENDLY, INC., n/k/a XENA EXPRESS, INC., CHARLES W. WEINACKER, JR. and TERESA Y. WEINACKER,

Defendants.

Civil Action No. 09-0169-B

State of Oregon:
County of Clackamas:

Before me, the undersigned authority in and for said county and state, appeared Michael J. Henry, who, being by me first duly sworn, says and deposes as follows:

My name is Michael J. Henry. I have knowledge of the facts stated herein. I am vice-president of National Loan Acquisitions Company, which purchased the debt made the subject of this suit from Regions Bank.

Attached as Exhibit A is a true and correct copy of a promissory note in the principal amount of $300,000.00 executed by Pet Friendly, Inc. on or about October 5, 2005 in favor of Regions Bank. Attached as Exhibit B is a true and correct copy of an allonge which pertains to the promissory note which is Exhibit A, evidencing that the note has been assigned to plaintiff National Loan Acquisitions Company. Attached as Exhibit C is a true and correct copy of a guaranty agreement executed by defendant Charles W. Weinacker, Jr. Attached as Exhibit D is a true and correct copy of an assignment of guaranty from Regions Bank to National Loan Acquisitions Company. Attached as Exhibit E is a true and correct copy of a guaranty agreement executed by defendant Teresa Y. Weinacker. Attached as Exhibit F is a true and correct copy of an assignment of the guaranty executed by defendant Teresa Y. Weinacker. Attached as Exhibit G is a true and correct copy of a commercial security agreement giving Regions Bank a first lien on the accounts receivable and inventory of Pet Friendly, Inc. Attached as Exhibit H is a true and correct copy of a UCC-1 recorded with the Alabama Secretary of State evidencing the perfection of Region Bank's security interest in Pet Friendly, Inc.'s accounts receivable and inventory. Attached as Exhibit I is a true and correct copy of a UCC financing statement amendment filed with the Alabama Secretary of State reflecting that plaintiff now holds that security interest.

The promissory note (Exhibit A) which is the subject of this suit became due on October 5, 2006 but remains unpaid. The principal owed on the promissory note was $299,155.50 at the time that it was assigned to plaintiff in 2008. The defendants

have made only one payment of $500.00 on the note since that time. Prejudgment interest owed on the note through May 5, 2009 is $35,582.88. Plaintiff has also paid $1,125.00 in premiums for forced-placed insurance on the building which secures the loan. On May 5, 2009, plaintiff National Loan Acquisitions Company, Inc. foreclosed on a second mortgage commercial property securing this loan and was the successful bidder at $200,000.00 (see foreclosure deed marked as Exhibit J). Crediting that amount, the total amount owed as of May 5, 2009 (exclusive of attorney's fees and costs) is $135,363.68, calculated as follows:

Principal	$299,155.20
Interest through 5/5/09	35,582.88
Insurance	1,125.00
Payment	-500.00
Foreclosure credit	-200,000.00
	$135,363.68

Additional interest after May 5, 2009 is accruing at the rate of $15.98 per day.

/s/Michael Henry
Vice-President
National Loan Acquisitions Company

Sworn to and subscribed before me this 11th day of May, 2009.

/s/ Katherine York
Katherine York
Notary Public

My Commission Expires:
9-18-09

Official Seal

Katherine York
Notary Public-Oregon
Commission No. 397356
My Commission Expires
September 18, 2009

PROOF OF SERVICE, IMAGE AND TRANSCRIPTION (APRIL 8, 2009)

AO 440 (Rev. 04/08) Civil Summons (Page 2)

Proof of Service

I declare under penalty of perjury that I served the summons and complaint in this case on _____, by:

(1) personally delivering a copy of each to the individual at this place, 12025 County Road 1 Point Clear, AL Teresa Y. Weinrather; or

(2) leaving a copy of each at the individual's dwelling or usual place of abode with _____ who resides there and is of suitable age and discretion; or

(3) delivering a copy of each to an agent authorized by appointment or by law to receive it whose name is _____; or

(4) returning the summons unexecuted to the court clerk on _____; or

(5) other *(specify)* _____

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00.

Date: April 8, 2009

Bruce Mack
Server's signature

BRUCE MACK PROCESS PRIVATE
Printed name and title

P.O. Box 81 Mobile, AL 36601
Server's address

I declare under penalty of perjury that I served the summons and complaint in this case on _____ by:

(1) personally delivering a copy of each to the individual at this place, 12025 County Road 1, Point Clear, AL Teresa Y. Weinacker;

Date: April 8, 2009

/s/ Bruce Mack
Server's signature

Bruce Mack Process Private
Printed name and title

P.O. Box 81,
Mobile, AL 36601
Server's address