IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

RICHARD ROE; VICTOR VOE; and OUTSERVE-SLDN, INC., Plaintiffs, v. PATRICK M. SHANAHAN, in his official capacity as Acting Secretary of Defense; HEATHER A. WILSON, in her official capacity as Secretary of the Air Force; and the UNITED STATES DEPARTMENT OF DEFENSE, Defendants.	)	No. 1:18-cv-1565-LMB-IDD

MEMORANDUM IN SUPPORT OF DEFENDANTS' CONSENT
MOTION FOR LEAVE TO FILE ANSWER OUT-OF-TIME

With the consent of Plaintiffs, and for good cause and excusable neglect shown, Defendants Patrick M. Shanahan, in his official capacity as Acting Secretary of Defense; Heather A. Wilson, in her official capacity as Secretary of the Air Force; and the United States Department of Defense, through their undersigned counsel, hereby respectfully submit their motion for leave to file their Answer to Plaintiffs' Complaint out-of-time, and by no later than March 8, 2019, pursuant to Federal Rule of Civil Procedure 6(b)(1)(B).

INTRODUCTION AND BACKGROUND

In this action, Plaintiffs Richard Roe and Victor Voe bring equal protection and Administrative Procedures Act claims challenging the discharge decisions of the Air Force. Compl. (ECF 1) at 22-30. The parties moved to consolidate pre-trial discovery in this matter with the ongoing discovery in a second case involving the same Department of Defense

personnel policies, *Harrison v. Shanahan*, No. 1:18-cv-641. ECF 29. The Court granted the parties' motion on January 4, 2019, setting a combined briefing schedule in this case for Plaintiffs' Motion for Preliminary Injunction and Defendants' Motion to Dismiss. ECF 32. Under the consolidated discovery plan approved by the Court, fact discovery, including depositions relevant to both *Harrison* and *Roe*, would be ongoing before and during the pendency of Plaintiffs' Motion for Preliminary Injunction and Defendants' Motion to Dismiss in Roe. The Court heard argument on the parties' motions on February 15, 2019, and denied Defendants' motion to dismiss by order that same day. ECF 73.

Since the hearing on Plaintiffs' Motion for Preliminary Injunction and Defendants' Motion to Dismiss, the parties have engaged in extensive discovery. Plaintiffs served two sets of interrogatories, two sets of requests for production of documents, and two sets of requests for admissions. Defendants timely served objections to Plaintiffs' second set of written discovery on February 28, 2019, and responses to Plaintiffs' first set of written discovery on March 1, 2019. Defendants have likewise served interrogatories, requests for production, and requests for admissions on Plaintiffs. In addition, the parties have taken and are scheduled to take a substantial number fact depositions. Plaintiffs in these consolidated cases have taken five depositions from February 22, 2019, to date, and have scheduled eight additional depositions through March 15, 2019. Defendants have taken four depositions to date, including one in Washington, D.C., on February 28, 2019, on in Detroit, Michigan, on March 1, 2019, one in San Angelo, Texas, on March 5, 2019, and one in Miami, Florida, on March 5, 2019, and have scheduled an additional four depositions through March 15, 2019.

In the midst of these efforts, counsel for Defendants recently realized that an Answer had not been filed within the time required by Rule 12(a)(4)(A). Defendants now respectfully seek

leave of the Court to file their Answer out-of-time to rectify this error. The parties' counsel have conferred with each other, and Plaintiffs have consented to extending the filing of Defendants' Answer for a brief, additional period of one week. Therefore, Defendants seek leave to file their Answer by no later than Friday, March 8, 2019.

ARGUMENT

In general, a court "may, for good cause shown, extend the time [in which a party must act] after the time has expired if the party failed to act because of excusable neglect." Fed. R. Civ. P. 6(b)(1)(B). The determination of whether a party's neglect is "excusable" is "at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." *See Pioneer Investment Servs. Co. v. Brunswick Assocs. Ltd. P'Ship*, 507 U.S. 380, 395 (1993); *see also Eagle Fire, Inc. v. Eagle Integrated Controls, Inc.*, No. 3:06cv264, 2006 WL 1720681, at *4 (E.D. Va. June 20, 2006) (explaining that *Pioneer Investment* applies to contexts outside of the bankruptcy rules in which it was originally decided, including Rule 6(b)(1)(B)). The Supreme Court has identified four factors to consider in making this determination: (1) the danger of prejudice to the opposing party, (2) the length of the delay and its potential impact on judicial proceedings, (3) the reason for the delay, and (4) whether the movant acted in good faith. *Id.* The third factor—the reason for the delay—is the most important factor. *See Thompson v. E.I. Dupont de Nemours & Co.*, 76 F.3d 530, 534 (4th Cir. 1996). Additionally, "[a]lthough inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect, it is clear that 'excusable neglect' . . . is a somewhat 'elastic concept' and is not limited strictly to omissions caused by circumstances beyond the control of the movant." *See Pioneer Investment*, 507 U.S. at 392.

Here, applying the factors set forth in *Pioneer Investment*, Defendants' failure to timely file an Answer after the denial of their Motion to Dismiss constitutes excusable neglect. Indeed, other courts in this circuit addressing a similar procedural posture as in this case have excused the defendant's untimely answer. *See Peche v. Keller*, No. 1:11cv362, 2012 WL 2128095, at *6-9 (M.D.N.C. June 12, 2012); *Gee v. Boyles*, No. 1:10cv270, 2011 WL 666369, at *2 (W.D.N.C. Feb. 14, 2011); *Moundsville Water Bd. v. Shook, Inc. Heavy & Envtl. Div.*, Nos. 5:09cv113, 5:10cv28, 2011 WL 666470, at *2 (N.D.W. Va. Feb. 14, 2011).

With respect to the first factor, there would be little, if any, prejudice to Plaintiffs in permitting Defendants to file an Answer out-of-time. A "delay in and of itself does not constitute prejudice to the opposing party." *Peche*, 2012 WL 2128095, at *7 (quoting *Colleton Preparatory Acad., Inc. v. Hoover Universal, Inc.*, 616 F.3d 413, 418 (4th Cir. 2010)). More importantly, Plaintiffs have consented to the delayed filing.

With respect to the second factor, Defendants have sought to correct their error and file Answer an additional seven days after the denial of their Motion to Dismiss. Other courts have held that greater delays in filing an out-of-time answer is "minimal" and therefore excusable. *See Peche*, 2012 WL 2128095, at *7 (collecting cases and concluding that a 35-day delay is "minimal"); *see also Gee*, 2011 WL 666369, at *2 (30-day delay is "not extensive"). Furthermore, no proceedings have been affected by the delay in filing.

With respect to the third factor, counsel for the Defendants acknowledge their failure to adhere to the deadline for filing their Answer set forth in the Federal Rules. However, the parties have been diligently pursuing pretrial discovery in these consolidated cases.

Finally, with respect to the fourth factor, the undersigned attests that Defendants' delay in filing an Answer was inadvertent.

In sum, Defendants' neglect was excusable, and allowing Defendants to file their Answer out-of-time will not prejudice Plaintiffs or adversely affect any court proceedings. Therefore, given the circumstances of this case and in the interest of judicial economy, Defendants' motion should be granted. *See Peche*, 2012 WL 2128095, at *9 ("[E]ven where an attorney is 'remiss' in allowing a deadline to pass (i.e., lacks an acceptable reason for his or her oversight), a court may find excusable neglect when the record lacks 'any evidence of prejudice to [the opposing party] or to judicial administration in th[e] case, or any indication at all of bad faith." (quoting *Pioneer Investment*, 507 U.S. at 398)).

CONCLUSION

For the foregoing reasons, Defendants respectfully request leave of Court to file their Answer out-of-time, and by no later than Friday, March 8, 2019.

DATE: March 6, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date, I filed the foregoing using the Court's CM/ECF system, which will send a notification of electronic filing (NEF) to the following counsel of record:

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