

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

MICHAEL J. FORBES,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 24-1953C
	)	(Judge Hadji)
THE UNITED STATES,	)	
	)	
Defendant.	)	

**DEFENDANT’S MOTION TO VACATE DEFAULT AND  
MOTION OUT OF TIME FOR AN ENLARGEMENT OF TIME  
TO FILE RESPONSE TO COMPLAINT**

Pursuant to Rule 55(c) of the United States Court of Federal Claims (RCFC), defendant, the United States, respectfully requests that the Court vacate the default entered by the Clerk in this case. Additionally, pursuant to RCFC 6(b)(1)(B), we respectfully request, out of time, a 37-day extension of time, through March 5, 2025, to respond to the complaint. This is our first request for an extension of time for this purpose. Pursuant to RCFC 7.3, defendant’s counsel of record certifies that the defendant has in good faith conferred with Mr. Forbes about this motion. Specifically, on February 5, 2025, counsel for the Government spoke with Mr. Forbes regarding both of our requests, and Mr. Forbes indicated that he opposes our requests. As explained below, good cause exists for this motion.

Mr. Forbes filed his complaint on November 22, 2024, asserting a claim for damages resulting from an alleged violation of the Privacy Act of 1974, 5 U.S.C. § 552. Plaintiff’s Complaint (Pl. Comp.) ECF No. 1 at 1. He alleges that he was involuntarily separated from service. Plaintiff’s Amended Complaint (Am. Compl.) ECF No. 5 at 3. Additionally, Mr. Forbes requests reinstatement and backpay regarding his position with

the Department of the Army because of the alleged violation of the Privacy Act and the Military Whistleblowers Protection Act of 1988. Pl. Comp. at 1, 6; Am. Comp. 1, 6. Mr. Forbes amended his complaint on December 9, 2024. Am. Comp at 5. The response to the complaint, whether by a Rule 12 motion or a motion for entry of a scheduling order pursuant to Appendix K ¶ 2, was due no later than January 27, 2025.

On February 3, 2025, Mr. Forbes filed a motion for entry of default, on the basis that the defendant had not responded to the complaint. *See* ECF No. 7. The Clerk entered default on February 5, 2025. ECF No. 8. On that same day, February 5, 2025, undersigned counsel entered his appearance.

## **ARGUMENT**

### **I. Standard of Review**

The Court’s rules provide that “[t]he court may set aside an entry of default for good cause, and it may set aside a final default judgement under RCFC 60(b). RCFC 55(c). The Court applies a three-factor test that considers “whether (1) the default was willful, (2) the non-movant would be prejudiced if the default were set aside, and (3) the movant has raised a meritorious defense[.]” to determine good cause. *Westec Co. v. United States*, 32 Fed. Cl. 576, 578 (1995) (internal citations omitted). “A movant is not required to satisfy all three elements in order to prevail; rather the court may balance the three factors to reach a decision.” *Plus Med., LLC v. United States*, No. 14-600C, 2014 WL 5446019, at \*2 (Fed. Cl. Oct. 27, 2014) (internal citations omitted). In conducting the three-factor test, “all doubts are resolved in favor of the party seeking relief.” *Id.* (citing *Jackson v. Beech*, 636 F.2d 831, 836 (D.C.Cir.1980)). The Court of Appeals for the Federal Circuit has stated “trial on the merits is favored over default judgment and ...

close cases should be resolved in favor of the party seeking to set aside default judgment.” *Info. Sys. & Networks Corp. v. United States*, 994 F.2d 792, 795 (Fed. Cir. 1993).

Regarding what constitutes willful conduct under the first factor, the Federal Circuit has stated that the inquiry is whether the defaulting party “‘intended to violate court rules and procedures.” *Id.* at 796. “Thus ‘mere failure to answer’ can fall within the definition of Rule 60(b)(1) excusable neglect, requiring a court to ‘inquire whether the defaulting party willfully declined to follow a court’s rules and procedures.’” *Plus Med., LLC*, 2014 WL at \*3 (citing *Info. Sys. & Networks Corp.*, 994 F.2d at 796). The second factor of the analysis, whether the non-movant would be prejudiced, “requires a showing of “delay [that] will result in the loss of evidence, create increased difficulties of discovery, or provide greater opportunity for fraud and collusion.”” *Id.* (citing *Dassault Systemes, SA v. Childress*, 663 F.3d 832, 838–39 (6th Cir. 2011)). “To this end, a showing of mere delay is insufficient to show prejudice.” *Id.* (internal citations omitted). The third factor of the analysis, whether a meritorious defense has been raised, examines whether a defense, such as “one that if established at trial, would be a complete defense to plaintiff’s claims.” *Id.* (citing *Westec Co.*, 32 Fed. Cl. at 579).

## **II. Good Cause Exists to Vacate the Default Judgement**

The defendant did not timely respond to Mr. Forbes’ complaint because of undersigned counsel’s failure to calendar the response deadline to Mr. Forbes’ complaint when he was assigned the case in December 2024. As a result, undersigned counsel did not realize that the deadline to respond to the complaint had passed until the matter was

brought to our office's attention by court staff on December 5, 2025. Undersigned counsel immediately entered an appearance and has worked diligently to prepare this motion.

It is our office's intention to always provide a timely response to the complaints against it. We sincerely apologize to both the Court and Mr. Forbes for the failure to timely respond in this case. Undersigned counsel will establish additional calendaring and case management safeguards to ensure that he does not repeat this unfortunate error.

While we understand the severity of our failure to timely respond, good cause exists to vacate the default. First, we did not intend to violate the Court's rules and procedures. The failure to timely respond was solely because of undersigned counsel's failure to accurately calendar the correct date to respond. Thus, our failure to answer falls under the definition of Rule 60(b)(1) as excusable neglect. *See Westec Co.*, 32 Fed. Cl. at 578 (concluding that default was not willful where attorney neglected to properly record the due date); *Plus Med., LLC*, 2014 WL at \*3 (finding that counsel's mistake as to the status of a case does not rise to the level of willfulness).

Second, Mr. Forbes will not be prejudiced by the delay in our response. The response to the complaint was due on January 27, 2025. As explained below, we are contemporaneously requesting a 37-day extension of time to respond to the complaint. Our delay, while regretful, does not endanger any evidence in this matter, or imperil Mr. Forbes' ability to participate fully in this proceeding. *See, e.g., Dassault Systemes, SA*, 663 F.3d at 842; *see also Plus Med., LLC*, 2014 WL at \*3 (finding that a six week delay did not endanger any evidence in that matter). If this Court grants our request to enlarge the time to respond until March 5, 2025, Mr. Forbes still would not be prejudiced.

Finally, Mr. Forbes alleges violations of the Privacy Act and Military Whistleblowers Protection Act. *See generally* Pl. Compl.; Am. Compl. Claims under both of these acts are outside of this Court’s jurisdiction. *See Lewis v. United States*, 476 F. App’x 240, 244 (Fed. Cir. 2012) (“The [United States Court of Federal] Claims ... has previously found that for purposes of Tucker Act jurisdiction[,] the Military Whistleblower Protection Act is not money-mandating.”); *see also Ghaffari v. United States*, 125 Fed. Cl. 665, 667 (2016) (“The Federal Circuit has clearly held ... that [the United States Court of Federal Claims] lacks jurisdiction to consider Privacy Act claims.”) Thus, there is some doubt as to whether at least some allegations in the complaint are ones over which the Court may exercise jurisdiction. However, as we explain below, more time is needed to confer with the Army to gather relevant information, and to identify the appropriate response to the complaint.

Accordingly, the balances of the three factor tests weighs in favor of vacating the default. For these reasons, we respectfully request that the Court find that good cause exists to vacate the default.

We further request that, the Court grant an enlargement of time, out of time, until March 5, 2025, for the United States to respond to Mr. Forbes’ complaint. As we explained above, our failure to respond to the complaint by the January 27, 2025 deadline was due to excusable neglect. We still require additional time to coordinate with agency counsel, obtain basic documents, and prepare an appropriate response to the complaint, whether a Rule 12 motion or a motion for entry of a scheduling order that would include a date for the filing of the administrative record responsive motion to the complaint. In

seeking an extension of time of this length, counsel has taken into consideration his responsibilities before this Court and others.

**CONCLUSION**

For these reasons, we respectfully request that the Court vacate the default and grant an enlargement of time until March 5, 2025 to respond to the complaint.

Respectfully submitted,

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