

In the United States Court of Federal Claims

MICHAEL J. FORBES, <i>pro se.</i>)	
)	
<i>Plaintiff,</i>)	
)	No. 24-1953
v.)	(Judge Hadji)
)	
THE UNITED STATES)	
)	
<i>Defendant.</i>)	

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

On January 27, 2025, the deadline under CFC Rule 12 passed for the Defendant to respond to the complaint, hence the Plaintiff *pro se* moved that a default be entered in the present case. On February 5, 2025, the Clerk of the Court of Federal Claims (CFC) entered a Notice of Entry of Default (ECF No. 6)

In the Defendant’s motion to vacate default, the defendant stated that it “did not realize that the deadline to response (sic) to the complaint had passed until the matter was brought to [its] office’s attention by court staff on December 5, 2025 (sic, February 5, 2025).” (ECF No. 10 at 3 - 4). On the same day, the Defendant entered an appearance on February 5, 2025 (ECF No. 9) and promptly filed the motions the Plaintiff opposes with this response (ECF No. 10). The Defendant’s symbiotic Motions cited [CFC] Rule 55(c) and Rule 60(b)(1) “excusable neglect” (ECF No. 10 at 3, 4, & 5) for a “failure to calendar the correct date to respond” (ECF No. 10 at

3) after being “assigned the case in December 2024” (ECF No. 10 at 3). Plaintiff submits this response in opposition to the Defendant’s symbiotic Motions with the reasoning below for denial of both.

THREE-FACTOR TEST RESPONSE ARGUMENT

The Three-Factor Test is found in the Court of Federal Claims (CFC) decision of *Westec Co v. United States*, 32 Fed Cl. 576, 578 (1995), which held that the court can set aside an entry of default for “good cause,” using a three-factor test. These three factors are: (1) whether the default is willful, (2) whether “the non-movant would be prejudiced if the default were set aside,” and (3) whether “the movement has raised a meritorious defense.”

The CFC also has clarified in *Plus Medical, LLC v the United States* (CFC No. 14-600C, Oct. 27, 2014) that “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.”

It is also important to note that the holding in the government-cited case of *Info. Sys. & Networks Corp. v. United States*, 994 F2d 792, 795 (Feb. Cir. 1993) does not apply, because the defendant’s motion was to vacate a default, not a default judgment.

Prong 1: Was the default willful?

The Plaintiff has no information about the inner workings or motives of the Department of Justice, however, notice was provided and there was more than ample time for the Defendant to calendar and reply to the Plaintiff’s complaint and, notably, the Defendant’s failure to reply

was not due to any stated emergency. Rule 12 of the CFC emulates the Federal Rules of Civil Procedure rules, which provide 60 days for the Defendant to answer. The Court granted a deadline of January 27, 2025, a deadline representing 66 days from the original complaint, which is more than a reasonable amount of time for the Defendant to request an extension, produce a motion to dismiss, or present a responsive pleading. This 37-day extension from the Complaint filing date is symbiotic to the requested vacation of the Entry of Default as the Defendant cannot have one without the other.

It is also worth noting that in contrast with the circumstances of *Plus Medical, LLC v the United States* (CFC No. 14-600C, Oct. 27, 2014), this is not a case where the Defendant is alleging that it had a mistaken understanding of the rules or wrongfully believed that an extension has already been granted, rather the defendant stated in its response that it's only excuse is that it failed to properly calendar and be prepared to meet required deadlines.

Prong 2: Would the non-movant be prejudiced if the default were set aside?

The argument contained in the Defendant's motion, that the 37-day extension "does not...imperil [the Plaintiff's] ability to participate fully in this proceeding," (ECF 10 at 4) is not accurate. In fact, the Plaintiff, as a *pro se* litigant, is acutely conscious of daily injurious costs of this case and identifies other perils of this delay herein.

This 37-day extension equates to another \$10,664¹ injury of lost wages, and does not include the time already spent awaiting a response (December 1, 2024, date of separation, - January 27, 2025), which totals \$16,428.² The \$27,092 of damages incurred represents the time

¹ Each day that passes injures the Plaintiff by \$288.22 (the per diem gross income of his service contract, including entitlements, as of his date of separation).

² Ibid.

period allowed for the Defendant's answer and the requested extension;³ it would continue to grow thereafter.

Moreover, the injuries are not limited to monetary concerns. They are also compounded by the loss of time. As a *pro se* litigant, the time necessary to respond to this motion (and any future motions) has a direct 'zero-sum-game' opportunity-cost in relation to the limited funds provided by the Defendant for the Plaintiff to find gainful employment (separation pay). This separation pay represents a deadline, the exhaustion of which without gainful employment has significant common-sense ramifications to the Plaintiff. Both, the Plaintiff's unemployed status and the Plaintiff's simultaneous need to search for employment, are the direct results of the Defendants alleged actions in the Plaintiff's Amended Complaint. Converse to the Defendant's aforementioned "participating fully" contention, the Plaintiff prioritizes the most expeditious, fair and amiable resolution of the controversy.

Prong 3: Has the movant raised a meritorious defense to determine good cause?

The movant (defendant) failed to raise any meritorious defense to determine good cause. It did not allege that it had a mistaken belief that an extension had already been granted (as in the *Plus Medical* case) and it did not allege that there was any other kind of defense, such as an emergency, under law that applied.

³ Note: These costs are higher if the Court considers that the Plaintiff would have likely been promoted by the time of this case's Complaint filing.

CFC RULE 6(b) ANALYSIS AND ARGUMENT

The Defendant's request for an extension of time was made in part on the grounds of Rule 60(b), (See ECF No. 10, at 2, 3 & 4). However, Rule 6(b)(2) provides that "The court **must not extend the time** to act under RCFC 52(b), 59(b), (d), and (e), and **60(b).**" (emphasis added)

CONCLUSION

For the above reasons, the Plaintiff respectfully requests that the Court deny the DEFENDANT'S MOTION TO VACATE DEFAULT AND MOTION OUT OF TIME FOR AN ENLARGEMENT OF TIME TO FILE RESPONSE TO COMPLAINT.

FEBRUARY 12, 2025

Date

614 Northampton Road
Fayetteville, NC 28303



Signature of Plaintiff

Cell: (910) 336-5966
Email: forbes2024cfc@yahoo.com