

**STATE OF NEW MEXICO  
COUNTY OF SANTA FE  
FIRST JUDICIAL DISTRICT**

**SOUTHWEST PUBLIC POLICY  
INSTITUTE,**

**Plaintiff,**

**No. D-101-CV-2023-00367**

**v.**

**NEW MEXICO DEPARTMENT OF HEALTH,**

**Defendant.**

**RESPONSE IN OPPOSITION TO DEFENDANT’S MOTION TO EXTEND TIME FOR  
FILING ANSWER TO COMPLAINT**

Plaintiff, Southwest Public Policy Institute, by and through its counsel, ARAGON MOSS GEORGE JENKINS, LLP (Jordon P. George), hereby states the following for its Response in Opposition to Defendant’s Motion to Extend Time for Filing Answer to Complaint.

1. Plaintiff admits the factual allegation in paragraph 1 of Defendant’s Motion to Extend Time for Filing Answer to Complaint (“Motion”).
2. Plaintiff admits the factual allegation in paragraph 2 of the Motion.
3. Plaintiff is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 3 that counsel was retained by DOH on April 4, 2023, or that counsel reviewed the docket in this matter at that time. Plaintiff admits that no return of summons had been filed as of April 4, 2023. Notwithstanding the foregoing, it should be emphasized that, as of April 4, 2023, Defendant’s answer to the Complaint was already six (6) days past the March 29, 2023 deadline.
4. Plaintiff admits the factual allegation in paragraph 4 of the Motion.

5. Plaintiff is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 5 of the Motion. However, it should be noted that counsel does not represent whether it also consulted with the Office of the Attorney General (“AG”), which was served with the Complaint approximately four (4) days prior to Defendant on February 23, 2023.

6. Plaintiff admits the factual allegations in paragraph 6 of the Motion that Defendant’s counsel called Plaintiff’s counsel regarding when the Complaint was served, and that, at that time, Plaintiff’s counsel was not able to confirm the dates of service, and that Plaintiff’s counsel would need to confer with his assistant regarding the issue. However, Plaintiff denies that Defendant’s counsel contacted him “immediately,” as stated in paragraph 6 of the Motion; Defendant’s counsel called Plaintiff’s counsel on April 6, 2023. Notwithstanding the foregoing, it should be emphasized that, as of April 6, 2023, Plaintiff’s answer to the Complaint was approximately eight (8) days past the March 29, 2023 deadline.

7. Plaintiff admits the factual allegations in paragraph 7 of the Motion.

8. Plaintiff admits the factual allegations in paragraph 8 of the Motion. However, it should be noted that Plaintiff’s counsel was unable to confirm the dates of service until his assistant returned from leave on April 11, 2023. Undersigned counsel responded to Defendant’s counsel on April 11, 2023, confirming that the AG was served with the Complaint on February 23, 2023, and that Defendant was served on February 27, 2023; undersigned counsel also provided copies of the returns of service, with certified mail receipts attached.

9. Plaintiff is without knowledge or information sufficient to form a belief as to the truth of the factual allegations in paragraph 9 of the Motion regarding Defendant's counsel not learning until April 12, 2023 that Defendant's answer to the Complaint was due on March 29, 2023. Notwithstanding the foregoing, it should be emphasized that, even if Plaintiff's counsel was able to confirm the dates of service to Defendant's counsel when initially contacted, the answer would have already been several days overdue. Further, it is Defendant and Defendant's counsel's responsibility to determine when an answer to the Complaint was due, as the Complaint was properly served on Defendant.

10. Plaintiff admits the factual allegation in paragraph 10 of the Motion that, at the time of the filing of the Motion, "no return of summons appear[ed] on the docket in this matter." However, Plaintiff further notes that the returns of service had been submitted for filing at the time of the filing of the Motion, and that Defendant's counsel had been provided with copies thereof, which included copies of the certified mail receipts attached. *See* Exhibit A to Motion. Moreover, it should be that the returns of service were initially submitted for filing on March 22, 2023, but they were rejected for clerical errors. Undersigned counsel was not aware of the rejected filings until looking into the dates of service after being contacted by Defendant's counsel, and the returns were promptly re-filed when undersigned counsel's assistant returned from leave. Notwithstanding the foregoing, the Complaint was properly served on Defendant on February 27, 2023, and an answer was due no later than March 29, 2023 regardless of whether returns of service had been filed yet. As admitted in the Motion, Defendant's counsel did not even begin inquiring about the dates of service until several days after its answer was due.

11. Plaintiff admits that the Court has discretion under Rule 1-006(B)(1)(b) to allow an extension of time after the time has expired if the party failed to act because of excusable neglect.

12. Plaintiff denies the legal conclusion in paragraph 12 of the Motion that the circumstances described in the Motion evidence excusable neglect on the part of Defendant and its counsel.

13. Because Defendant fails to demonstrate the requisite excusable neglect to warrant an extension of time for it to file an answer to the Complaint, Defendant's Motion should be denied; in support, Plaintiff further states the following:

### **ARGUMENT**

In seeking an extension of time to file an answer to the Complaint after the deadline to do so has already passed, Defendant must demonstrate that its failure to file an answer was the result of "excusable neglect." Rule 1-006(B)(1)(b) NMRA. New Mexico case law holds that excusable neglect is the standard for allowing extensions of time for deadlines for filing responses to motions. *Skeen v. Boyles*, 2009-NMCA-80, ¶¶ 40-41, 146 N.M. 627. There are New Mexico cases that provide a standard for excusable neglect under rules other than Rule 1-006; however, there is a lack of state case law providing a standard or explanation of excusable neglect under Rule 1-006. *Kinder Morgan CO2 v. State Tax. and Rev.*, 2009-NMCA-19, ¶ 8, 145 N.M. 579. However, the Tenth Circuit has a long-standing rule for excusable neglect under Federal Rule 6, which is essentially identical to Rule 1-006(B). In relevant part, the federal and state rules state:

FRCP Rule 6 Computing and Extending Time; Time for Motion Papers.

(b) EXTENDING TIME.

(1) In General. When an act may or must be done within a specified time, the court may, for good cause, extend the time:

(A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or

(B) on motion made after the time has expired if the party failed to act because of excusable neglect.

Rule 6(B) F.R.C.P 2018.

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Rule 1-006 Time.

B. Extending time.

(1) In General. When an act may or must be done within a specified time, the court may, for cause shown, extend the time

(a) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or

(b) on motion made after the time has expired if the party failed to act because of excusable neglect.

Rule 1-006 NMRA 2018.

The Tenth Circuit has adopted the standard set out in *Pioneer Inv. Servs. v. Brunswick Assocs. Ltd P'ship* with regard to excusable neglect under Rule 6(B) F.R.C.P 2018. *Broitman v. Kirkland (In re Kirkland)*, 86 F.3d 172, 174-175 (C.A.10 (Utah), 1996) citing, *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd P'ship*, 507 U.S. 380, 391, 395 (1993). In *Pioneer*, the Supreme Court held that factors to be considered in determining whether excusable neglect is present include “the danger of prejudice to the [party opposing the late filing], the length of the delay and its potential impact on the judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.” 507 U.S. 380, 395 (1993). This is the same standard that New Mexico Supreme Court has adopted in excusable neglect for Rules 1-060(B)(1). *Kinder Morgan CO2 v. State Tax. and Rev.*, 2009-NMCA-19, ¶ 8, 145 N.M. 579.

“Excusable neglect may encompass delays caused by inadvertence, by mistake, or by carelessness, at least where the delay is not long, where there is no bad faith, and where there is no prejudice to the opposing party; the movant’s excuse must also have some merit. *Trs. of the N.M. Pipe Trades Health & Welfare Tr. Fund v. Mares Plumbing & Mech., Inc.*, No. 11-1065 BB-WDS, 2012 U.S. Dist. LEXIS 193213, at \*22 (D.N.M. June 18, 2012) (citing *LoSacco v. City of Middletown*, 71 F.3d 88, 93 (2d Cir. 1995) and *Pioneer Inv. Servs. Co. v. Brunswick Assocs.*, 507 U.S. 380, 392, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993)). In this case, the forgoing factors weigh heavily against a finding of excusable neglect by Defendant in failing to file a timely answer to the Complaint.

First, Plaintiff will be prejudiced if Defendant is permitted to file an untimely answer to the Complaint. In *Mares Plumbing & Mech., Inc.*, in which the New Mexico federal district court construed excusable neglect in the context of the analogue Rule 6(B) F.R.C.P., plaintiff had merely begun preparation of the default judgment documents after the defendant failed to file a timely answer. *Mares Plumbing & Mech., Inc.*, No. 11-1065 BB-WDS, 2012 U.S. Dist. LEXIS 193213, at \*22. The Court noted that “Defendant's failure to file the response in a timely fashion forced Plaintiffs to needlessly waste resources preparing the appropriate papers for a default judgment.” *Id.*, \*26. Here, Plaintiff has likewise been prejudiced, as it has been required to expend significant resources to address the issue of Defendant’s failure to answer the Complaint, including beginning to prepare the appropriate pleadings to move for a default judgment. Plaintiff is further prejudiced by having to respond to the subject Motion, which fails to set forth an adequate and good faith

reason for Defendant not filing a timely answer. The first *Pioneer* factor therefore weighs against finding excusable neglect in this case.

The second *Pioneer* factor also weighs in favor of finding that no excusable neglect is present in this case. As of April 4, 2023, when Defendant's counsel was allegedly retained, the answer to the Complaint was already six (6) days past the March 29, 2023 deadline. Although the Court in *Mares Plumbing & Mech., Inc.*, found that a delay of 10 days weighed in favor of permitting a late answer, it also held that, notwithstanding the short delay, the other equities still supported a holding striking the answer. *Id.*, \*30. Here, Defendant's answer to the Complaint is currently thirty-three (33) days past the March 29, 2023 deadline. Further, Defendant did not seek leave to file an untimely answer to the Complaint until approximately fourteen (14) days after the deadline. The second *Pioneer* factor therefore weighs against finding excusable neglect in this case.

The third *Pioneer* factor also weighs heavily in favor of denying Defendant's Motion, as Defendant has provided an inadequate and meritless reason for failing to answer the Complaint by the March 29, 2023 deadline. Defendant groundlessly places the blame for its failure to timely answer the Complaint on Plaintiff's counsel for not confirming the dates of services immediately upon being contacted on April 6, 2023, and for not filing returns of service prior to the deadline. However, Defendant does not dispute that the Complaint was properly served on Defendant on February 27, 2023, and that an answer was due no later than March 29, 2023. As admitted in the Motion, Defendant's counsel did not even begin inquiring about the dates of service until several days after its answer was due. Defendant entirely fails to explain why it was unclear about the

date of service of the Complaint when there is no dispute that Defendant was properly served. Notably, the Motion does not reference whether the AG's Office was also contacted regarding service, which likely would have alerted Defendant of an impending deadline to answer based on when the AG was served. Defendant was clearly aware of the Complaint by April 4, 2023 when it retained counsel to defend this case, yet it made no inquires to confirm the deadline to answer until April 6, 2023, which was already several days after the answer was due. Accordingly, Defendant's lack of any adequate explanation for its failure to timely answer weighs heavily in favor of denying the Motion.

The final *Pioneer* factor, whether or not the Defendant acted in good faith in failing to answer the Complaint, also appears to weigh against a finding of excusable neglect. Again, Defendant does not dispute that it was properly served and that the deadline to answer the Complaint was March 29, 2023. Yet, Defendant does not even attempt to provide an explanation for why its in-house counsel could not confirm the date of service of the Complaint, or why it did not retain defense counsel or begin inquiring about the dates of service until several days after its answer was due. Failing to provide any reasonable explanation for such neglect—much less one that is excusable under the rule—demonstrates a clear lack of good faith by Defendant in failing to timely answer the Complaint; such bad faith conduct weighs in favor of denying the Motion.



WHEREFORE, based on the foregoing, Plaintiff respectfully requests that this Court grant an Order providing the following relief:

- A. Denying Defendant's Motion;
- B. Awarding Plaintiff its reasonable attorney's fees and costs in having to respond to the Motion; and
- C. Awarding any other relief this Court deems just and proper.

Respectfully submitted,

**ARAGON MOSS  
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*Attorneys for Plaintiff*

Certificate of Service:

I hereby certify that the foregoing was electronically filed and served to all counsel of record through the Odyssey filing system on this 1<sup>st</sup> day of May 2023.

/s/ Jordon P. George  
Jordon P. George