THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
CIVIL ACTION No.: 1:15-CV-559

THE CITY OF GREENSBORO, LEWIS A. BRANDON III, JOYCE JOHNSON, NELSON JOHNSON, RICHARD ALAN KORITZ, SANDRA SELF KORITZ, AND CHARLI MAE SYKES, Plaintiffs, vs. GUILFORD COUNTY BOARD OF ELECTIONS, Defendants.	**DEFENDANT'S BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE OUT OF TIME TO ANSWER PLAINTIFFS' COMPLAINT**

Pursuant to Fed. R. Civ. P., Rule 6(b)(1)(b), and LR 7.2 and 7.3(k), the Defendant Guilford County Board of Elections hereby submits this Brief in Support of the Defendant's Motion For Leave to File Out of Time to Answer Plaintiffs' Complaint.

I. NATURE OF THE MATTER BEFORE THE COURT

On July 13, 2015, the Plaintiffs filed a Complaint with the Middle District of North Carolina in response to the North Carolina General Assembly's passing of a local act referred to by the Plaintiffs as "The Greensboro Act." The Plaintiffs contend that the Greensboro Act substantially impairs the City of Greensboro and its citizens' rights to self-governance. Additionally, the Plaintiffs contend that the Greensboro Act's modified redistricting plan disparately splits precincts and pits incumbent council members against

each other in favor of Republican constituents on the eve of the filing period for candidates. However, the Plaintiffs filed an action only against the local elections board, Defendant Guilford County, and no action is pending at this time against any other Defendant. This Court held a hearing and granted the Plaintiffs' request for injunctive relief.

The Defendant mistakenly believed that due to the Court's discussion and the Plaintiffs' assertion that an amended complaint would be forthcoming to join additional defendants, it did not need to file an answer to the Plaintiffs' Complaint at this time and thereby missed the filing deadline of September 18, 2015. The Defendant filed its Motion for Leave to File Out of Time to Answer Plaintiffs' Complaint simultaneously with this Brief in Support of Motion for Leave to File Out of Time which is now before this Court.

II. BRIEF STATEMENT OF FACTS

On July 13, 2015, according to the CM/ECF date, the Plaintiffs filed a Complaint with the Middle District of North Carolina. On July 23, 2015, pursuant to the Plaintiffs' request for injunctive relief due to the time within which the filing deadlines for candidates was scheduled for July 27, 2015, the Court held a hearing for the preliminary injunctive relief. Counsel for the Defendant attended and participated in the hearing and asserted the Defendant's position as only a minister of the processes as outlined by the North Carolina State Board of Elections and the Defendant's duties to act in a fair, impartial, and non-partisan manner. During the hearing, the Court emphasized the

necessity of enjoining additional parties in order for the Plaintiffs to seek relief on some of the causes of action requested in their Complaint which could not be addressed with the Defendant.

Further, the Court determined that it could enjoin the Greensboro Act in reference to, *inter alia*, the filing deadline for candidates and in reference to mandating that the former election structure would continue for the upcoming election cycle, but that the matter would have to be addressed for future voting past the 2016 elections. The Plaintiffs' counsel conceded that an amended complaint would likely be filed subsequent to the injunctive relief to include further necessary defendants.

The Defendant now seeks relief in its Motion for Leave to File Out of Time due to excusable neglect.

III. QUESTION PRESENTED

The question before this Court is whether the Defendant is entitled to have its Motion for Leave to File Out of Time To Answer Plaintiffs' Complaint granted due to excusable neglect.

IV. ARGUMENT

The Defendant can demonstrate to the Court that failure to file an Answer to the Plaintiffs' Complaint was due to excusable neglect pursuant to Fed. R. Civ. P., Rule 6(b)(1)(b) and LCvR 6.1(a) and 7.3(k) justifying that this Court grant its Motion for Leave to File Out of Time. Pursuant to Fed. R. Civ. P., Rule 6(b)(1)(b), a party may apply to the court for an extension of time on a motion made after the time has expired if

the party failed to act because of excusable neglect." In a determination of the circumstances surrounding excusable neglect, the court considers four factors: "(1)the danger of prejudice to the [non-moving party]; (2) the length of the delay and its impact on judicial proceedings; (3) the reason for the delay; and (4) whether the movant acted in good faith." *Morris-Belcher v. Housing Authority of the City of Winston-Salem*, 2005 WL 1423592 (M.D.N.C.).

The Supreme Court in *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 113 S. Ct. 1489, 123 L.Ed.2d 74 (1993)held that "[a]lthough inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect, it is clear that 'excusable neglect' under Rule 6(b) is a somewhat 'elastic concept' and is not limited strictly to omissions caused by circumstances beyond the control of the movant." The Rule grants a reprieve to out-of time filings that were delayed by "neglect." *Id.* at 388.

The ordinary meaning of "neglect" is "to give little attention or respect" to a matter, or, closer to the point for our purposes, "to leave undone or unattended to esp[ecially] through carelessness." *Id.* (quoting Webster's Ninth New Collegiate Dictionary 791 (1983) (emphasis added)). Excusable neglect therefore encompasses both simple, faultless omissions to act and, more commonly, omissions caused by carelessness. *Id.* Courts properly assume, absent sufficient indication to the contrary, that Congress intends the words in its enactments to carry "their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U. S. 37, 42 (1979).

Hence, by empowering the courts to accept late filings "where the failure to act was the result of excusable neglect," Congress plainly contemplated that the courts would be permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control. *Pioneer*, 507 U.S. at 388. Whether an omission is excusable is "left to the sound discretion of the district court" giving the court broad power to interpret the elasticity of excusable neglect. *Morris-Belcher*, 2005 WL 1423592 at *3 (holding that the granting the motion for leave to file out of time would cause undue delay because the plaintiff waited seven weeks to file its motion for leave) (quoting *Pioneer*, 740 F.2d 507 U.S. at 385).

Pursuant to the local rules for the Middle District of North Carolina, failure to file a response within the time specified shall constitute\e a waiver of the right thereafter to file such response, "except upon a showing of excusable neglect." *Sutton v. Cree, Inc.*, 386 F. Supp. 2d 600 (M.D.N.C. 2005); *see also*, LCvR 6.1(a) and 7.3(k). The plaintiff in *Sutton* moved the court for a grant of leave after plaintiff's counsel experienced an increased caseload which the court determined did not constitute excusable neglect. However, since the plaintiff had already provided its proposed opposition brief and consideration of the merits of the case, the court determined that the defendant would not suffer any prejudice. *Id.* at 606.

A. <u>The Defendant can demonstrate excusable neglect because it mistakenly believed that the time for filing the answer was tolled due to the hearing on July 23, 2015 regarding the Plaintiffs' request for injunctive relief and due to the mistaken belief that an amended complaint was forthcoming.</u>

The main cause of the delay in filing of the Answer to the Plaintiffs' Complaint in the present case is due to the mistaken belief as a result of the Court's discussion of additional parties in the July 23, 2015 hearing in order to grant the Plaintiffs full requested relief and the Plaintiffs assertion that it would be filing an amended complaint to join the necessary defendants. Further, in addition to the Court granting the injunctive relief and allowing the election process to proceed under the structure in place prior to the passing of Session Law 2015-138, the Court discussed the necessity addressing any changes the election structure for all elections subsequent to the 2016 elections period. The Defendant thereby believed that the period for filing an answer was tolled. Although not controlling in this Court, the holding in Hancock v. City of Okla. City, 857 F.2d 1394, 1396 (10th Cir. 1998) is persuasive in that the court declared that missed deadlines caused by inadvertence and not willful and deliberate, as in this case, are excusable. Therefore, the Defendant's inadvertence, mistaken belief, and excusable neglect, and the its Motion for Leave to File Out of Time filed in good faith are sufficient grounds for the Court to grant the Defendant's motion.

B. <u>The Defendant's Motion for Leave to File Out of Time will not prejudice the Plaintiff, will not cause undue delay of the judicial proceedings, will demonstrate delay outside the reasonable control of the Defendant, and will demonstrate that the Defendant is acting in good faith.</u>

Under the factors set forth in *Morris-Belcher*, three of the factors present virtually no problems in the case at hand: (1) no prejudice to the Plaintiffs will occur if the Defendant's Motion is granted; (2) no undue delay of the judicial proceedings will occur if the Defendant's Motion is granted; and (3) the Defendant has not acted in bad faith.

Unlike the plaintiff in *Morris-Belcher*, in the case at hand, the Defendant's delay has only been seven (7) days and the case has not yet proceeded beyond the responsive pleading stage. Additionally, no scheduling order has been entered in this matter by the Court and the short delay has not had an adverse effect on the progress of judicial proceedings in this case to date. Further, this is not a case of ignorance of the rules or a mistake construing the rules. There has been no evidence that the Defendant acted in bad faith or on any other factor other than inadvertence, mistaken belief, and excusable neglect. In fact, upon discovery of the mistake, the Defendant promptly filed its Motion for Leave to File Out of Time to Answer the Plaintiffs' Complaint and attached the proposed documents as exhibits which demonstrates a good faith effort to immediately, and without delay, remedy the mistake.

Additionally, no real prejudice to the Plaintiffs is likely to occur nor has any prejudice been demonstrated. *Sutton*, 384 F. Supp. 2d at 606 (holding that since the plaintiff had already provided its proposed opposition brief and in consideration of the merits of the case, the court determined that the defendant would not suffer any prejudice). In fact, the Plaintiffs do not object to the Defendant's Motion for Leave to File Out of Time.

The final *Morris-Belche/Pioneer* factor, the reason for the delay and whether it was in the reasonable control of the moving party, is the only factor for consideration in this case. The *Pioneer* Court expressly gave little weight to the fact that counsel was experiencing upheaval in his law practice at the time of the deadline. *Pioneer*, 507 U.S.

at 389. As a general rule, mere inadvertence is an insufficient basis for noncompliance within the specified time. However, the district court has broad discretion, and was empowered specifically, in accepting permitting movants to file answers out of time when the record shows the late answers stem from "mistake, inadvertence or carelessness, as well as intervening circumstances beyond the party's control" and not from bad faith. *Pioneer*, 507 U.S. at 388.

The issues before the Court regarding the elections restructuring and the self-governance issues affecting the City of Greensboro and its citizens are complicated and in-depth as demonstrated during the hearing on July 23, 2015. The Defendant's mistaken belief that the period within which its Answer to the Plaintiffs' Complaint was due had been tolled constitutes grounds upon which the Court has broad discretion in accepting its seven-day late Answer. Further, the Defendant's mistaken assumption that other defendants would need to be joined to the action in order to perfect the relief requested by the Plaintiffs was assumed in a good faith belief and was not conjured by the Defendant as a means in which to prejudice or harm the Plaintiffs. In fact, the Defendant has asserted in its previously filed brief that it is statutorily mandated to act fairly and impartially and without regard to partisan matters. In *Pioneer*, excusable neglect includes simple omissions to act and more commonly, omissions caused by carelessness and mistake. The Defendant's assumption that the filing period for the Answer was tolled is a simple and careless omission as determined in *Pioneer*.

Therefore, because the Defendant's inadvertence and mistaken belief (that the filing period for the Answer was tolled) falls within the realm of what is contemplated as excusable neglect and the Defendant has acted quickly and demonstrated good faith effort, without danger of prejudice to the Plaintiffs and undue delay in the judicial proceedings and has presented a valid reason for the delay, and since the Plaintiffs do not object to the Defendant's Motion, the Defendant respectfully asks that the Court grant the Defendant's Motion for Leave to File Out of Time to Answer the Plaintiff's Complaint.

Respectfully submitted this the 25th day of September, 2015.

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CERTIFICATE OF SERVICE

The undersigned attorney certifies that this day he has electronically filed the foregoing ***Defendant's Brief in Support of Motion for Leave to File Out of Time to Answer Plaintiffs' Complaint*** in the above-titled action with the Clerk of Court using the CM/ECF system, which provided notice of such filing to:

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This the 25th day of September, 2015.

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