

**UNITED STATES DISTRICT COURT  
DISTRICT OF COLORADO**

SARA M. ROGERS,

Plaintiff,

v.

THOMAS J. VILSACK, in his official  
capacity as Secretary of the United States  
Department of Agriculture, and

ZACH DUCHENEAUX, in his official  
capacity as Administrator of the Farm Service  
Agency,

Defendants.

Case No. 1:21-cv-01779

**NOTICE OF DEFENDANTS'  
NONCOMPLIANCE WITH  
RESPONSIVE PLEADING DEADLINE**

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“Defendants’ current deadline is September 7, 2021.” ECF 13, at 1.

Six days before the deadline for its initial responsive pleading, on September 1, 2021, the Government asked the Court to hurriedly act to postpone all case deadlines indefinitely. Plaintiff filed its opposition the same day, within hours. The Government’s 60-day deadline for filing a responsive pleading has since come and passed, but no responsive pleading as been filed.

Plaintiff conferred with the Government on September 8, 2021, requesting that it explain why no responsive pleading had been filed. In response, the Government stated that it was disregarding the deadline, pending resolution of its motion to continue. *See* Exhibit 1. The Government apparently believes that it has granted its own motion, and had no duty to comply with the September 7 deadline. When asked on September 9, 2021, for authority supporting the proposition that a motion to continue is “self-executing,” the government declined to respond. *See* Exhibit 2.

Under Fed. R. Civ. P. 12(a)(2), a United States officer or employee sued in an official capacity must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the United States attorney. An allegation—other than one relating to the amount of damages—is admitted if a responsive pleading is required and the allegation is not denied. Fed. R. Civ. P. 8(b)(6).

Parties to a case do not have the unilateral power to grant their own motion for continuance. Indeed, this District has stated that the Court has sole authority to waive or excuse a party's obligation to serve a responsive pleading—parties themselves can't simply make assumptions. *See QFA Royalties*, 2007 WL 2071633, \*2 (D. Colo., Jul. 16, 2007) (rejecting the argument that settlement talks obviated the need to file an answer, and noting “that it is the authority of the court to waive or excuse such obligation” to file an answer).

Indeed, when a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default. Fed. R. Civ. P. 55(a). And when considering whether to vacate the default, “[g]enerally, a defendant's conduct is considered culpable if he has defaulted willfully or has no excuse for the default.” *Id.*; *see Meadows v. Dominican Republic*, 817 F.2d 517, 521 (9th Cir. 1987) (“A defendant's conduct is culpable if he has received actual or constructive notice of the filing of the action and failed to answer.”). This is especially true when the non-defaulting party has conferred with the defaulting party to no avail. *See U.S. v. Wang*, 130 F.R.D. 676, 678 (D. Kan. 1990) (“When the non-defaulting party endeavors to encourage the other party to respond, the court is more inclined to deny the request to set aside an entry of default.”).

Given that (1) Executive Branch officials are the Defendants in the case, that (2) the underlying suit involves a federal statute, and (3) the significant constitutional issues at stake, Plaintiff has opted not to consume the Court's time by filing a motion for default judgment as of yet. Yet.

### CONCLUSION

For these reasons, the Court should take note of the Government's non-compliance with its duty to provide timely responsive pleadings.

Dated: September 10, 2021,

Respectfully submitted,

/s/ Corey C. Bartkus

Corey C. Bartkus, CO. Bar No. 54789

MOUNTAIN STATES LEGAL FOUNDATION

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*Counsel for Plaintiff*

*I hereby certify that the foregoing pleading complies with the type-volume limitation set forth in Judge Domenico's Practice Standard III(A)(1).*

**CERTIFICATE OF SERVICE**

I hereby certify that on September 10, 2021, I caused a true and correct copy of the foregoing document to be electronically filed with the Clerk of the Court using the Court's CM/ECF system which sent notification of such filing to all counsel of record of this matter.

*/s/ Corey C. Bartkus*

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Corey C. Bartkus

# EXHIBIT 1

**From:** Snow, Kyla (CIV) <[Kyla.Snow@usdoj.gov](mailto:Kyla.Snow@usdoj.gov)>

**Sent:** Thursday, September 9, 2021 7:45 AM

**To:** Corey Bartkus <[corey@mslegal.org](mailto:corey@mslegal.org)>; Newton, Emily S. (CIV) <[Emily.S.Newton@usdoj.gov](mailto:Emily.S.Newton@usdoj.gov)>

**Cc:** William Trachman <[wtrachman@mslegal.org](mailto:wtrachman@mslegal.org)>

**Subject:** RE: Rogers v Vilsack - motion to stay

Hi Corey,

On July 6, the U.S. Attorney's Office for the District of Colorado informed us that it had received service of the complaint on that same day. Thus, under the Federal Rules, the deadline to respond would have been 9/7 (accounting for the fact that the 60-day deadline fell on Saturday, 9/4, and Monday, 9/6, was a holiday). However, as you know, we've moved to continue the answer deadline in light of our stay motion. When that motion to continue is resolved, we will respond to the complaint if necessary, in accordance with the Court's ruling.

Best,  
Kyla

# EXHIBIT 2

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**From:** Corey Bartkus  
**Sent:** Thursday, September 9, 2021 12:23 PM  
**To:** Snow, Kyla (CIV) <Kyla.Snow@usdoj.gov>; Newton, Emily S. (CIV) <Emily.S.Newton@usdoj.gov>  
**Cc:** William Trachman <wtrachman@mslegal.org>  
**Subject:** RE: Rogers v Vilsack - motion to stay

Hi Kyla,

Thanks for the quick response. Do you have any authority for the proposition that a motion to continue a response deadline is self-executing, and that the Court need not rule on it before a deadline is continued?

Absent such authority, and unless Defendants file an answer by close of business today, Plaintiff reserves the right to file a notice of non-compliance tomorrow morning.

Best,

**COREY BARTKUS**  
ATTORNEY

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