

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JONATHAN LINDSEY, Senator; JAMES
RUNESTAD, Senator; JAMES DESANA,
Representative; RACHELLE SMIT,
Representative; STEVE CARRA, Representative;
JOSEPH FOX, Representative; MATT
MADDOCK, Representative; ANGELA RIGAS,
Representative; JOSH SCHRIVER,
Representative; NEIL FRISKE, Representative;
and BRAD PAQUETTE, Representative,

Plaintiffs,

v.

GRETCHEN WHITMER, in her official capacity
as Governor of Michigan; JOCELYN BENSON,
in her official capacity as Michigan Secretary of
State; and JONATHAN BRATER, in his official
capacity as Director of Elections,

Defendants.

CIVIL ACTION

Case No. 1:23-cv-01025-JMB-PJG

Hon. Jane M. Beckering

**PROPOSED INTERVENOR-
DEFENDANTS' MOTION TO
STRIKE PLAINTIFFS'
MEMORANDUM IN OPPOSITION
TO MOTION TO INTERVENE OR,
IN THE ALTERNATIVE, FOR
LEAVE TO FILE A REPLY IN
SUPPORT OF THEIR MOTION TO
INTERVENE**

Proposed Intervenor-Defendants Jim Pedersen, Andrea Hunter, the Michigan Alliance for Retired Americans, the Detroit Downriver Chapter of the A. Philip Randolph Institute, and Detroit Disability Power (together, "Proposed Intervenor"), by and through their attorneys, move to strike Plaintiffs' Memorandum in Opposition to Motion to Intervene or, in the alternative, for leave to file a reply in support of their Motion to Intervene. In support of their motion, Proposed Intervenor state as follows:

1. Proposed Intervenor filed a Motion to Intervene on October 11, 2023. ECF No. 5, PageID.31.

2. Pursuant to Local Rule 7.3(c) and § III(B) of this Court's Information and Guidelines for Civil Practice, "[u]nless otherwise ordered, any party opposing a nondispositive motion shall, within fourteen (14) days of service of the motion, file a responsive brief and supporting materials." W.D. Mich. LCivR 7.3(c).

3. Plaintiffs filed a Memorandum in Opposition to Motion to Intervene on November 8, 2023—two weeks after their deadline. ECF No. 8, PageID.115.

4. Plaintiffs neither sought nor obtained an extension from the Court, and they have failed to even acknowledge that the filing was late, let alone explain the delay.

WHEREFORE, Proposed Intervenors respectfully request that this Court enter an order striking Plaintiffs' untimely response and evaluate Proposed Intervenors' Motion to Intervene on its face. Alternatively, if this Court is inclined to permit the filing of Plaintiffs' response, Proposed Intervenors respectfully request leave to file a reply brief addressing Plaintiffs' arguments within seven days of the Court's order.

Pursuant to Local Rule 7.1(d) and § III(B) of this Court's Information and Guidelines for Civil Practice, counsel for Proposed Intervenors conferred with counsel for Plaintiffs and Defendants for their positions on this motion. Defendants, represented by the Attorney General, indicated they do not oppose (but do not concur). Plaintiffs indicated that they do not concur.

Dated: November 13, 2023

Respectfully submitted,

/s/ Sarah Prescott

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Counsel for Proposed Intervenor-Defendants

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CERTIFICATE OF SERVICE

Sarah Prescott certifies that on the 13th day of November 2023, she served a copy of the above document in this matter on all counsel of record and parties via the ECF system.

/s/ Sarah S. Prescott
Sarah S. Prescott

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WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

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Defendants.

CIVIL ACTION

Case No. 1:23-cv-01025-JMB-PJG

Hon. Jane M. Beckering

**PROPOSED INTERVENOR-DEFENDANTS' MEMORANDUM IN SUPPORT OF
MOTION TO STRIKE PLAINTIFFS' MEMORANDUM IN OPPOSITION TO MOTION
TO INTERVENE OR, IN THE ALTERNATIVE, FOR LEAVE TO FILE A REPLY IN
SUPPORT OF THEIR MOTION TO INTERVENE**

CONCISE STATEMENT OF REASONS

- I. Plaintiffs filed their response to Proposed Intervenors’ motion two weeks late without explanation.
- II. Plaintiffs cannot show that they failed to meet the deadline because of “excusable neglect.”
- III. Striking Plaintiffs’ response brief is the appropriate remedy under these circumstances.

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On October 11, 2023, Proposed Intervenor-Defendants Jim Pedersen, Andrea Hunter, the Michigan Alliance for Retired Americans, the Detroit Downriver Chapter of the A. Philip Randolph Institute, and Detroit Disability Power (together, “Proposed Intervenors”), filed a Motion to Intervene in this action. ECF No. 5, PageID.31. This Court’s local rules make clear that, “[u]nless otherwise ordered, any party opposing a nondispositive motion shall, within fourteen (14) days of service of the motion, file a responsive brief and supporting materials.” W.D. Mich. LCivR 7.3(c). However, without explanation, Plaintiffs failed to file their Memorandum in Opposition to Motion to Intervene until November 8, 2023—two weeks after their deadline. ECF No. 8, PageID.115. Plaintiffs neither sought nor obtained an extension from this Court, and they have failed to acknowledge, let alone explain, their delay. Plaintiffs have thus waived their right to respond to Proposed Intervenors’ Motion to Intervene. *Cf. Marshall v. Grand Trunk W. R.R. Co.*, No. 1:09-CV-754, 2011 WL 13359596, at *1 (W.D. Mich. Mar. 22, 2011) (“For courts concerned about the integrity of their case management process — and the concepts of fairness that evenhanded case management seeks to implement — allowing this sort of tardy motion, submitted without a showing of good cause, penalizes those who abide by the case management order and rewards sloppy practice.”).

I. Plaintiffs did not obtain leave to file an untimely brief and are not entitled to retroactive relief under Rule 6(b)(1)(B).

Plaintiffs unilaterally granted themselves a 14-day extension to respond to Proposed Intervenors’ motion. And this Court should deny any request by Plaintiffs to retroactively extend their deadline to respond to Proposed Intervenors’ motion under Federal Rule of Civil Procedure 6(b)(1)(B). Because any such request would come weeks after the expiration of the October 25 deadline, Plaintiffs must show that they failed to meet that deadline “because of excusable neglect.” Fed. R. Civ. P. 6(b)(1)(B). Plaintiffs have failed to make that showing.

The Sixth Circuit has set forth several factors relevant to determining whether there is excusable neglect, including “(1) the danger of prejudice to the nonmoving party, (2) the length of the delay and its potential impact on judicial proceedings, (3) the reason for the delay, (4) whether the delay was within the reasonable control of the moving party, and (5) whether the late-filing party acted in good faith.” *Nafziger v. McDermott Int’l, Inc.*, 467 F.3d 514, 522 (6th Cir. 2006). Under the Local Rules, Plaintiffs had two weeks to draft and file their response brief; a timely filing was surely not outside of their control, and their failure even to acknowledge that they have missed their deadline demonstrates both that there is no good reason for delay and a lack of good faith. Moreover, Plaintiffs’ deadline was within the typical course for all nondispositive motions in the district. *Cf. Pioneer Inv. Serv. Co. v. Brunswick Assocs. P’ship*, 507 U.S. 380, 398 (1993) (finding excusable neglect where missed deadline was “outside the ordinary course” and announcement of deadline contained a “dramatic ambiguity”). And “inadvertence ‘do[es] not usually constitute’ excusable neglect.” *Howard v. Nationwide Prop. & Cas. Ins. Co.*, 306 F. App’x 265, 267 (6th Cir. 2009) (quoting *Pioneer*, 507 U.S. at 392); *see also id.* at 267-68 (“[C]lients must be held accountable for the acts and omissions of their attorneys.” (quoting *Pioneer*, 507 U.S. at 396-97)). Accordingly, the relevant factors do not support a finding of excusable neglect.

II. This Court should strike Plaintiffs’ response or, alternatively, grant Proposed Intervenor’s leave to file a reply.

Under these circumstances, the Court should strike Plaintiffs’ response and evaluate Proposed Intervenor’s motion on its face. *See, e.g., Mich. Dep’t of Env’t v. Mueller*, No. 1:20-CV-528, 2023 WL 7162161, at *1 (W.D. Mich. Jan. 24, 2023), *reconsideration dismissed*, No. 1:20-CV-528, 2023 WL 7162553 (W.D. Mich. Feb. 8, 2023) (striking untimely brief filed in violation of the local rules); *Castleberry v. Neumann Law, P.C.*, No. 1:07-cv-856, 2008 WL 5744179, *4 (W.D. Mich. July 9, 2008) (“Castleberry never moved for an extension of time, and he offers no

explanation for his untimeliness. ‘Even a party proceeding pro se is not entitled to disregard the Federal Rules of Civil Procedure. Nor is a party entitled to disregard the Local Rules of the United States District Court.’”) (quoting *Krantz, Inc. v. Nissan N. Am., Inc.*, 408 F. Supp. 2d 854, 865 (D. S.D. 2005) (citing *Carman v. Treat*, 7 F.3d 1379, 1381 (8th Cir. 1993))).¹

If the Court ultimately chooses to accept Plaintiffs’ untimely filing, Proposed Intervenors respectfully request that the Court permit them to file a reply within seven days of the Court’s order.

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¹ See also, e.g., *Westrick v. Dow Corning Corp.*, No. 06-08-KKC, 2008 WL 269068, *3 (E.D. Ky. Jan.29, 2008) (“He has not explained his failure to file a timely response nor asked the court’s permission to file an untimely response. Accordingly, the court need not consider the [19-day-late] response at all.”); *Festa v. Cornier*, No. 05-1940 (PG), 2007 WL 2331946, *1 (D.P.R. Aug. 13, 2007) (“This court is not obligated to consider the plaintiff’s untimely opposition ‘Rules are rules and the parties must play by them.’ Consequently, this court deems defendants’ motion to dismiss as unopposed.”) (quoting *Mendez v. Banco Popular de P.R.*, 900 F.2d 4, 7 (1st Cir. 1990)); *Lozaya v. Garrou Const., Inc.*, 2006 WL 1028869, *1 n .1 (D. Colo. Apr. 17, 2006) (“The Court directed Plaintiff’s response to be filed no later than April 3, 2006. Plaintiff filed his Response on April 6, 2006. The Court need not consider this untimely filing.”) (record citation omitted); *Schwartz v. Potter*, No. 1:04-CV-075-C, 2005 WL 1148734, *1 (N.D. Tex. 2005) (“Plaintiff has not shown good cause for failure to file a timely response. Nor did Plaintiff seek . . . an extension of time. [T]he Court need not consider [the] untimely response [filed four weeks late].”).

Dated: November 13, 2023

Respectfully submitted,

/s/ Sarah Prescott

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