RECORD NO.

22-659

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

***Plaintiff – Appellee*,**

v.

CRISTAL STARLING,

***Claimant – Appellant*,**

$8,040.00 UNITED STATES CURRENCY,

***Defendant*.**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK (ROCHESTER)

REPLY BRIEF OF APPELLANT

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INTRODUCTION

While the government spends much of its brief recounting the alleged basis for the criminal prosecution of Kendrick Bronson, it is important to remember that Kendrick was *acquitted* by a jury of his peers. Meanwhile, Appellant Cristal Starling, Kendrick's ex-girlfriend, stands on the verge of losing her $8,040 through civil forfeiture, simply because police found the cash in her apartment when they arrested Kendrick. Cristal has not been accused of wrongdoing, and yet she may lose her property forever without any hearing on the merits.[1]

The government offers two primary arguments in support of this harsh result. First, it argues that the district court properly applied a demanding legal standard under which a defaulting party will, "in the ordinary course, lose." Resp. Br. 42–43. Second, it argues that Cristal could not overcome that demanding standard because, even though she admittedly acted "in good faith to claim the currency," her "efforts were incomplete and inadequate" because they did not actually comply with the applicable rules. *Id.* at 50.

The government is wrong on both scores. With respect to the legal standard, "a district court should grant a default judgment sparingly and grant leave to set

[1] The government at times seems to suggest the money belongs to Kendrick, not Cristal. *See*, *e.g.*, Resp. Br. 4. However, the money was found in Cristal's apartment, and a portion was even found in the pocket of a pair of women's pants. This was money that Cristal planned to use to expand her food cart business.

aside the entry of default freely when the defaulting party is appearing *pro se*." *Enron Oil Corp. v. Diakuhara*, 10 F.3d 90, 96 (2d Cir. 1993). In response, the government contends that the question was not whether to lift the default but rather whether to extend the time to file in response to the Complaint. But the same could be said for *every* default. Unsurprisingly, the government's position is rejected by cases from this and other Circuits. Those cases were cited in the Opening Brief, but the government ignores them.

As for the purported requirement that Cristal show an ironclad justification for her default, the case law again does not support the government's position. The Opening Brief cited cases that reject any such requirement in the default judgment context, and yet the government again does not cite them. The government pins its hat, instead, on *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993), but in fact that case held that fault is *not* a bar to excusing a missed deadline. Moreover, both that and other cases cited by the government arise in distinct contexts and are far afield.

Ultimately, whether considered under the "good cause" or "excusable neglect" standard, the result is the same: All relevant factors—including Cristal's *pro se* status and the total lack of prejudice to the government—weigh in favor of allowing Cristal to contest the forfeiture of her $8,040.

ARGUMENT

I. The district court applied the wrong standard.

The Opening Brief explained that the district court applied the wrong legal standard in at least two respects. First, because Cristal appeared in the action before a final default judgment, the district court should have analyzed this case under the lenient "good cause" standard of Rule 55(c). *See* Op. Br. 22–30. Second, to the extent that the "excusable neglect" standard somehow applied, the district court erred by applying a stringent version of that standard, rather than the more "generous[ ]" version that applies in the default context. *See id*. at 42-43. The district court erred when it instead held Cristal to a near-insurmountable standard under which a defaulting party "will, in the ordinary course, lose." A-74.

A. This case should have been analyzed under the "good cause" standard.

There is no question that the government's aim in the district court was to convert the clerk's entry of default into a final default judgment; after all, the government filed both a motion to strike Cristal's untimely claim and a motion for default judgment. *See* A-2 (D.E. 8, 11). Similarly, there is no question that Cristal's aim in the district court was to lift the default and proceed to the merits; after all, she clearly stated that "I would like to move forward with court proceedings to have all of the funds returned to me." A-41. The question posed to the district court

was therefore whether to convert the entry of default into a final default judgment or, instead, whether to lift the default and proceed with the litigation.

As the Opening Brief explained, under Rule 55(c) that question is assessed under a lenient "good cause" standard. *See* Op. Br. 22–30. Once default judgment has been entered the "excusable neglect" standard applies under Rule 60, but, before then, only good cause is required. The government, in response, argues that Rule 55(c) *only* applies to lifting the entry of default; in the government's view, whether to allow an untimely claim is a separate issue that must be assessed under the "excusable neglect" standard under Rule 6(b)(1). *See* Resp. Br. 26–27. In the government's apparent view, a court can lift a default for good cause *but* can only allow an untimely response to a complaint for excusable neglect. This makes no sense: There is no point to lifting the default if the defaulting party cannot cure it by responding to the complaint. The government's view of the rules would have courts liberally lift defaults under Rule 55(c) only to promptly re-impose those same defaults after refusing to allow the defaulting party to correct its error. The end result would be to effectively read the Rule 55(c) standard out of the law, as every defaulting party would also have to make a separate and more demanding showing of "excusable neglect" under Rule 6(b)(1).

The Court should reject the government's invitation to eviscerate Rule 55(c). The government's arguments are contrary to precedent, including cases from both

this Court and other Circuits. The Opening Brief cited and discussed these cases, *see* Op. Br. 24–29, and yet the government largely ignores them. The government's arguments are also contrary to the plain text of Supplemental Rule G, which confirms that a court can extend the deadline to file a claim for "good cause"—adopting the same standard that applies under Rule 55(c).

1. The government's primary argument is contrary to case law from both this Court and other Circuits.

The Opening Brief cited at least three decisions that refute the government's position. In all three, the courts held that the Rule 55(c) good cause standard applied to motions *other than* motions to lift an entry of default. In *Meehan v. Snow*, 652 F.2d 274, 277 (2d Cir. 1981), the Rule 55(c) good cause standard applied where the non-defaulting party filed a motion for default judgment—which is one of the motions filed by the government in this case. *See* A-2 (D.E. 8). In *United States v. $22,050.00 U.S. Currency*, 595 F.3d 318, 320 (6th Cir. 2010), the Rule 55(c) good cause standard applied where the non-defaulting party filed a motion to strike an untimely civil forfeiture claim—again, one of the motions that the government filed in this case. *See* A-2 (D.E. 11). And in *Perez v. Wells Fargo N.A.*, 774 F.3d 1329, 1338 (11th Cir. 2014), the Rule 55(c) good cause standard applied where the defaulting party filed a motion for leave to file an untimely answer. In each case, the Rule 55(c) standard applied because, whatever the "characterization of [the] motion," *Perez*, 774 F.3d at 1338, the "motions

essentially presented the same question to the district court—whether to excuse [the defaulting party's] untimely filing" and proceed to the merits. *$22,050.00*, 595 F.3d at 322.

These cases refute the government's argument that a different standard applies depending on whether the issue is framed as lifting the default or allowing an untimely claim; either way, the question is whether the case should be allowed to proceed to the merits following a default, and either way the Rule 55(c) "good cause" standard applies. The government asserts that its characterization of its motion (as a motion to strike an untimely claim) should determine the relevant standard under "the principle of party presentation," Resp. Br. 28, but if that were true then the Rule 55(c) standard would not have applied in any of these three cases—all of which involve motions that were not denominated as motions to lift the entry of default. Indeed, the government in this case filed precisely the same motions at issue in *Meehan* (a motion for default judgment) and in *$22,050* (a motion to strike an untimely claim). If the government is correct, those cases are wrong.

Furthermore, these decisions also refute the government's suggestion that the Rule 55(c) standard cannot apply because "Starling never moved the court to vacate the clerk's entry of default." Resp. Br. 26. No such motion was filed in *Meehan* or in *Perez*, and yet the courts in both cases found that the Rule 55(c)

standard applied regardless based on "the nature of the relief that [the non-defaulting party] actually sought—effectively, a default judgment." *Perez*, 774 F.3d at 1338; *see also Meehan*, 652 F.2d at 276 ("opposition to a motion for a default judgment can be treated as a motion to set aside the entry of a default despite the absence of a formal Rule 55 motion"). Of course, if it was necessary for Cristal to file a Rule 55(c) motion, the district court should have construed her letters in that manner given her *pro se* status. *See Traguth v. Zuck*, 710 F.2d 90, 95 (2d Cir. 1983). As a matter of fact, however, the Rule 55(c) standard applies in the default context regardless of which party moves or how their motion is styled.

2. The government ignores two of these decisions and offers a meaningless distinction for the third.

The Opening Brief did not hide these cases under a bushel. All three cases were cited and discussed at length in the Opening Brief. *See* Op. Br. 24–25 (*Perez*), 25–26 (*Meehan*), 27–29 (*$22,050*). Yet the government in its brief effectively offers no response. The government does not even cite *Perez* at all, and the government cites this Court's decision in *Meehan* only for the uncontroversial point that "'good cause' is a 'less rigorous' standard than 'excusable neglect.'" Resp. Br. 26. That is certainly true, but it ignores the main relevance of *Meehan* for this case.

As for *$22,050*, the government concedes, in a profound understatement, that there "are similarities between" the Sixth Circuit's decision and this case.

Resp. Br. 35. In both cases, the clerk entered default after a civil forfeiture claimant failed to file a timely claim, the claimant appeared to contest the action after the entry of default and before final judgment, and the government responded by filing a motion to strike an untimely claim. Notwithstanding these similarities, the government argues that *$22,050* is distinct because the claimant there filed a "'technically compliant but untimely verified claim,'" whereas "Starling's filings were not 'technically compliant'" because they were not signed under penalty of perjury. *id*. at 35 (quoting *$22,050.00*, 595 F.3d at 324). Thus, according to the government, this case is distinct insofar as it "involves a claim that is *both* late-filed *and* technically deficient." *Id.* at 36. This argument fails for three reasons.

The first problem with this argument is that it was waived below. As the government acknowledges in a footnote, "the government's motion to strike did not assert this deficiency." Resp. Br. 47 n.6. If the government had made this argument in the district court, Cristal might well have responded by filing another claim with the magic words declaring that the claim was submitted under penalty of perjury. Instead, because the government waived the argument, the district court properly did not address it in its decision—which relied only on the fact that the claim was untimely and not on any other technical deficiency.[2]

[2] In a footnote, the government argues that the Court might nonetheless reach this issue on the ground that the judgment "may be affirmed on any ground permitted by the law and record." Resp. Br. 47 n.6 (marks and citation omitted).

The second problem with this argument is that it can easily be defeated by construing Cristal's letters not as a claim but, rather, as a motion for leave to file an out-of-time claim. *See Perez*, 774 F.3d at 1338 (applying Rule 55(c) standard to a motion for leave to file an untimely answer). Under this interpretation of Cristal's filings, it makes no difference that her letters did not meet the formal requirements for a claim, as the letters merely sought permission to file such a claim; viewed that way, the district court could have granted relief by lifting the entry of default and setting a new deadline to file a properly verified claim. The district court easily could have adopted this interpretation of Cristal's letters, which the district court was required to liberally construe given her *pro se* status. *See Traguth*, 710 F.2d at 95. Presumably the district court saw no need to construe Cristal's filings in this manner, however, becuase the government did not raise (and therefore waived) any challenge to the form of the claim.

Lastly, the third problem with this argument is that it runs squarely into precedent holding that "amendments should be liberally permitted to add

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However, unless it is jurisdictional, a ground for decision that has been waived is generally *not* a ground that is "permitted by the law and record." *See In re Chesteen*, 799 F. App'x 236, 242 (5th Cir. 2020) (citing cases). The government does not even attempt to argue that any technical deficiencies in the claim are jurisdictional, and in fact this Court has held the opposite. *See United States v. Premises & Real Prop. at 4492 S. Livonia Rd.*, 889 F.2d 1258, 1262 (2d Cir. 1989); *see also United States v. Funds From Prudential Sec.*, 300 F. Supp. 2d 99, 104 (D.D.C. 2004).

verifications to claims originally lacking them." *United States v. $103,387.27*, 863 F.2d 555, 562 (7th Cir. 1988) (quoting *United States v. 1982 Yukon Delta Houseboat,* 774 F.2d 1432, 1436 (9th Cir. 1985)); *see also United States v. $125,938.62*, 370 F.3d 1325, 1328–29 (11th Cir. 2004) (district court "abused its discretion" by refusing to allow additional time to cure technical defects in claim); *United States v. $9,020.00 in U.S. Currency*, 30 F. App'x 855, 859 (10th Cir. 2002) (district court abused its discretion by refusing to allow claimant leave to amend technically deficient claim). If the government had challenged Cristal's claim on the ground that it was not verified under penalty of perjury, then it would have been proper to allow Cristal to amend to add the necessary magic words. Again, however, there was no need to do so because the government waived any such objection.

For all these reasons, the government's proffered distinction of *$22,050* is meaningless. The government does not dispute that *$22,050* analyzes the question of whether to allow an untimely claim prior to entry of default judgment under the Rule 55(c) "good cause" standard. That is the portion of *$22,050* that is relevant to the issue here, where the government's sole objection to Cristal's claim was that it was not timely filed. With respect to the actual question presented to this Court, then, *$22,050* is on all fours.

3. The government's position also cannot be squared with the text of Supplemental Rule G(5)(a)(ii).

The government's argument for application of the "excusable neglect" standard fails for another reason, as well, as it cannot be reconciled with the text of Supplemental Rule G(5)(a)(ii). As the Opening Brief pointed out, Rule G(5)(a)(ii) states that the standard deadline to file a claim applies "[u]nless the court *for good cause* sets a different time." *See* Op. Br. 26–27. The rules that apply specifically to civil forfeiture cases thus dovetail with the "good cause" standard that applies more generally to a defaulting party under Rule 55(c).

In response, the government argues that Rule G(5)(a)(ii) only applies when a court "sets a different time" before—not after—the deadline has already run. *See* Resp. Br. 31–32. However, nothing in the text of the rule supports that distinction. The rule states: "Unless the court for good cause sets a different time, the claim must be filed … by the time stated in a direct notice sent under Rule G(4)(b)." Supp. R. G(5)(a)(ii). Nothing in that language suggests that a different standard applies depending on whether the court "sets a different time" before or after the initial deadline set in the notice has already run.

The government's contrary argument invokes the text of Federal Rule of Civil Procedure 6(b)(1), which *does* explicitly draw a distinction between an extension of time that is sought "before the original time or its extension expires" and one that is sought "after the time has expired." But that provision cuts *against*

the government, as it shows that the rules are fully capable of expressly drawing such a distinction when it applies. And while it is true that Rule 6(b)(1) applies in civil forfeiture cases, it applies *only* to the extent that it is not "inconsistent with the Supplemental Rules." Supp. R. A(2). To the extent that the plain text of Rule G(5)(a)(ii) requires a showing of "good cause" in a circumstance where Rule 6(b)(1) would otherwise require a showing of "excusable neglect," the rules are inconsistent and the forfeiture-specific standard of Rule G(5)(a)(ii) controls.[3]

As a policy matter, the government argues that its position is superior because "it makes sense to measure a timely request for an extension by a less rigorous standard than an untimely one." Resp. Br. 34. However, as reflected both in Rule 55(c) and in Rule G(5)(a)(ii), the rules adopt a different policy judgment when it comes to the initial response to a complaint. Courts have a strong interest in seeing cases resolved on the merits, rather than by default, and the "extreme sanction of a default judgment must remain a weapon of last, rather than first, resort." *Meehan*, 652 F.2d at 277. Once a default judgment has been entered courts require a showing of "excusable neglect" before they will proceed to the merits.

[3] But of course there is no actual inconsistency between Supplemental Rule G and the ordinary rules of civil procedure in this case because, as explained above, the motions in this case should have been analyzed under the "good cause" standard regardless under Rule 55(c).

However, so long as a litigant appears in the case before final judgment, courts will excuse the default based on a lower showing of "good cause."

B. If the "excusable neglect" standard applied, then the district court should have applied a more lenient version of the standard.

The Opening Brief further explained that, even if the excusable neglect standard did somehow apply, the district court applied an overly demanding version of that standard under which, so long as the filing deadline is clear, a defaulting party "will, in the ordinary course, lose." A-74; *see also* Op. Br. 36–37. The government, in response, doubles down on the district court's demanding standard—arguing for a version of "excusable neglect" under which Cristal cannot prevail unless she can proffer an ironclad justification for her default. *See* Resp. Br. 40–41. The government argues that courts must "afford[ ] determinative weight" to the reason for the delay, *id.* at 41 n.5, and, although it concedes that Cristal acted in "good faith," it argues that her efforts were necessarily inadequate because they failed to comply with applicable rules, *id.* at 50.

The demanding standard adopted by the district court—and urged by the government on appeal—is incompatible with this Court's precedent. As the Opening Brief explained, this Court has held that "'excusable neglect' is to be construed generously in the context of an attempt to vacate a default judgment," given the Court's "strong preference for resolving disputes on the merits." *Am. All. Ins. Co. v. Eagle Ins. Co.*, 92 F.3d 57, 58 (2d Cir. 1996). After all, "[i]t is well

established that default judgments are disfavored," and "[a] clear preference exists for cases to be adjudicated on the merits." *Pecarsky v. Galaxiworld.com Ltd.*, 249 F.3d 167, 174 (2d Cir. 2001). In short, this Court in the default judgment context applies a far more forgiving version of excusable neglect.

Moreover, these cases specifically reject the argument that a defaulting party must offer an ironclad justification for her default to secure relief. In *American Allied Insurance*, the Court explained that the "excusable neglect" standard "expressly contemplates that some kinds of 'neglect' are 'excusable.'" 92 F.3d at 61. Thus, there exists a category of "defaults that, though due to neglect, are excusable." *Id.* Indeed, even "[g]ross negligence … does not necessarily preclude relief." *Id.* And in fact the Court granted relief in *American Allied Insurance* despite holding that the defaulting party there was guilty of "gross negligence." *Id.* at 62. That gross negligence "weigh[ed] somewhat against" relief, but other factors—including the "presentation of a meritorious defense and the lack of prejudice"—weighed "heavily in favor" of lifting the default and ultimately carried the day. *Id.* Similarly, in *Pecarsky*, the Court held that the default could be forgiven so long as the default was not willful, or, in other words, so long as "we cannot say [the party] deliberately chose not to appear." 249 F.3d at 172. Both cases refute the government's demand for an ironclad justification.

The government, in response, ignores these decisions. Once again, the Opening Brief discussed these cases. *See*, *e.g.*, Op. Br. 20, 42–44. Yet the government does not even cite *American Allied Insurance*, even though the decision in that case directly addresses the application of the "excusable neglect" standard in the context of a default. And the government likewise fails to cite *Pecarsky* anywhere in its brief.

Instead, the government relies on cases that do not involve defaults and that arise in totally different situations. The government stresses *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993), and *In re Enron Corp.*, 419 F.3d 115 (2d Cir. 2005), both of which involve the bankruptcy rules. The government also highlights *Silivanch v. Celebrity Cruises, Inc.*, 333 F.3d 355, 366 (2d Cir. 2003), *Alexander v. Saul*, 5 F.4th 139 (2d Cir. 2021), and *Williams v. KFC National Management Co.*, 391 F.3d 411 (2d Cir. 2004), all of which involve attempts to expand the time to file a notice of appeal—a jurisdictional deadline that courts are naturally less willing to extend. Finally, the government cites *Padila v. Maersk Line, Ltd.*, 721 F.3d 77, 83–84 (2d Cir. 2013), which involved a motion to amend a judgment that was filed six months after the time set by Rule 59(e) and two months after the party had already filed *another* motion to make yet another amendment to the judgment. A party who repeatedly

seeks to change the substance of a court's rulings is obviously distinct from a party who seeks a *first* opportunity to litigate the merits.[4]

Notwithstanding these differences, the government argues that its cited cases are directly on point because they apply an "excusable neglect" standard. *See* Resp. Br. 38–39. In the government's apparent view, "excusable neglect" is a one-size-fits-all standard that does not distinguish between a default, a notice of appeal, or an attempt to modify the substance of a judgment. However, *American Allied Insurance* expressly holds otherwise. The Court in that case, after stating that excusable neglect should be "construed generously" in the default context, "recognize[d] that this construction of 'excusable neglect' is more lenient than our interpretation of that phrase for purposes of granting an extension of time to file a notice of appeal." 92 F.3d at 61 n.2. The Court stated, however, that a "less rigorous construction is appropriate for a lawsuit yet to be contested on its merits." *Id.* This Court has thus already distinguished the government's proffered cases.

The government also suggests that its one-size-fits-all approach is supported by *Pioneer*, which it says applies to all "federal rules that incorporate an

[4] *Canfield v. Van Atta Buick/GMC Truck, Inc.*, 127 F.3d 248 (2d Cir. 1997), is likewise distinct, as the lawyer in that case had failed to timely respond to a motion to summary judgment because he was preoccupied with his bid for public office. Failure to respond to a dispositive motion mid-litigation presents an entirely different set of issues from a default at the outset. Further, that case actually states that there is no "per se rule" against finding excusable neglect where a party erred in missing a clear deadline.

excusable-neglect standard." Resp. Br. 38. However, *American Allied Insurance* and *Pecarsky* were decided after *Pioneer*, and they presumably took *Pioneer* into account. Moreover, *Pioneer* itself rejects such a one-size-fits-all approach. The Supreme Court adopted a "flexible understanding of 'excusable neglect,'" 507 U.S. at 389, which it labelled "a somewhat 'elastic concept,'" *id.* at 392, and the Court stated outright that the "meaning given 'excusable neglect' for purposes of [one] Rule obviously is not controlling for purposes of [another] Rule," *id.* at 394 n.11 (emphasis added). So, while the government premises its one-size-fits-all approach on *Pioneer*, *Pioneer* itself makes clear that context matters. Where, as here, a missed deadline leads to a default, *American Allied Insurance* and *Pecarsky* are right on point and set the governing standard.

Finally, the government's reliance on *Pioneer* is particularly misplaced given that *Pioneer* itself rejects the kind of harsh application of the rules urged by the government here. The Court in *Pioneer* specifically held that "excusable neglect" *does* include "omissions caused by carelessness," meaning that courts are "permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness." 507 U.S. at 388. After all, the "ordinary meaning of 'neglect'" is to "'give little attention or respect' to a matter … '*especially through carelessness*.'" *Id.* (brackets omitted) (emphasis in original). The Court also discussed case law involving default judgments and explained that, in the default

context, "'excusable neglect' is understood to encompass situations in which the failure to comply with a filing deadline is attributable to negligence." *Id.* at 394. And the Court in *Pioneer*—like this Court in *American Allied Insurance*—also granted relief notwithstanding the party's negligence; the Court acknowledged that the lawyer who missed the deadline was "remiss," but the Court granted relief regardless based on other factors. *Id.* at 398. Given the actual holding of *Pioneer*, it is difficult to see how *Pioneer* can possibly support the government's position. Rather, the Court should adopt a forgiving approach to "excusable neglect" in line with *American Allied Insurance* and *Pecarsky*.

C. *The district court gave insufficient weight to Cristal's* pro se *status, and in fact wrongly faulted Cristal for not hiring a lawyer.*

The Opening Brief further explained that the demanding standard applied by the district court was particularly inappropriate given Cristal's *pro se* status below. *See* Op. Br. 35–38. After all, this Court has held that, "as a general rule a district court should grant a default judgment sparingly and grant leave to set aside the entry of default freely when the defaulting party is appearing *pro se*." *Enron Oil Corp. v. Diakuhara*, 10 F.3d 90, 96 (2d Cir. 1993). The district court failed to apply this rule, and, to the contrary, actually held Cristal's failure to hire a lawyer against her in its decision.

The government argues that the district court *did* account for Cristal's *pro se* status insofar as it "construe[d] her filings liberally" as constituting a claim,

answer, and response to the motion to strike. Resp. Br. 29. However, this Court's cases are clear that, *in addition* to liberally construing a *pro se* litigant's filings, district courts should also be more hesitant to enter defaults—and more willing to lift them—where a party is *pro se*. *See Enron Oil*, 10 F.3d at 96; *Traguth*, 710 F.2d at 95. The government does not even try to argue that the district court adopted that approach. Nor does the government meaningfully address these cases: The government does not cite *Traguth*, and, while the government does cite *Enron Oil*, it does so only for an uncontroversial explanation of the mechanics of how courts enter default judgments. *See* Resp. Br. 18.[5] Once again, rather than address the relevant authority, the government ignores it.

The government also argues that the district court did not hold Cristal's *pro se* status against her, but then concedes in the same breath that the district court "observed, in the course of assessing the validity of her reasons for her untimely submissions, that she could have sought counsel but did not to [sic] do so." Resp. Br. 30. To the extent that the government means to suggest that this was simply a neutral observation, rather than a basis for the decision, that argument is belied by the decision itself. The district court held that Cristal's decision not to hire a lawyer was "a matter within her reasonable control, which *weighs against* a finding of

[5] The government relies instead on another (less relevant) case involving Enron. *See In re Enron Corp.*, 419 F.3d 115 (2d Cir. 2005). The government's *Enron* case is discussed *supra* p. 15.

excusable neglect." A-75 (marks and citation omitted, emphasis added). In other words, Cristal's failure to hire a lawyer—which is inextricable from her *pro se* status—"weigh[ed] against" her in the district court. Other than to deny that it exists, the government offers no defense of this part of the district court's decision. And for good reason, as it cannot be defended.[6]

II. Cristal should have been allowed to contest the forfeiture on the merits.

The Opening Brief explained that, regardless of whether the case is analyzed under a "good cause" or "excusable neglect" standard, the district court ultimately reached the wrong conclusion—terminating the case when Cristal should, instead, have been allowed to continue to the merits. *See* Op. Br. 30–34 ("good cause"); 42–46 ("excusable neglect"). Further, that is particularly true given Cristal's *pro se* status and the lack of prejudice to the government—two factors that the district court impermissibly ignored. *See id.* at 35–42. Nothing that the government says in the Response Brief is to the contrary.

[6] Meanwhile, the government itself faults Cristal for not hiring a lawyer, as it pointedly observes that "it is noteworthy that Starling found able counsel to represent her on appeal." Resp. Br. 30. However, the fact that Cristal is now represented *pro bono* on appeal does not change the standard that should have applied in the district court—where Cristal had no such representation.

A. The government does not even attempt to argue that it can prevail under the good cause standard.

The government does not argue that it can prevail under the more lenient good cause standard. And for good reason. The good cause standard looks to (1) the willfulness of the defaulting party; (2) prejudice to the non-movant; and (3) whether the defaulting party has a meritorious defense. *Meehan*, 652 F.2d at 277. The government cannot argue that Cristal's default was somehow willful; to the contrary, it concedes that she "undeniably took steps in good faith to claim the currency." Resp. Br. 50. The government also cannot argue that it was somehow prejudiced by the delay; instead, it says this Court "can assume" it was not. *Id.* at 41. Nor can the government deny that Cristal has a meritorious defense, given that the forfeiture is premised on allegations that were rejected by the jury in Kendrick's criminal trial. *See* Op. Br. 33–34. If the good cause standard applies, there is no serious question that it has been met.

B. The government also cannot prevail under the excusable neglect standard.

When it comes to "excusable neglect," meanwhile, the parties disagree about what factors should apply. The Opening Brief explained that this Court's decisions in the default context assess excusable neglect under the same three factors that apply under the "good cause" standard. *See* Op. Br. 43–44. The government, in response, argues that this Court should instead consider four factors drawn from *Pioneer*. *See* Resp. Br. 39. This dispute would seem to be resolved by *American*

Allied Insurance and *Pecarsky*, both of which post-date *Pioneer* and continue to analyze "excusable neglect" in the default context under the same three factors that apply under the "good cause" standard. *See* Op. Br. 43–44. The government nowhere explains how its contrary position can be reconciled with those decisions.[7] For that reason, the Court can resolve the "excusable neglect" analysis under the same three-factor test discussed just above.

The question of what factors to apply ultimately is not all that important, however, as the result should be the same regardless. The Opening Brief explained that all four of the *Pioneer* factors weigh in favor of allowing Cristal to proceed with the merits of her defense to the forfeiture action. *See* Op. Br. 45–46. The government does not argue otherwise when it comes to three of the factors—the danger of prejudice, the length of the delay, or the movant's good faith—and in fact invites this Court to "assume" that those factors weigh in favor of lifting the default. *See* Resp. Br. 41.

The fourth factor, the reason for the delay, also weighs in favor of lifting the default. *See* Op. Br. 35–38, 45–46. Cristal, a *pro se* litigant, was confused about the

[7] The government does suggest that cases applying the three-factor test under Rule 60 are irrelevant here because, again, the relevant question is whether to extend the time to file a claim under Rule 6(b)(1). That argument fails for the same reasons discussed *supra* pp. 5–7. If a party seeking to lift a default also has to satisfy Rule 6(b)(1), then the separate standards developed to govern defaults would never actually apply. Of course, that is not the law.

deadline to file a claim both because she had *already* filed a claim in the earlier administrative proceeding and because she understood, from her conversation with the state prosecutors in Kendrick's criminal case, that the forfeiture would not be adjudicated until after the criminal case was resolved. *See id.* Cristal also stated that she believed she had not been notified about the deadline. *See* A-58–59. While it is true that Cristal was confused and (ultimately) incorrect about her obligations under the rules, this is precisely the type of understandable confusion on the part of a *pro se* litigant that justifies lifting a default. *See Traguth*, 710 F.2d at 95 (lifting default where *pro se* litigant did not know that he had to respond to complaint); *Enron Oil Corp.*, 10 F.3d at 98 (lifting default where *pro se* litigant did not believe that he had been served with notice, even though there was conflicting evidence indicating that he had in fact been served). Other cases, not involving *pro se* litigants, are in accord. *See Am. All. Ins.*, 92 F.3d at 62 (lifting default despite "gross negligence," based on showing of meritorious claim and lack of prejudice to other party); *Pecarsky*, 249 F.3d at 172 (lifting default where "we cannot say that [the defaulting party] deliberately chose not to appear").

C. *Under either standard, the lack of prejudice to the government should have weighed heavily in the analysis.*

The Opening Brief further explained that—under either standard—the lack of prejudice to the government should have weighed particularly heavily in this analysis. *See* Op. Br. 38–42. The Opening Brief noted that the district court gave

no consideration to this factor and, to show that this was error, cited cases that gave it heavy weight. *Id.* In particular, the Opening Brief cited *United States v. $103,387.27*, 863 F.2d 555, 653 (7th Cir. 1988), and *United States v. $125,938.62*, 370 F.3d 1325, 1330 (11th Cir. 2004), both of which hold that a lack of prejudice to the government weighs heavily in the analysis when considering whether to allow an untimely claim. As with other cases, the government does not even mention these cases in its brief, much less attempt to respond.

Moreover, while the government emphasizes the Supreme Court's decision in *Pioneer*, that decision confirms the importance of prejudice as a factor. That factor weighed heavily in *Pioneer*, where the Court held that the "lack of any prejudice to the debtor or to the interests of efficient judicial administration, combined with the good faith of respondents and their counsel, *weigh strongly* in favor of permitting the tardy [bankruptcy] claim." 507 U.S. at 398 (emphasis added). Indeed, the Court held that the lack of prejudice was dispositive—explaining that it would not have forgiven the missed deadline if there was "any evidence of prejudice." *Id.* Given Cristal's *pro se* status and undisputed good faith, the lack of prejudice to the government should have been dispositive here too.

* * *

The government concludes its brief with an appeal to judicial efficiency, invoking "[p]rinciples of finality as well as institutional-resource limitations."

Resp. Br. 51. And these are no doubt important considerations. With that in mind, however, it is important to note the limited scope of the relief that Cristal seeks: Cristal notified the government of her interest in the property even before the forfeiture action was filed, she appeared to defend the forfeiture before final judgment was entered, and there has been no suggestion of any prejudice to the government should the case be allowed to proceed.

Moreover, those are not the only values implicated by this case. As the Supreme Court observed, in a case involving civil asset forfeiture, the "dignity of a court derives from the respect accorded its judgments," and "[t]hat respect is eroded, not enhanced, by too free a recourse to rules foreclosing consideration of claims on the merits." *Degen v. United States*, 517 U.S. 820, 828 (1996). These important values counsel in favor of allowing Cristal Starling to contest the merits of the forfeiture of her $8,040.

CONCLUSION

The decision below should be reversed with instructions that Cristal should be allowed to proceed to the merits.

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Respectfully submitted,

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Dated: October 18, 2022

/s/ Robert E. Johnson
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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 18th day of October, 2022, I caused this Claimant-Appellant's Reply Brief to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

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