

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

|  |   |                                   |
|--|---|-----------------------------------|
| DOE(P),                                | ) |                                   |
|  | ) |                                   |
|  | ) |                                   |
| Plaintiff,                             | ) |                                   |
|  | ) |                                   |
| v.                                     | ) | Civil Action No. 1:04CV02122 (GK) |
|  | ) |                                   |
| Gen. MICHAEL V. HAYDEN, USAF           | ) |                                   |
| Director, Central Intelligence Agency, | ) |                                   |
|  | ) |                                   |
| CENTRAL INTELLIGENCE AGENCY,           | ) |                                   |
|  | ) |                                   |
| and                                    | ) |                                   |
|  | ) |                                   |
| JAMES L. PAVITT,                       | ) |                                   |
|  | ) |                                   |
| Defendants.                            | ) |                                   |

**DEFENDANT JAMES L. PAVITT’S OPPOSITION TO PLAINTIFF’S MOTION FOR  
DEFAULT JUDGMENT**

Plaintiff Doe has filed a motion for default judgment against Defendant James L. Pavitt predicated on the assumption that Mr. Pavitt should have responded to the Second Amended Complaint within twenty days of service. Plaintiff fails to recognize that the Federal Rules give former government employees sixty days in which to respond to complaints. Consequently, Mr. Pavitt’s answer is due on October 1, 2007, and therefore the motion for a default judgment against him is improper.<sup>1</sup>

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<sup>1</sup> The fact that Mr. Pavitt is responding to this motion in no way constitutes a waiver of the arguments raised in the recently-filed motion to dismiss that Mr. Pavitt was not timely served and should be dismissed from this litigation pursuant to Federal Rules of Civil Procedure 12(b)(5) and 4(m).

All parties are agreed that Mr. Pavitt was served on July 31, 2007, which is more than twenty months after Mr. Pavitt was first named as a defendant to this suit in the Amended Complaint.<sup>2</sup> See Plaintiff's Motion for Default Judgment Against Defendant Pavitt at 1. Plaintiff contends that because Mr. Pavitt is now a private citizen sued in his individual capacity, he is required to answer within twenty days. Id. Plaintiff's reading of the Federal Rules of Civil Procedure ignores the fact that Mr. Pavitt is being sued for actions he allegedly took while in the employment of a federal agency—the Central Intelligence Agency ("CIA").

The relevant provision of Rule 12 provides as follows:

An officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States shall serve an answer to the complaint . . . within 60 days after service on the officer or employee, or service on the United States attorney, whichever is later.

Fed. R. Civ. P. 12(a)(3)(B). Mr. Pavitt was an employee of the United States at the time of the alleged events described in the Second Amended Complaint. That the sixty-day provision applies to former employees is made clear in the 2000 commentary to Rule 12, which provides as follows:

Rule 12(a)(3)(B) is added to complement the addition of Rule 4(i)(2)(B). The purposes that underlie the requirement that service be made on the United States in an action that asserts individual liability of an officer or employee for acts occurring in connection with the performance of duties on behalf of the United States also require that the time to answer be extended to 60 days. Time is needed for the United States to determine whether to provide representation to the defendant officer or employee. If the United States provides representation, the need for an extended answer period is the same as in actions against the United

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<sup>2</sup> Plaintiff did seek waiver of service from Mr. Pavitt in February 2007, 15 months after the Amended Complaint was filed. However, Mr. Pavitt did not return the waiver of service, so the relevant date is the date of actual service, which is July 31, 2007.

States, a United States agency, or a United States officer sued in an official capacity.

*An action against a former officer or employee of the United States is covered by subparagraph (3)(B) in the same way as an action against a present officer or employee.* Termination of the relationship between the individual defendant and the United States does not reduce the need for additional time to answer.

Fed. R. Civ. P. 12 commentary on 2000 Amendment (emphasis added).

As the commentary makes clear, former employees are entitled to the same sixty days to respond to the complaint as current employees, because the government needs time to determine whether to represent individuals, regardless of whether they are current or former employees.

The reason that no Notice of Appearance was filed on behalf of Mr. Pavitt previously is that the United States was still processing his request for representation. Recently, Mr. Pavitt timely filed a Motion to Dismiss the Second Amended Complaint.

Because Mr. Pavitt's response to the Second Amended Complaint is not untimely, the motion for default judgment should be denied.

Respectfully submitted,

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/s/ Marcia N. Tiersky  
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