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JOHN T. FREY  
CLERK, CIRCUIT COURT  
FAIRFAX, VA

VIRGINIA: IN THE CIRCUIT COURT FOR THE COUNTY OF FAIRFAX

PAUL SHAO,

Plaintiff,

v.

Case No.: 2021-03802

ALLSTATE INSURANCE COMPANY,

Defendant.

**RESPONSE IN OPPOSITION TO PLAINTIFF'S  
MOTION FOR DEFAULT FOR FAILURE TO APPEAR**

Defendant Allstate Insurance Company (“Allstate”), by and through the undersigned counsel, hereby submits its Response in Opposition to Plaintiff’s Motion for Default for Failure to Appear. In support of its opposition, Allstate shows the Court as follows:

**I. BACKGROUND**

Plaintiff Paul Shao (“Shao”) filed a Complaint and Request for Trial by Jury (“Complaint”) against Allstate on or about March 15, 2021, which initiated the above-captioned action in this Court. Allstate’s registered agent in the State of Virginia, CT Corporation System, 4701 Cox Road, Suite 285, Glen Allen, Virginia 23060, was formally served with a copy of the Complaint on March 19, 2021.

Allstate timely filed a Notice of Removal in the U.S. District Court for the Eastern District of Virginia, along with a Notice of Filing of Notice of Removal in this Court, on April 20, 2019.<sup>1</sup> The Notice of Removal was based on the complete diversity of the parties and what Allstate believed, based on the face of Shao’s pleading, constituted a claim for relief in excess of

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<sup>1</sup> Pursuant to 28 U.S.C. § 1446(b), a notice of removal must be filed within 30 days of service, which would have been April 19, 2021. However, a problem with the District Court’s server prevented filing on April 19, and the Clerk automatically extended all deadlines to the following day. Shao has not contested the timeliness of Allstate’s removal filing.

\$75,000.

On April 26, 2021, Allstate timely filed its Answer and Affirmative Defenses (“Answer”), which was due seven days after its Notice of Removal was filed pursuant to Fed. R. Civ. P. 81(c). It also served Shao with a copy of the Answer via email and via U.S. mail.

Also on April 26, 2021, Shao filed a Memorandum of Law in Support of Motion to Remand in the District Court, denying that the amount in controversy exceeded \$75,000. Then, on May 4, 2021, following a conversation with Allstate’s counsel in which Allstate’s counsel attempted to address potential settlement, Shao filed a Motion to Remand, in support of which he also filed a sworn statement that he is not seeking more than \$70,313.33 in relief from Allstate. On May 10, 2021, Allstate submitted a Response to Shao’s Motion to Remand in which it consented to remand of the parties’ lawsuit. That same day, the District Court granted Shao’s Motion to Remand, sending the case back to this Court.

Shao filed a Motion for Default for Failure to Appear (“Motion”) in this Court on May 19, 2021, and unilaterally set a hearing on the matter for May 28, 2021, despite the fact that he had been in communication with Allstate’s counsel to discuss ongoing proceedings and the merits of his claims. Although the Motion states that Shao sent Allstate’s counsel a copy of the motion on the day of filing, he did not in fact send a copy of the Motion to Allstate’s counsel until May 24, 2021. Allstate asked Shao to withdraw his motion in light of its prior Answer filing, but Shao refused.

To confirm that it has appeared, has answered the allegations in Shao’s Complaint, and is ready to defend its case on the merits before this Court, Allstate re-filed its Answer in this Court on May 25, 2021. Nonetheless, on May 26, 2021, Shao filed “Plaintiff’s Memorandum of Law in Support of His Motion for Default for Failure to Appear.”

## II. ARGUMENT

### A. Legal Standard

Pursuant to Rule 3.19 of the Rules of the Supreme Court of Virginia governing Practice and Procedures in Civil Actions, a defendant who fails to respond to a pleading within 21 days pursuant to Rule 3.8 is in default. However, prior to the entry of judgment, “for good cause show, the court may grant leave to a defendant who is in default to file a late responsive pleading.” Rule 3:19(b).

In evaluating whether “good cause” exists for the court to exercise its discretion to afford relief for a late filing, the court should consider any number of factors under the circumstances, including: “lack of prejudice to the opposing party, the good faith of the moving party, the promptness of the moving party in responding to the opposing parties’ decision to progress with the cause, the existence of a meritorious claim or substantial defense, the existence of legitimate extenuating circumstances, and justified belief that the suit has been abandoned or will be allowed to remain dormant on the docket.” *Yang v. Kim*, 89 Va. Cir. 423, 2015 WL 6395693, at \*2 (Va. Cir. Ct. 2015) (quoting *AME Fin. Corp. v. Kiritsis*, 707 SE2d 820, 824 (Va. 2011)).

These factors should be evaluated in the context of the public policy favoring resolution of cases on the merits, especially where a defendant has acted in good faith in responding to a plaintiff’s filing, and the plaintiff has not shown any prejudice due to a late filing. *See Brown’s Buick, Inc. v. Granite State Ins. Co.*, 78 Va. Cir. 22, 2008 WL 8203214, at \*2 (Va. Cir. Ct. 2008) (concluding that circuit court did not abuse its discretion in allowing brief delay in answer filing where “Defendant’s failure to timely file a responsive pleading was not due to any dilatory tactics on Defendant’s part” and there was no showing of prejudice to plaintiff); *Lennon v. Va. Bd. of Dentistry*, 2007 WL 4523071, at \*2 (Va. Ct. App. Dec. 27, 2007) (exercising discretion to

allow late filing where plaintiff did not present evidence that brief delay “caused a delay of any kind in the remainder of the proceedings”).

Indeed, the Virginia Supreme Court has held that the purpose for Rule 3.8’s answer deadline “is not to cut off the orderly presentation of defenses, or to set a trap for the unwary defendant by which a plaintiff may by delaying the prosecution of his cause cut off the defendant from a full defense or escape the necessity of proving his case.” *Lennon*, 2007 WL 4523071, at \*1 (quoting *Worsham v. Nadon*, 157 S.E. 560, 562 (1931)). Therefore, “when defendants have acted in good faith and have not caused egregious delay, courts should exercise their discretion to allow adjudication on the merits.” *Id.* (quoting *Mack v. Starwood Hotels and Resorts Worldwide, Inc.*, 57 Va. Cir. 390, 393 (Va. Cir. Ct. 2002)); accord *Brown’s Buick*, 2008 WL 8203214, at \*2 (“[I]t is well settled that default judgments are not favored and there is a preference for deciding underlying issues on the merits.”).

**B. Good Cause Exists to Proceed With the Case on the Merits**

In this case, good cause within the meaning of 3:19(b) exists to support continuing with litigation on the merits. Shao has not shown (or even attempted to claim) any prejudice from the brief delay in Allstate’s Answer filing, especially given the fact that Allstate timely filed under the Federal Rules of Civil Procedure and promptly served Shao, giving him notice of Allstate’s asserted defenses.

Allstate has attempted to cooperate to streamline the litigation since then as much as possible, attempting to meet and confer with Shao regarding the amount in controversy and even regarding the merits of the Motion for Default.

Indeed, this case would have moved forward more expeditiously following remand had Shao not filed his Motion in the first place, which now requires the parties to expend time and

resources briefing this secondary issue as opposed to proceeding on the merits. If anything, additional delay and prejudice to Shao has been caused by Shao himself.

Shao cannot in good faith allege that he believes no action will be taken absent a default judgment. Shao has been in contact with Allstate throughout the pendency of this case. Allstate, for its part, has attempted to keep lines of communication open in hopes of resolving the dispute amicably. Meanwhile, Shao is asking the Court to expend time and resources on unnecessary motion practice rather than digging into the merits of his claims. This should not be countenanced, especially in view of the fact that Shao's claims, styled as "Failure to Pay Full TPP Amount" and "Failure to Pay the Portion of the Book, Written By Employee Salespersons," are not actionable claims under Virginia law. Allstate should be afforded the opportunity to appear and defend itself accordingly.

### **III. CONCLUSION**

For the foregoing reasons, Allstate respectfully requests that the Court deny Shao's Motion, enter an Order lifting default, and issue a scheduling order pursuant to which the parties may proceed with litigation of this case on the merits.

*[Signature of Counsel Appears on the Following Page]*

DATED: May 27, 2021

Respectfully submitted,

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\*seeking admission *pro hac vice*

**CERTIFICATE OF SERVICE**

I certify that on May 27, 2021, a copy of the foregoing **Response in Opposition to Motion for Default for Failure to Appear** was emailed and mailed, postage pre-paid, to Plaintiff at the following address:

Paul Shao  
9233 Lee Masey Drive  
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paulyshao@gmail.com

*/s/ Renée B Appel*  
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Renée B. Appel