

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
FOR THE THIRTEENTH JUDICIAL CIRCUIT
CASE NO.: 2025-CP-23-04210

Frank George Rogers, individually and
Derivatively as a member and on behalf of
Exodus Aircraft, LLC,

Plaintiffs,

vs.

Joshua Brett Kimbrell, Liliya Shcherba
Robertson Kimbrell, Exodus Airways, LLC,
Thomas Blake Whitaker,

Defendants.

**DEFENDANT JOSHUA BRETT
KIMBRELL AND LILIYA
SHCHERBA ROBERTSON
KIMBRELL'S RULE 55 MOTION**

Defendants, Joshua Brett Kimbrell and Liliya Shcherba Robertson Kimbrell, and Exodus Airways, LLC (collectively, "Defendants"), by and through their undersigned counsel, move pursuant to Rule 55(c) of the South Carolina Rules of Civil Procedure ("SCRCP") to set aside the Entry of Default entered against them on September 28, 2026.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

South Carolina appellate courts have repeatedly emphasized that cases should be resolved on their merits whenever reasonably possible. Consistent with that principle, the striking of pleadings, the entry of default, or any sanction that effectively terminates a party's ability to litigate its claims or defenses is among the most severe sanctions available to a trial court. Such extraordinary relief is reserved only for the rare case involving deliberate, willful, and bad-faith

disregard of the judicial process, not ordinary discovery disputes, substantial compliance, or procedural deficiencies that can be remedied through lesser means.

This is not such a case.

From the inception of this litigation, Defendants have consistently demonstrated their intent to defend this action, as well as their intent to prosecute their claims for damages against Plaintiffs. Prior to the commencement of formal discovery, Defendants voluntarily produced documents and information in an effort to facilitate the litigation. However, following entry of a consent temporary restraining order, Defendants were unable to access their email accounts, paperwork, financial accounts, and other records necessary to respond to Plaintiff's discovery requests. However, Plaintiffs filed a Motion to Compel Discovery Responses, which the Court heard in April, and made an Order on May 5, 2026 ("The May 5, 2026, Order"). Notably, since the entry of this Order, Defendants have complied with their discovery obligations and have now produced all responsive documents within their possession, custody, or control. More importantly, it has recently come to Defendants' knowledge that Plaintiffs already possessed this information that was requested in the May 5, 2026 Order, as Plaintiffs filed it on the public index in a very similar Spartanburg case, and failed to inform this Court or the Defendants of their possession of these documents.

The May 5, 2026, Order required Defendants to comply with specified discovery obligations by noon on May 18, 2026, or Defendants' answer and counterclaims would be struck without any further judicial determination as required by South Carolina Courts to evaluate compliance, willfulness, prejudice, or the appropriateness of lesser sanctions. Notably, Defendant Josh Kimbrell was constitutionally protected by legislative immunity during the period in which the Court required discovery compliance. Nevertheless, even though Defendants

have produced all discovery in their possession, including discovery that Plaintiffs already had in their possession, the Court has, without further interpretation, entered default against Defendants on September 28, 2026. This is the shortened facts for this Court's consideration.

LEGAL STANDARD

South Carolina policy “favor[s] the disposition of issues on their merits rather than on technicalities.” *Micronics, Inc. v. S.C. Dep’t of Revenue*, 345 S.C. 506, 511, 548 S.E.2d 223, 226 (Ct. App. 2001). To that end, the Court may set aside an entry of default “for good cause.” SCRCP 55(c). Rule 55(c) is to be “liberally construed to promote justice. . . .” *Melton v. Olenik*, 379 S.C. 45, 47, 664 S.E.2d 487, 488 (Ct. App. 2008). “[T]his element of discretion given to the trial judge makes it clear the party requesting a judgment by default is not entitled to one as of right, even when the defendant is technically in default.” *Ricks v. Weinrauch*, 293 S.C. 372, 374-75, 360 S.E.2d 535, 536 (Ct. App. 1987). Rule 55(c) simply requires a party seeking relief from an entry of default to provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice. *Id.* Once a party has put forth a satisfactory explanation for the default, the trial court must also consider: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted. *Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 465, 381 S.E.2d 499, 501–02 (Ct. App. 1989). As previously discussed, the court’s consideration of these factors is to be “liberally construed” to promote justice and, perhaps more importantly, dispose of cases on the merits rather than on a technicality. *See generally Bage v. Southeastern Roofing Co. of Spartanburg, Inc.*, 373 S.C. 457, 471, 646 S.E.2d 153, 160 (Ct. App. 2007), *cert. granted* (Mar. 20, 2008). In short, “[r]elief granted at the point of entry of default is within the equitable power of the court and excuses previous failure to act promptly.” *Ricks*, 293 S.C. at 374, 360 S.E.2d at 536.

It is important to note that the Defendant is not subject to the more rigorous excusable neglect standard promulgated under SCRCP Rule 60(b), as default judgment has not yet been entered. *Lolatchy v. Arthur Murry, Inc.*, 816 F.2d 951, 953 (4th Cir. 1987). In fact, South Carolina courts have taken nearly every opportunity to reassert the basic legal premise that the standard for granting relief under Rule 60(b) is far more rigorous than under Rule 55(c), and that an entry of default may be set aside for reasons that would be insufficient to relieve a party from a default judgment. *Sundown Operating Co. v. Intedger Indus., Inc.*, 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009).

As the foregoing authority makes clear, this Court has the discretion to set aside an entry of default and may utilize its equitable powers and inherent interest in the administration of justice as the means by which to do so.

ARGUMENT

I. Vacation of Default would Serve in the Interests of Justice

The Entry of Default did not arise from Defendants' failure to appear, answer, or participate. Defendants appeared, filed pleadings, asserted defenses and counterclaims, participated in proceedings and depositions, and produced responsive materials. The Entry of Default instead arose from a dispute over whether Defendants fully complied with a discovery deadline and from the treatment of the May 5 Order as automatically striking their pleadings.

Defendants' inability to produce all requested materials by the deadline arose from Defendant Josh Kimbrell's constitutional protection from legal process while serving as a member of the South Carolina General Assembly. The South Carolina Constitution provides that members of both houses are "protected in their persons and estates" while attending, traveling to, and returning from the General Assembly, as well as for ten days before the session and ten days

after adjournment. S.C. Const. Ann. art. III, § 14. This protection is not merely a procedural accommodation; it reflects the constitutional recognition that legislators must be able to perform their legislative duties without interference from civil litigation or compulsory legal process that could distract from or impede those duties. *Id.*

At the time this Court entered the May 5 Order, Defendant Kimbrell was actively serving in legislative session. Legislative session continued until May 22, 2026, and the constitutional protections afforded under Article III, Section 14 remained in effect throughout the period in which the Court required compliance. Thus, the May 18 deadline expired before Defendant's constitutional protection had ended.

However, as soon as Defendants were outside of the constitutional protection and aware of the deficiency, they made every effort and produced all documents available to them and responsive to Plaintiffs' discovery requests. Nonetheless, the Court entered default against Defendants without finding that their failure to comply with the discovery deadline was willful.

The good-cause standard requires an explanation for the default and reasons why vacating the entry would serve the interests of justice. *Sundown Operating Co. v. Intedger Indus.*, 383 S.C. 601, 608 (2009). Defendants' continued participation, production efforts, access limitations, and corrective actions provide that explanation. Setting aside the Entry of Default would serve the interests of justice by permitting the parties' disputed claims, defenses, and counterclaims to be decided on their merits while preserving the Court's ability to remedy any specifically identified discovery deficiency.

II. Defendants satisfy the *Wham* Factors

a. The Timing of this Motion favors relief

The first Rule 55(c) factor is the timing of the motion for relief. *Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 465 (1989). Defendants learned of the Entry of Default on September 28, 2026 and filed this motion on October 13, 2026, approximately two weeks later. Defendants did not abandon the litigation, disregard the proceedings, or delay seeking relief for tactical advantage. They appeared, filed an Answer and Counterclaims, participated in the case, and took steps to address the discovery issues underlying the default. Their prompt effort to restore their pleadings reflects a continuing intent to defend against Plaintiffs' allegations and resolve the parties' disputes on the merits.

Because Defendants acted promptly and seek relief while the case remains at the entry-of-default stage, this factor weighs strongly in favor of setting aside the Entry of Default.

b. Defendants Have Alleged and Provided Evidence of Meritorious Defenses

A meritorious defense requires a "proffer of evidence which would permit a finding for the defaulting party or which would establish a valid counterclaim." *Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp.*, 843 F.2d 808, 811-12 (4th Cir. 1988).

The existence of a meritorious defense is a critical consideration under Rule 55(c), SCRCF, because default should not substitute for adjudication where the pleadings reveal substantial disputes concerning liability. A defendant seeking to set aside an entry of default need not establish that its defenses will ultimately prevail. Rather, the defendant must demonstrate that its defenses present a legitimate basis for judicial inquiry and that the outcome of the litigation may differ if the case proceeds on its merits. *Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 465 (1989). Defendants meet this standard because the pleadings reveal substantial factual and legal disputes concerning the parties' respective conduct, financial transactions, and obligations.

Plaintiffs allege that Joshua Kimbrell diverted more than \$2 million in Company funds for personal use and improperly redirected Company assets. Defendants deny these allegations and dispute the nature, purpose, authorization, and disposition of the challenged transactions. The Membership Interest Purchase Agreement identifies Kimbrell as the Company's Accountable Manager for purposes of its federal aviation certification, further supporting the need to examine his operational authority and the circumstances surrounding the disputed transactions. Whether particular expenditures were legitimate business expenses or improper diversions presents a factual question that should be resolved on the merits.

Defendants' counterclaims further demonstrate that the parties' disputes extend beyond Plaintiffs' allegations. Defendants allege that Rogers breached fiduciary duties by failing to participate in Company operations, engaging in self-dealing, and refusing to communicate with Kimbrell and investors, thereby harming the Company and depriving it of funds and business opportunities. They also allege that Rogers converted identifiable Company funds for personal use or unrelated expenses without authorization. These competing allegations present material factual disputes concerning each party's conduct and financial responsibilities.

Finally, Defendants allege that Rogers made false oral and written statements accusing Joshua and Liliya Kimbrell of theft, conversion, breaches of duty, and intentionally damaging the business. Defendants contend those statements were defamatory and harmed their reputations. Taken together, the Complaint's disputed allegations and Defendants' denials and counterclaims establish substantial questions of fact and law that should not be resolved by default. Defendants have demonstrated meritorious defenses sufficient to satisfy Rule 55(c) and warrant an opportunity to litigate the case on its merits.

c. Plaintiff Would Not Suffer Prejudice If Relief Were Granted

Whether a nonmoving party would be prejudiced by the setting aside of an entry of default has been scarcely addressed with any specificity in the courts of South Carolina; however, in the instances where the degree of prejudice to the nonmoving party has been measured in the context of a motion to set aside entry of default, our courts tend to make such determinations on the basis of whether “further delay” would in some way prejudice the opposing party. *Wilder v. Blue Ribbon Taxicab Corp.*, 396 S.C. 139, 143, 719 S.E.2d 703, 705 (Ct. App. 2011).

In analyzing this method of review, the Fourth Circuit has found that in the context of a motion to set aside an entry of default, as in other contexts, delay in and of itself does not constitute prejudice to the opposing party. *Colleton Preparatory Acad., Inc. v. Hoover Universal, Inc.*, 616 F.3d 413, 419 (4th Cir. 2010); *See also, e.g., Indigo America, Inc. v. Big Impressions, LLC*, 597 F.3d 1, 4 (1st Cir.2010).

Other federal circuits have addressed this issue much more directly, holding that “[p]rejudice does not arise from the fact that the defaulting party will be permitted to defend the litigation on the merits.” *Emmons v. Emmons*, 349 B.R. 780, 789 (W.D. Mo. 2006). Rather, the court's grant of a motion to set aside entry of default must prejudice the nonmoving party in a more concrete way, such as loss of evidence, increased difficulties in discovery, or greater opportunities for fraud or collusion. *See Johnson v. Dayton Electric Mfg. Co.*, 140 F.3d 781, 785 (8th Cir. 1998).

This factor highly favors Defendants. Defendants contend that Plaintiff already possessed at least some of the materials underlying the alleged deficiencies, including materials obtained or filed in a separate Spartanburg County action; additionally, all documents in Defendants’ possession have since been provided to Plaintiffs and their counsel and Defendants are unable to

secure additional discovery documents due to the consent TRO denying his access to the company or any emails or records requested. Plaintiffs now have all documents in Defendants' possession; therefore, restoring Defendants' pleadings will not impair Plaintiffs' ability to prepare or present their claims on the merits.

Continued litigation alone does not establish case-specific prejudice. *Emmons v. Emmons*, 349 B.R. 780, 789 (W.D. Mo. 2006). Here, Plaintiff's ability to litigate can be fully protected through a focused remedy directed to any material discovery that remains outstanding. By contrast, leaving the Entry of Default in place would extinguish Defendants' defenses and counterclaims without adjudication on the merits. Because Rule 55(c) should be liberally construed to promote justice and resolve cases on their merits, the absence of unfair prejudice supports setting aside the Entry of Default. *Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 465, 381 S.E.2d 499, 501–02 (Ct. App.1989).

CONCLUSION

For the foregoing reasons, Defendants Joshua Brett Kimbrell and Liliya Shcherba Robertson Kimbrell respectfully request that this Court grant their Motion to Set Aside Entry of Default.

Respectfully submitted
this 13th day of October, 2026

TRULUCK THOMASON, LLC

s/ Kimberly Thomason

Kimberly Thomason

S.C. Bar No.: 79179

s/Adrienne A. Tauscheck

Adrienne A. Tauscheck

S.C. Bar No.: 107081

3 Boyce Avenue

Greenville, South Carolina 29601

Phone and Fax: (864) 331-1751

kim@truluckthomason.com
adrienne@truluckthomason.com

Attorneys for Defendants

FITSNEWS