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**UNITED STATES DISTRICT COURT DISTRICT OF UTAH  
CENTRAL DIVISION**

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UNITED STATES OF AMERICA,

Plaintiff,

v.

XLEAR, INC., a corporation and NATHAN  
JONES, individually and as an officer of  
XLEAR, INC.,

Defendants.

**PLAINTIFF'S OPPOSITION TO  
MOTION FOR LEAVE TO FILE  
MEMORANDUM OF *AMICUS*  
CURIAE ALLIANCE FOR NATURAL  
HEALTH USA**

Case No. 2:21-cv-00640-RSJ-DBP

Chief Judge Robert J. Shelby

Chief Magistrate Judge Dustin B. Pead

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The Alliance for Natural Health (“ANH”) has filed an untimely motion seeking leave to participate in this litigation as *amicus curiae* in support of Defendants’ motion for judgment on the pleadings. In its motion, ANH does not dispute that the deadline for the submission of *amicus curiae* motions in this case was October 14, 2024, and does not claim to have been unaware of this deadline before it passed. Nonetheless, ANH did not meet the deadline or seek a timely extension. Instead, ANH waited until November 8, 2024—25 days later—to seek leave to file.

ANH’s untimely motion does not attempt to explain, much less justify, its disregard of the Court’s deadline. In fact, ANH’s brief never even acknowledges that, pursuant to Federal Rule of Civil Procedure 6(b)(1)(B), which governs requests for extensions filed after a deadline has passed, it bears the burden to show both “good cause” and “excusable neglect” for its late filing. ANH’s failure to make these required showings is a sufficient reason to deny its motion.

Beyond its untimeliness and failure to comply with Rule 6(b), there are additional, independent reasons to deny ANH’s motion.

First, ANH’s assertion that no prejudice will result from its late filing is wrong. By holding back its motion until the day before the United States’ Opposition Brief was due, ANH ensured the United States lacked the time to fully consider and respond to its arguments. In addition, discovery shows that ANH is working with Defendants through shared counsel. Significant prejudice will result if Defendants are permitted to have Xlear’s former counsel and Board Member submit briefs under the guise of an independent *amicus curiae*.

Second, as detailed below, ANH’s proposed brief is “not useful in the determination of the case,” appears to be “an effort by a party to circumvent the length limits of the local rules,” and otherwise fails to comply with applicable local rules. *See* DUCivR 7-6(f).

**I. ANH’S UNTIMELY AND PREJUDICIAL FILING IS NOT JUSTIFIED BY “GOOD CAUSE” OR “EXCUSABLE NEGLIGENCE.”**

ANH’s motion presumes that, in order to justify its weeks-long disregard for the Court’s deadline to seek participation as *amicus curiae*, it need only show a lack of resulting prejudice. *See* Mot. at 4 (citing DUCivR 7-6(e)(3)). That is not the case. Local Rule 7-6(e)(3) only permits modification of the *amicus* deadline “upon a showing of good cause.” DUCivR 7-6(e)(3). And where, as here, a party has waited until “after . . . time has expired” to request an extension from the Court, even more is required. Fed. R. Civ. P 6(b)(1)(B). Specifically, the party seeking to excuse its non-compliance must show: (1) that there was “good cause” for the delay, and (2) that they “failed to act because of excusable neglect.” *Id.* The failure to make either showing justifies denial of the motion. *Ion Solar LLC v. Maya*, 2024 WL 916238, at \*2 (D. Utah Mar. 4, 2024).

**A. ANH Has Not Shown “Good Cause” for its Delay.**

To establish good cause to excuse compliance with a Court deadline that has already passed, a movant must show that it could not have met the deadline “despite . . . diligent efforts.” *PNHC, LLC v. N. Park Enterprises, LC*, 2022 WL 6161278, at \*2 (D. Utah Oct. 7, 2022) (quotation omitted). In evaluating whether good cause exists, the Court “focus[es] . . . on the diligence of the party seeking leave to modify the schedule.” *Gelt Trading, Ltd. v. Co-Diagnostics, Inc.*, 2023 WL 6690574, at \*3 (D. Utah Oct. 12, 2023).

Far from making a showing of good cause, ANH is entirely silent as to why it did not file either its motion for leave or a motion to extend the time to file by the October 14 deadline.<sup>1</sup> ANH is equally silent as to why it subsequently delayed filing its motion for leave for more than three weeks after the October 14 deadline passed. Given ANH's failure to show good cause, the Court should deny ANH's untimely motion. *See, e.g., PNHC*, 2022 WL 6161278, at \*4 (finding no good cause where the moving party "provides no explanation as to why it could not have" complied with the deadline); *Gallacher v. Falenla.com*, 2020 WL 4904081, at \*3 (D. Utah Aug. 20, 2020) (finding no good cause where moving party "fail[ed] to describe efforts to meet the deadlines").

**B. ANH Has Not Shown "Excusable Neglect" for its Delay.**

In assessing whether excusable neglect exists to justify a party's failure to abide by a Court-ordered deadline, the Court considers four factors: (1) "the danger of prejudice" to the non-moving party; (2) "the length of delay and its potential impact on judicial proceedings;" (3) "the reason for the delay, including whether it was within the reasonable control of the movant; and (4) "whether the movant acted in good faith." *Perez v. El Tequila, LLC*, 847 F.3d 1247, 1253 (10th Cir. 2017).

Here, all factors favor the United States and warrant denying ANH's motion.

**Prejudice.** Contrary to ANH's claim (Mot. at 4), the United States will be prejudiced if ANH's untimely motion for leave is granted for at least two reasons. First, ANH filed the motion for leave only one business day before the United States' Opposition Brief was due. This delay

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<sup>1</sup> On October 11, counsel for Defendants first referenced an unidentified amicus potentially interested in filing in connection with their motion that may require additional time. But ANH did not contact the United States about its proposed brief until October 25. Counsel met and conferred on October 29, and the following day, Plaintiff informed ANH that it had not demonstrated reason to modify the filing deadline and would oppose its belated extension request.

ensured that the United States was unable to fully consider and respond to ANH's arguments in its Opposition Brief.<sup>2</sup> Second, as explained in more detail as related to the fourth factor of "good faith," *see infra* pp. 5-6, there is significant evidence that ANH is not operating independently, but instead as an extension of Defendants. The interrelation between ANH and Defendants shows that ANH's proposed *amicus curiae* brief is, in reality, a vehicle for Defendants to submit further briefing. That is prejudicial.

***Length of Delay.*** ANH's decision to wait until 25 days after the October 14 deadline before filing its motion for leave is a significant delay, particularly where ANH has offered no explanation for its failure to abide by the Court's deadline.

***Reason for the Delay.*** The Tenth Circuit has made clear that, in evaluating whether excusable neglect exists, Courts should treat the third factor—*i.e.*, the reason for the delay—as "[t]he most important." *Perez*, 847 F.3d at 1253. "[A]n inadequate explanation for delay may, by itself, be sufficient to reject a finding of excusable neglect" even where all other factors favor the moving party. *Id.*; *see also PNHC*, 2022 WL 6161278, at \*3 ("[C]onsideration of the third factor, by itself, directs the conclusion that [the moving party] fails to establish excusable neglect."); *Gelt Trading*, 2023 WL 6690574, at \*2 (same). Here, ANH has not offered any explanation for its delay of over three weeks. This lack of justification is fatal to ANH's request. *See, e.g., Birch, ex*

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<sup>2</sup> ANH suggests (Mot. at 4) that the United States could have simply sought an extension of its briefing deadline. But because ANH chose to wait so long to file its motion, that possibility was no longer practically available. ANH left only one business day for (1) the United States to confer with Defendants and prepare and file such a request—while it was also finalizing its opposition brief—and (2) for the Court to review and act upon the motion before the United States's opposition brief was due. ANH's argument also ignores that any such extension would have required a reciprocal extension of Defendants' reply brief deadline, ultimately slowing down the progress of this long-pending litigation.

*rel. Birch v. Polaris Indus. Inc.*, 2015 WL 1280051, at \*6 (D. Utah Mar. 20, 2015) (finding that plaintiff “failed to establish excusable neglect” where they gave “no adequate explanation for the four month delay”); *Johnson v. City of Murray*, 2012 WL 5194025, at \*2 (D. Utah Oct. 19, 2012) (“Defendants fail to provide any legitimate reason why they . . . [could not have sought leave to amend] before the amendment deadline and have thus failed to show excusable neglect.”).

**Good Faith.** There is ample reason for the Court to conclude that ANH’s delay of more than three weeks—and its decision to ultimately file its motion for leave only one business day prior to the due date for the United States’ Opposition Brief—was a strategic decision not done in good faith. Discovery makes apparent that ANH has been actively discussing this litigation, and the related FTC investigation, with Defendants for years. As early as 2021, ANH’s Board of Directors was discussing Xlear’s “efforts with the FTC,” and an ANH Director told Defendant Nathan Jones that the ANH board was “receptive to supporting Xlear and messaging through our outreach.” Ex. 1 (Xlear00095027); *see also* Ex. 2 (Xlear0009933) (ANH Director writing to Defendant Nathan Jones to ask about “your situation with the FTC” and informing him that “maybe we can help you [with the FTC] if you want our support”). Defendant Nathan Jones has also tried to use ANH as a front for Xlear’s advocacy, suggesting that he would fund and shadow-write an article for ANH to publish, because “coming from your group it would be looked at better than coming from Xlear.” Ex. 3 (Xlear00230768). Moreover, counsel for ANH were, until June of this year, representing Defendants in this litigation. *Compare* Mot. at 1 (listing Kenneth A. Okazaki and Michael E. Harmond as ANH’s counsel), *with* ECF No. 129 (June 3, 2024, Substitution of Counsel) (noting Okazaki and Harmon’s withdrawal as counsel for Defendants). Counsel for ANH has also served as a longstanding member of Xlear’s Board of Directors and

operates a company that is a current Xlear shareholder.<sup>3</sup> In light of ANH's close relationship with Defendants and shared counsel on this case, there is ample reason to conclude that it knew about the October 14 deadline before it passed and, tellingly, nowhere in ANH's brief does it claim otherwise. Accordingly, ANH's failure to meet the deadline and to wait to file until the last business day before the United States' brief was due exhibits a lack of good faith.

**II. ANH'S MOTION FOR LEAVE IS PROPERLY DENIED PURSUANT TO DUCivR 7-6(f).**

Even if ANH's motion had been timely, it should be denied pursuant to DUCivR 7-6(f), which provides that the Court may "prohibit the filing" of an *amicus curiae* brief where that brief: (1) "merely restates the arguments of a party," (2) "is not useful in the determination of the case," (3) "is an effort by a party to circumvent" page-length limits, or (4) "otherwise violates" the District of Utah Local Rules.

Here, the Court can properly deny ANH's motion for any or all of these four reasons.

The vast majority of ANH's proposed brief merely reiterates arguments already made by Defendants in their motion, including arguments regarding the statutory basis for the FTC's restriction of unsubstantiated disease claims and straw-man arguments about the Complaint's supposed "sole reliance presumptive absence of two supported randomized clinical trials." *See* Mot. at 3-4 (ANH describing the contents of its proposed brief).

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<sup>3</sup> *See* Ex. 4 (N. Jones Dep. Tr., *Craig v. Xlear*, 16-cv-00392-DB (D. Utah), ECF No. 108-1) at 10:16-23 (testifying that Mr. Okazaki joined Xlear's board in 2015); Ex. 5 (N. Jones (30(b)(6)) Dep. Tr.) at 17:4-10 (testifying in this case that Mr. Okazaki operates the company Academy Capital, LLC); Ex. 6 (excerpt of Xlear's Amended and Restated Response to the Government's First Set of Interrogatories (Aug. 9, 2022) at 3-4 (identifying Academy Capital, LLC as a Xlear shareholder).

To the extent that ANH's proposed brief offers anything new, it is only a discussion of what ANH purportedly believes is "scientific evidence supporting the effectiveness of nasal rinses and nasal cleaners in reducing the risk of and mitigating COVID-19 infections." *Id.* at 3. But this argument is "not useful" to the Court given the procedural posture of Defendants' motion, filed under Rule 12(c). In resolving a motion for judgment on the pleadings, the Court is required to take all allegations in the Complaint as true and to defer considerations that go to the weight of the parties' competing evidence. *See M.S. v. Premera Blue Cross*, 2020 WL 1692820, at \*2 (D. Utah Apr. 7, 2020). Accordingly, ANH's belief as to the utility of nasal rinses and whatever evidence ANH claims supports that belief are not relevant at this stage of the litigation.

Moreover, in light of the extensive coordination between ANH and Xlear, including having a member of Xlear's Board of Directors and Xlear's former counsel draft ANH's brief, *see supra* at pp. 5-6, it is apparent that granting ANH's motion would effectively permit Defendants to conduct an end-run around their page limits and existing briefing deadlines. Indeed, ANH's proposed brief notably omits the disclosures required by DUCivR 7-6(d)—*i.e.*, disclosure of whether "a party's counsel authored the memorandum" and whether "a party or party's counsel contributed money" to prepare the memorandum. *See* ECF No. 158-1. This omission is further evidence of ANH's lack of independence. It is also a failure to abide by the District of Utah's local rules and, therefore, an independent basis on which to deny ANH's motion for leave. *See* DUCivR 7-6(f).

### CONCLUSION

For the reasons stated above, ANH's motion for leave should be denied.



DATED this 15th day of November 2024.

Respectfully submitted,

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