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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

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Capitol Records, Inc., et al.,

) No. CV 06-1124-PHX-JAT

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Plaintiffs,

) **ORDER**

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vs.

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Debra Weed,

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Defendant.

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Pending before the Court is Plaintiffs' Motion to Set Aside Judgment Dismissing Case (Doc. #10). The Court now rules on the motion.

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**I. PROCEDURAL BACKGROUND**

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Plaintiffs filed their Complaint against Defendant Debra Weed on April 21, 2006. Summons to Ms. Weed was returned executed on May 18, 2006. Plaintiffs took no further action in this case until they filed the pending motion. On September 8, 2006, the Court ordered Plaintiffs to appear on Monday, September 19, 2006 at 11:00 a.m. to show cause as to why the Court should not dismiss the action for failure to prosecute. (Doc. #7). Plaintiffs' counsel failed to appear for that hearing. The Court therefore dismissed the action for failure to prosecute on September 18, 2006. (Doc. #8). Plaintiffs filed their pending Motion to Set Aside Judgment the next day. Defendant has not opposed the motion. Local Rule of Civil Procedure 7.2(i) provides that the Court may deem a failure to respond to a motion as consent to granting the motion.

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1 **II. LEGAL STANDARD AND ANALYSIS**

2 Rule 60(b)(1) allows a court to relieve a party or a party's legal representative from  
3 a final judgment on the basis of mistake, inadvertence, surprise, or excusable neglect. *TCI*  
4 *Group Life Ins. Plan v. Knoebber*, 244 F.3d 691, 695 (9<sup>th</sup> Cir. 2001). The Court applies the  
5 "good cause" standard that governs vacating an entry of default under Rule 55(c) when ruling  
6 on a motion to vacate a default judgment under Rule 60(b). *Id.* at 696. Specifically, the  
7 Court examines whether: (1) the defaulting party acted with "excusable neglect";<sup>1</sup> (2) the  
8 plaintiff has a meritorious case;<sup>2</sup> and (3) reopening the default judgment would prejudice the  
9 non-defaulting party. *See id.*

10 "Excusable neglect" covers negligence on the part of counsel. *Pioneer Inv. Servs. Co.*  
11 *v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 394 (1993). The determination of whether  
12 neglect is excusable is an equitable one that depends on at least four factors: (1) the danger  
13 of prejudice to the opposing party; (2) the length of the delay and its potential impact on the  
14 proceedings; (3) the reason for the delay; and (4) whether the movant acted in good faith.  
15 *Bateman v. U.S. Postal Serv.*, 231 F.3d 1220, 1223-24 (9<sup>th</sup> Cir. 2000). These factors are not  
16 exclusive, but "provide a framework with which to determine whether missing a filing  
17 deadline constitutes 'excusable' neglect." *Briones v. Riviera Hotel & Casino*, 116 F.3d 379,  
18 381 (9<sup>th</sup> Cir. 1997).

19 "To be prejudicial, the setting aside of a judgment must result in greater harm than  
20 simply delaying resolution of the case." *TCI*, 244 F.3d at 701. Courts must determine  
21 whether setting aside the default judgment would hinder the defendant's ability to pursue his  
22 defense. *See id.* Defendant has not argued that granting the motion will prejudice her. The

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24 <sup>1</sup>The *TCI* court held, "A showing of lack of culpability sufficient to meet the Rule  
25 55(c) good cause standard is ordinarily sufficient to demonstrate as well the excusable  
26 neglect or mistake criteria under Rule 60(b)(1), and there is therefore no reason to require  
27 that those 60(b)(1) criteria be established separately." 244 F.3d at 698 (internal quotations  
28 omitted).

<sup>2</sup>In *TCI*, the circuit court entered default judgment against the defendant, so the Court  
examined whether the defendant had a meritorious defense. 244 F.3d at 700-01.

1 prejudice factor therefore weighs in favor of Plaintiffs. Additionally, Plaintiffs filed their  
2 motion the day after the Court dismissed the case. This slight delay could have no impact  
3 on the proceedings.

4 Plaintiffs' counsel believes that a calendaring error on his part or the part of his staff  
5 caused him to miss the September 18, 2006 status hearing.<sup>3</sup> For whatever reason, the hearing  
6 was not on his calendar for that day. The Court does not believe Plaintiffs' counsel acted in  
7 bad faith in missing the hearing. The Court finds, based on an analysis of the four *Pioneer*  
8 factors, that Plaintiff acted with excusable neglect.

9 The Court has little basis for determining the second 60(b) factor -whether Plaintiffs  
10 have a meritorious case. Because Defendant has not responded to the motion, the Court will  
11 assume this factor weights in favor of Plaintiffs. As to the third factor, the Court already has  
12 held that reinstatement of the case would not cause prejudice to Defendant. Because the  
13 Court has found Plaintiffs acted with excusable neglect and that reinstatement will not  
14 prejudice Defendant, the Court will grant Plaintiffs' motion for relief. But the Court strongly  
15 cautions Plaintiffs to comply with all future Court orders and deadlines.

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20 Accordingly,

21 IT IS ORDERED GRANTING Plaintiffs' Motion to Set Aside Judgment Dismissing  
22 Case (Doc. #10).

23 IT IS FURTHER ORDERED that the Clerk of the Court shall vacate the Judgment  
24 of Dismissal (Doc. #9) and reinstate the case.

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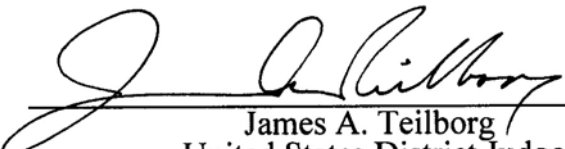
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27 <sup>3</sup>Plaintiffs' counsel does not offer any reasons why Plaintiffs took no action for over  
28 four months on the case, which prompted the show cause hearing.

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IT IS FURTHER ORDERED that Plaintiff shall file a status report within thirty days of the date of this Order.

DATED this 26<sup>th</sup> day of June, 2007.

  
James A. Teilborg  
United States District Judge