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7 **UNITED STATES DISTRICT COURT**
8 **FOR THE EASTERN DISTRICT OF CALIFORNIA**

9 FRESNO ROCK TACO, LLC, et al.,

CASE No. 1:11-cv-00845-SKO

10 Plaintiffs,

11 v.

**ORDER GRANTING DEFENDANT'S
MOTION FOR AN EXTENSION OF
TIME TO FILE AN AMENDED
NOTICE OF APPEAL**

12
13 NATIONAL SURETY CORPORATION,

(Doc. 394)

14 Defendant.
15 _____/

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17 This case proceeded to trial on August 6, 2014, and the jury reached a verdict in favor of
18 Plaintiffs on August 22, 2014. (Doc. 364.) Judgment was entered on August 25, 2014. (Doc.
19 368.) The parties each filed motions to amend the judgment on September 22, 2014 (Docs 375,
20 376) and on September 23, 2014, while those motions to amend the judgment were pending,
21 National Surety Corporation (National) filed a Notice of Appeal. (Doc. 378.)

22 On October 24, 2014, the United States Court of Appeals for the Ninth Circuit issued an
23 order noting that its docket reflected that a notice of appeal was filed during the pendency of a
24 timely filed motion listed in Federal Rule of Appellate Procedure 4(a)(4). The Notice of Appeal
25 therefore was ineffective until entry of the order by the district court disposing of the last
26 outstanding post-judgment motion. All appellate proceedings other than mediation were held in
27 abeyance pending the district court's resolution of the pending motions to amend the judgment.

1 (Doc. 388.) The Ninth Circuit also instructed that, "[t]o appeal the district court's ruling on the
2 post-judgment motion, appellant must file an amended notice of appeal within the time
3 prescribed by Federal Rule of Appellate Procedure 4." (Doc. 388.)

4 On January 9, 2015, this Court issued a decision on the parties' motions to amend the
5 judgment. (Doc. 392.) An amended judgment was entered in favor of Plaintiffs. (Doc. 394.)
6 Any amended notice of appeal was to be filed on or before February 9, 2015.

7 On February 11, 2015, National filed a motion seeking leave to file a late amended
8 notice of appeal pursuant to Fed. R. App. P. 4(a)(5). (Doc. 394.) No opposition to the motion
9 was filed.

10 A notice of appeal must be filed within thirty days from the date of entry of judgment.
11 Fed. R. App. P. 4(a)(1). If a party files a motion to alter or amend the judgment pursuant to
12 Federal Rule of Civil Procedure 59, the time to file a notice of appeal runs for all parties from
13 the entry of the order disposing of the motion under Rule 59. Fed. R. App. P. 4(a)(4)(A). The
14 Court may grant an extension of time to file an appeal upon a showing of good cause or
15 excusable neglect if the motion seeking the extension is filed no later than thirty days after the
16 thirty-day period in Rule 4(a) expires. Fed. R. App. P. 4(a)(5)(i).

17 Here, National claims its failure to timely file an amended notice of appeal is
18 attributable to excusable neglect and there is good cause to extend the deadline. Counsel for
19 National was on paternity leave until February 2, 2015, and was still involved in the duties of
20 being a new parent and a backlog of accumulated work. As such, counsel did not realize until
21 February 11, 2015, that he had failed to file the amended notice of appeal from the January 9,
22 2015, order and amended judgment.

23 In analyzing whether a party's neglect was excusable for purposes of Rule 4(a), courts
24 are to apply the test articulated by the Supreme Court in *Pioneer Inv. Servs. Co. v. Brunswick*
25 *Assocs. Ltd. P'ship*, 507 U.S. 380 (1993). *Pincay v. Andrews*, 389 F.3d 853, 855 (9th Cir. 2004)
26 (en banc). Pursuant to *Pioneer*, the court is to consider (1) "the danger of prejudice to the [non-

1 moving party]"; (2) "the length of delay and its potential impact on judicial proceedings"; (3)
2 "the reason for the delay, including whether it was within the reasonable control of the movant";
3 and (4) "whether the moving party's conduct was in good faith." 507 U.S. at 395; *see also*
4 *Mendez v. Knowles*, 556 F.3d 757, 765 (9th Cir. 2009).

5 National's motion was timely, and the Court finds National has shown excusable neglect
6 in failing to file a notice of appeal within thirty days from entry of the Court's order on the
7 parties Rule 59 motions. Fed. R. App. P. 4(a)(5)(A)(ii). Allowing National a limited extension
8 of time to appeal will not cause any additional prejudice or impact judicial proceedings, as the
9 motion was filed only two days after the time to file an amended notice of appeal had expired,
10 and the amended notice of appeal will be filed within 10 days from the date of this order.
11 Further, there is no indication from the record that the reason for the delay was due to anything
12 other than excusable neglect or that National failed to act in good faith. *Pincay*, 389 F.3d at 859
13 (excusable neglect encompasses situations in which the failure to comply with the deadline is
14 attributable to negligence, and includes omissions caused by carelessness).

15 Accordingly, National's motion for an extension of time to file an amended notice of
16 appeal is HEREBY GRANTED. **Pursuant to Rule 4(a)(5)(C), National is cautioned that its**
17 **notice of appeal MUST BE filed within 10 days from the date of this order.**

18 IT IS SO ORDERED.
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20 Dated: February 27, 2015

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE