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UNITED STATES DISTRICT COURT

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EASTERN DISTRICT OF CALIFORNIA

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DIANA McMENEMY, an
individual, and MICHAEL
McMENEMY, an individual,

No. 2:14-cv-001482 JAM AC

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Plaintiffs,

**ORDER DENYING PLAINTIFF'S MOTION
FOR RELIEF UNDER FRCP 60(B)(1)**

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v.

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COLONIAL FIRST LENDING GROUP,
INC., a Utah corporation,
COLONIAL FIRST BUSINESS
DEVELOPMENT, LLC, a Utah
limited liability company,
DEVIN JONES, an individual,
FLAGSHIP FINANCIAL GROUP,
LLC, and DOES 1 through 10,

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Defendants.

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This matter is before the Court on Plaintiffs Diana McMenemy
and Michael McMenemy's ("Plaintiffs") Motion for Relief (Doc.
#43) from the Court's August 25, 2014 Order (Doc. #40) under Rule
60(b)(1) of the Federal Rules of Civil Procedure ("FRCP").

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Defendant Colonial First Lending Group, Inc. ("Defendant" or

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"CFLG") opposes Plaintiffs' motion (Doc. #45). Plaintiffs filed

1 a reply (Doc. #47). For the following reasons, Plaintiffs'
2 motion is DENIED.¹

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4 I. OPINION

5 On August 20, 2014 the Court held a hearing on Plaintiffs'
6 motion for the issuance of a new summons. Plaintiffs' counsel,
7 Patrick Dwyer, failed to appear at that hearing. At the hearing,
8 based on the evidence presented by Defendant, the Court denied
9 Plaintiffs' motion. On August 25, 2014, the Court issued a
10 written order to that effect (Doc. #40). Plaintiffs now request
11 relief from that order, pursuant to Rule 60(b)(1) of the Federal
12 Rules of Civil Procedure ("FRCP"). Rule 60(b)(1) provides that
13 the Court "may relieve a party or its legal representative from a
14 final judgment, order, or proceeding for . . . mistake,
15 inadvertence, surprise, or excusable neglect." Fed. R. Civ. P.
16 60(b)(1). Mr. Dwyer argues that his failure to file a timely
17 reply brief, with regard to Plaintiffs' motion for the issuance
18 of a new summons, was excusable neglect due to an email
19 malfunction, which caused him to be unaware that Defendant had
20 filed an opposition. Mr. Dwyer does not address his failure to
21 appear at the hearing in his motion, but does discuss it briefly
22 it in his attached declaration.

23 The Ninth Circuit has held that, in determining "whether a
24 party's failure to meet a deadline constitutes 'excusable
25 neglect,' courts must apply a four-factor equitable test,

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27 ¹ This motion was determined to be suitable for decision without
28 oral argument. E.D. Cal. L.R. 230(g). The hearing was
scheduled for October 1, 2014.

1 examining: (1) the danger of prejudice to the opposing party;
2 (2) the length of the delay and its potential impact on the
3 proceedings; (3) the reason for the delay; and (4) whether the
4 movant acted in good faith." Ahanchian v. Xenon Pictures, Inc.,
5 624 F.3d 1253, 1261 (9th Cir. 2010).

6 Here, the first and second Ahanchian factors weigh slightly
7 in Plaintiffs' favor. The only prejudice complained of by
8 Defendant CFLG is delay to the proceedings. Opp. at 3. However,
9 the case is still in the early stages of discovery, and trial is
10 not scheduled until January 2016. The delay caused by
11 Plaintiffs' failure to file a timely reply is minimal and will
12 have no meaningful effect on the proceedings.

13 The third Ahanchian factor is dispositive. The purported
14 reason for the delay is the failure of Mr. Dwyer's email service.
15 The "CM/ECF Final Procedures" published on the Eastern District
16 of California's website indicate that technological failures do
17 not constitute excusable neglect. Specifically, Procedure 6.20
18 provides that "[p]roblems on the filer's end, such as phone line
19 problems, problems with the filer's Internet Service Provider
20 (ISP), or hardware or software problems, will not . . . excuse an
21 untimely filing." CM/ECF Final Procedures, U.S. District Court,
22 E.D.C.A. (available at: [http://www.caed.uscourts.gov/caed/](http://www.caed.uscourts.gov/caed/DOCUMENTS/CMECF/CMECFFinalProcedures.pdf)
23 DOCUMENTS/CMECF/ CMECFFinalProcedures.pdf). Plaintiffs' counsel
24 also had independent means of monitoring the docket for relevant
25 filings, even in the absence of email notifications from CM/ECF.
26 As the hearing date approached, he could simply have logged into
27 CM/ECF and checked the docket for an opposition. Furthermore,
28 Mr. Dwyer's failure to appear at the August 20, 2014 hearing is

1 unrelated to the email malfunction. This factor weighs heavily
2 against Plaintiffs.

3 As for the fourth Ahanchian factor, Defendant's argument
4 that Plaintiffs acted in bad faith is not well taken. Mr. Dwyer
5 has included an affidavit from his email service provider
6 explaining the lapse in service, and there is no indication that
7 he has attempted to mislead the Court. Not all mistakes are made
8 in bad faith.

9 Nevertheless, upon weighing the four factor Ahanchian test,
10 the Court concludes that Plaintiff's failure to file a timely
11 reply does not constitute excusable neglect and, therefore,
12 Plaintiff's motion for relief under Rule 60(b)(1) from the
13 Court's August 25, 2014 order is DENIED.

14 15 II. ORDER TO SHOW CAUSE

16 Defendant's Opposition contains the following argument:

17 "The Ninth Circuit has already heard a case alleging
18 email problems as a basis for excusable neglect.
19 Engleson v. Burlington N. R. Co., 972 F.2d 1038, 1043
20 (9th Cir. 1992). There, as here, the email problems
21 occurred approximately two weeks prior to the ruling on
22 the motion before the court. Ibid. The court held
23 that counsel's gamble on whether the matter would
24 proceed was not excusable neglect. Ibid. Counsel had
25 every opportunity to follow up and see if the matter
26 would proceed."

27 Opp. at 4 (citing Engleson v. Burlington N. R. Co., 972 F.2d
28 1038, 1043 (9th Cir. 1992)). Upon reviewing Engleson, the
Court is perplexed as to why Defendant cited this case as
authority in support of its opposition given that it does
not concern "email problems as a basis for excusable
neglect." Opp. at 4. Engleson stands for none of the

1 propositions for which it is cited by Defendant.
2 Defendant's attorney, Jody L. Winter, is ordered to show
3 good cause as to why sanctions should not be imposed for his
4 apparent attempt to present to this Court a pleading
5 containing legal contentions not warranted by existing law.
6 See Federal Rule of Civil Procedure 11(b)(2).

7 III. ORDER

8 For the reasons set forth above, the Court DENIES
9 Plaintiffs' Motion for Relief from Judgment. The Court further
10 orders that Mr. Winter show cause as to why he should not be
11 sanctioned. Mr. Winter shall file a declaration in response to
12 this order within ten (10) days of its filing.

13 IT IS SO ORDERED.

14 Dated: October 9, 2014

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16 JOHN A. MENDEZ,
17 UNITED STATES DISTRICT JUDGE
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