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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

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TYRONE ROGERS,

CASE NO. 11cv560-WQH-RBB

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Plaintiff,

ORDER

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v.

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GJ GIURBINO, et al.,

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Defendant.

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HAYES, Judge:

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On March 21, 2011, Plaintiff Tyrone Rogers, a state prisoner proceeding pro se, initiated this action by filing a complaint alleging various civil rights violations pursuant to 42 U.S.C. § 1983. (ECF No. 1). On February 2, 2017, this Court issued an Order denying Plaintiff's motion for leave to file a fourth amended complaint and closing the case. (ECF No. 157). A clerk's judgment was entered on February 2, 2017. (ECF No. 158).

On May 12, 2017, Plaintiff filed a notice of appeal to the United States Court of Appeals for the Ninth Circuit. (ECF No. 159). In the notice of appeal, Plaintiff states,

Notice is hereby given that Tyrone Rogers, Plaintiff not Defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order (Plaintiff's motion for leave to file a fourth amended complaint) entered in this proceeding on the 02 day of February 2017 but not made know[n] to Plaintiff until May 4, 2017. Plaintiff also need[s] a copy of the February 2017 Order for his record.

(ECF No. 159).

On June 13, 2017, the Court of Appeals entered an Order stating,

A review of the record demonstrates that the May 12, 2017 notice

1 of appeal was not filed or delivered to prison officials within 30 days after
2 entry of the February 2, 2017 judgment. However, appellant's notice of
3 appeal contains a statement that he was not aware of the judgment until
4 May 4, 2017. We construe appellant's notice of appeal as including a
5 timely request to reopen the time to appeal pursuant to Federal Rule of
6 Appellant Procedure 4(a)(6) The district court has not had an
7 opportunity to rule on this request. Accordingly, this appeal is remanded
8 to the district court for the limited purpose of allowing that court to rule
9 on appellant's request to reopen the time to appeal contained in the May
10 12, 2017 notice of appeal.

11 (ECF No. 162).

12 The Federal Rules of Appellate Procedure provide that a notice of appeal in a
13 civil case must be filed with the district clerk within 30 days after an entry of judgment.
14 Fed. R. App. P. 3, 4(a)(1). However, Rule 4(a)(6) of the Federal Rules of Appellate
15 Procedure provides:

16 The district court may reopen the time to file an appeal for a period of 14
17 days after the date when its order to reopen is entered, but only if all of the
18 following conditions are satisfied:

- 19 (A) the court finds that the moving party did not receive notice
20 under Federal Rule of Civil Procedure 77(d) of the entry of the
21 judgment or order sought to be appealed within 21 days after entry;
- 22 (B) the motion is filed within 180 days after the judgment or order
23 is entered or within 14 days after the moving party receives notice
24 under Federal Rule of Civil Procedure 77(d) of the entry, whichever
25 is earlier; and
- 26 (C) the court finds that no party would be prejudiced.

27 Fed. R. App. P. 4(a)(6).

28 Pursuant to this Order of the Court of Appeals, this Court construes Plaintiff's
notice of appeal to contain a timely request to reopen the time to appeal pursuant to
Federal Rule of Appellant Procedure 4(a)(6). Based on the record before the Court, it
appears that Plaintiff did not receive notice of the Court's February 2, 2017 Order until
May 4, 2017. The Court finds that Plaintiff did not receive notice of the entry of
judgment within 21 days after entry. Plaintiff's motion and notice of appeal was filed
within 180 days after the Order and Judgment were entered. The Court finds that no
party would be prejudiced by reopening the time to file a notice of appeal. The Court
finds that the conditions of Rule 4(a)(6) are satisfied.

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1 IT IS HEREBY ORDERED that the motion to reopen time to file a notice of
2 appeal (*See* ECF Nos. 159, 162) is GRANTED. The Clerk of Court shall serve Plaintiff
3 with copies of the Court's February 2, 2017 Order, (ECF No. 157), the Clerk's
4 Judgment (ECF No. 158), and this Order. The Clerk of Court shall serve a copy of this
5 Order on the United States Court of Appeals for the Ninth Circuit.

6 DATED: June 19, 2017

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8 **WILLIAM Q. HAYES**
9 United States District Judge

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