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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ROBERT BUCKLEY and NANCY
BUCKLEY,

 Plaintiffs,

v.

DJO SURGICAL fka ENCORE
MEDICAL L.P., and DOES 1 through 20,

 Defendant.

Civil No. 11cv2804 L (MDD)

**ORDER DENYING IN PART AND
GRANTING IN PART EX PARTE
MOTION TO VACATE ORDER and
DISMISSING ACTION WITH
PREJUDICE [doc. #36]**

The Court granted without prejudice defendant’s motion for judgment on the pleadings on October 11, 2012. Prior to the entry of that decision, the parties had already fully executed a settlement agreement but failed to notify the Court of their resolution by requesting dismissal of the case. Plaintiffs now move ex parte for the Court to vacate its October 11, 2012 Order and dismiss the case with prejudice because of the settlement. Defendant opposes that portion of the ex parte motion that seeks to vacate the October 11, 2012 Order . Plaintiffs have replied.

Defendant first argues that plaintiffs have failed to meet or even articulate the Federal Rule of Civil Procedure 60(b) standard for vacating an order of the court.

A court may set aside a judgment or order only upon a showing of:

- (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or

1 discharged, or a prior judgment upon which it is based has been reversed or
2 otherwise vacated, or it is no longer equitable that the judgment should have
3 prospective application; or (6) any other reason justifying relief from the operation
of the judgment.

4 FED. R. CIV. P. 60(b).

5 In their reply, plaintiffs acknowledge that it was their responsibility to prepare and file a
6 notice of voluntary dismissal upon settlement of the action and prior to the Court's ruling on
7 defendant's then-pending motion. But they contend that the delay "was an office
8 misunderstanding and amounts to, at most, excusable neglect." (Reply at 1.) Thus, it appears that
9 plaintiffs seek to have the Court's order vacated under Rule 60(b)(1) only.

10 *Pioneer Investment Services Company v. Brunswick Associates* established a balancing
11 test to determine whether an untimely filing is due to excusable neglect. 507 U.S. 380, 395
12 (1993); *Pincay v. Andrews*, 389 F.3d 853, 855 (9th Cir. 2004) (*en banc*). The determination
13 whether neglect is excusable is an equitable one that depends on at least four factors:

14 (1) the danger of prejudice to the non-moving party, (2) the length of delay and its
15 potential impact on judicial proceedings, (3) the reason for the delay, including
16 whether it was within the reasonable control of the movant, and (4) whether the
moving party's conduct was in good faith.

17 *Pincay*, 389 F.3d at 855 (citing *Pioneer*, 507 U.S. at 395).

18 Here, plaintiffs do not contend that they would suffer any prejudice if the Order remains
19 on the Court's record. But defendant argues it would suffer prejudice because this Court's Order
20 has been submitted as supplemental authority in a similar case in the United States District Court
21 for the Middle District of Pennsylvania. As the parties are clearly aware, a decision from this
22 district is of little consequence to the Pennsylvania court. Thus, vacating this Court's Order
23 would not prejudice defendant.

24 Plaintiffs' failure in submitting the notice of dismissal of the action required the Court to
25 expend significant time and energy in considering defendant's motion and preparing the relevant
26 Order. Had the notice of dismissal been promptly filed after the settlement was executed, the
27 Court's limited resources could have been directed in a needed way. Of note, plaintiffs did not
28 seek to have the Court's Order vacated and the action dismissed until October 29, 2012 –

1 approximately six weeks after the matter had settled and 18 days after the entry of the Court's
2 Order. "An office misunderstanding" does not begin to explain or justify plaintiffs' failure to
3 promptly provide notice to the Court of settlement or to file their current ex parte motion to set
4 aside the Court's Order. (*See* Plaintiffs' Reply at 1.)


5 Plaintiffs did not just briefly delay notifying the Court but instead failed to file the notice
6 of dismissal which was clearly within the reasonable control of plaintiffs' counsel. Such a failure
7 to timely advise the Court that a decision on the merits of a then-pending motion would be
8 unnecessary because the entire case had been resolved suggests a lack of good faith on the part
9 of counsel.

10 On balance, the Court finds counsel's neglect to not be excusable. Nevertheless, it is
11 apparent the parties anticipated with their settlement that this action would be dismissed with
12 prejudice. Accordingly, the Court will grant this portion of plaintiffs' request.

13 Based on the foregoing, **IT IS ORDERED** denying plaintiffs' ex parte motion to vacate
14 order and granting plaintiffs' ex parte motion to dismiss action with prejudice in accordance with
15 the parties' settlement agreement. The Clerk of the Court is directed to close this case.

16 **IT IS SO ORDERED.**

17 DATED: November 12, 2012

18 
19 M. James Lorenz
United States District Court Judge

20 COPY TO:

21 HON. MITCHELL D. DEMBIN
22 UNITED STATES MAGISTRATE JUDGE

23 ALL PARTIES/COUNSEL
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