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CLERK, U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

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

10 PETER R. SOLLENNE and  
11 PATRICIA D. SOLLENNE, as  
12 Trustees for the Solenne Family  
13 Trust, dated December 12, 2007,  
14 Plaintiffs,

15 vs.

16 U.S. BANK NATIONAL  
17 ASSOCIATION, as Trustee for  
18 Lehman XS Trust Mortgage Pass-  
19 Through Certificates, Series 2007-  
20 18N; NATIONSTAR MORTGAGE,  
21 LLC; and DOES 1-10, inclusive,  
22 Defendants.

CASE NO. 12-CV-2977-BEN (WVG)

**ORDER:**

**(1) GRANTING MOTION TO SET  
ASIDE JUDGMENT**

**(2) DENYING MOTION TO  
DISMISS PURSUANT TO FED. R.  
CIV. P. 41(b)**

[Docket Nos. 27, 31]

23 Before this Court are a Motion to Set Aside Judgment (Docket No. 27), filed by  
24 Plaintiffs Peter R. Solenne and Patricia D. Solenne and a Motion to Dismiss Pursuant  
25 to Federal Rule of Civil Procedure 41(b) (Docket No. 31), filed by Defendants U.S.  
26 Bank National Association and Nationstar Mortgage, LLC.

27 Plaintiffs originally brought a foreclosure-related complaint on December 14,  
28 2012. (Docket No. 1). On December 13, 2013, this Court granted Defendants' Motion  
to Dismiss Plaintiff's First Amended Complaint. (Docket No. 25). Plaintiffs were  
given 30 days to file a Second Amended Complaint. On January 16, 2014, after more

1 than 30 days had elapsed, Plaintiffs attempted to file a Second Amended Complaint.  
2 The filing was rejected as untimely. (Docket No. 26). Plaintiffs did not request an  
3 extension of the deadline to file, or file a motion for reconsideration of the order  
4 rejecting the Second Amended Complaint.

5 On February 28, 2014, Plaintiffs filed a motion asking this Court to set aside the  
6 dismissal on the grounds of excusable neglect. Plaintiffs assert that they mistakenly  
7 believed that they had until January 30, 2014 to file a Second Amended Complaint, and  
8 ask that this Court excuse their failure to meet the deadline. (Mot. to Set Aside at 2).  
9 Defendants oppose the motion, and ask that this Court dismiss the case. For the  
10 reasons stated below, the Motion to Set Aside is **GRANTED** and the Motion to  
11 Dismiss is **DENIED**.

#### 12 I. Motion to Set Aside

13 A district court is empowered to relieve a party from a final judgment, order, or  
14 proceeding resulting from “excusable neglect.” FED. R. CIV. P. 60(b)(1). This Court  
15 notes that no final judgment document has been filed, but understands that Plaintiffs  
16 are asking for relief from the deadline set in this Court’s December 13 Order, which  
17 effectively ends their case. A Rule 60(b) motion is an appropriate means to ask a Court  
18 to excuse a failure to file in a timely fashion. *See Briones v. Riviera Hotel & Casino*,  
19 116 F.3d 379, 382 (9th Cir. 1997). The determination of whether neglect is excusable  
20 is “at bottom an equitable one, taking account of all relevant circumstances surrounding  
21 the party’s omission.” *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd.*, 507 U.S. 380,  
22 395 (1993). In applying the *Pioneer* analysis, a court is to consider at least four factors,  
23 including (1) the danger of prejudice to the opposing party, (2) the length of the delay  
24 and its potential impact on proceedings, (3) the reasons for the delay, and (4) whether  
25 the movant acted in good faith. *Lemoge v. United States*, 587 F.3d 1188, 1192 (9th Cir.  
26 2009) (citations omitted). Ignorance of court rules does not constitute excusable  
27 neglect, even if the litigant is pro se. *Briones*, 116 F.3d at 381.

28 Upon analysis of the four factors and taking into account all of the relevant

1 circumstances, the Court concludes that setting aside the deadline is equitable.  
2 Plaintiffs argue that their amended complaint was only filed a few days late. They  
3 argue that the prejudice to Defendants is only the cost of litigation, but the prejudice  
4 to Plaintiffs is the loss of their home. (Mot. to Set Aside at 4). They also point out that  
5 they sought to set aside the dismissal 41 days after this Court rejected their amended  
6 complaint, and that it will cause little delay in the proceedings. They also emphasize  
7 that they were acting without an attorney at the time.

8 In their Opposition, Defendants argue that this Court has already found the case  
9 without merit. (Opp'n to Mot. to Set Aside at 1). They contend that they are  
10 prejudiced by having to pay attorney's fees and costs to defend the lawsuit. (*Id.* at 4).  
11 They assert that the trustee's sale would not be stopped. (*Id.*) Defendants argue that  
12 the delay caused by the failure to meet deadlines would be substantial, as the hearing  
13 on this motion was not set until more than three months after they should have filed  
14 their complaint. (*Id.* at 4-5). They argue that Plaintiffs are abusing the legal process  
15 in the hope of delaying foreclosure. (*Id.* at 5). Defendants argue that the explanation  
16 for delay was "dubious." (*Id.*)

17 This Court finds that an extension of time to file a response is appropriate.  
18 Plaintiffs, who were then proceeding without the assistance of counsel, were only a few  
19 days late in filing, and clearly were attempting to prosecute their case. This delay  
20 necessitated these motions, but has not seriously impeded the prosecution of the case.  
21 Although the reason for the failure to file in a timely fashion appears to be simple  
22 negligence in determining filing deadlines, there is no evidence that Plaintiffs are  
23 seeking to amend their complaint in bad faith. Defendants also fail to establish that  
24 they will suffer prejudice. Defendants point to the costs of litigating this matter, but  
25 merely being forced to litigate the merits is not prejudicial. *See TCI Grp. Life Ins. Plan*  
26 *v. Knoebber*, 244 F.3d 691, 701 (9th Cir. 2001). Defendants themselves state that  
27 continuing the litigation will not prevent them from continuing with the foreclosure.  
28 Although this Court warns Plaintiffs that future failures to comply with Court-ordered

1 filing deadlines may result in the dismissal of their case, the equities of this situation  
2 favor allowing Plaintiffs to proceed. The Motion to Set Aside is **GRANTED**.

3 **II. Motion to Dismiss**

4 Defendants ask this Court to dismiss this case pursuant to Federal Rule of Civil  
5 Procedure 41(b). When a plaintiff fails to amend his complaint after a district judge  
6 dismisses the complaint with leave to amend, the dismissal is typically considered a  
7 dismissal for failure to comply with a court order. *Yourish v. Cal. Amplifier*, 191 F.3d  
8 983, 986 (9th Cir. 1999) (citing *Ferdick v. Bonzelet*, 963 F.2d 1258, 1260 (9th Cir.  
9 1992)). In determining if dismissal is appropriate, a court is to consider (1) the public's  
10 interest in expeditious resolution of litigation; (2) the court's need to manage its  
11 docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring  
12 disposition of cases on their merits; and (5) the availability of less drastic alternatives.  
13 *Id.* at 990.


14 As discussed above, this Court has determined that the appropriate Rule 60(b)  
15 analysis requires that Plaintiffs' failure to comply with the filing deadline be excused.  
16 The Court determines that dismissal is not required by the Court's need to manage its  
17 docket, and that Plaintiffs should be given an opportunity to litigate the merits of their  
18 case. Accordingly, the Motion to Dismiss is **DENIED**.

19 **III. Conclusion**

20 For the reasons stated above, Plaintiffs' Motion to Set Aside is **GRANTED** and  
21 Defendants' Motion to Dismiss is **DENIED**. Plaintiffs have **21 days** from the date this  
22 Order is signed to file their Second Amended Complaint. Plaintiffs are specifically  
23 warned that failure to comply with the new deadline will likely result in dismissal of  
24 their action for failure to comply with a court order.

25 **IT IS SO ORDERED.**

26  
27 Dated: April 16, 2014

28   
HON. ROGER T. BENITEZ  
United States District Judge