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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 JAVAN QUINONES; ALEXANDRA
12 LEGY, a Minor by and through her
13 Guardian Ad Litem ROSA ALICIA
14 CABRERA,

14 Plaintiffs,

15 v.

16 ZURICH AMERICAN INSURANCE
17 COMPANY, ZURICH NORTH
18 AMERICA; ESIS, INC.; ESIS
19 WOODLAND HILLS WC; DOES
20 ADJUSTER(S) OTHER LEGAL HEIRS
21 OF LIZZETH CABRERA, Deceased; and
22 DOES 1 through 100, Inclusive,

21 Defendants.

Case No.: 18cv467-GPC(MDD)

**ORDER GRANTING PLAINTIFFS’
EX PARTE APPLICATION
SEEKING LEAVE TO BELATEDLY
FILE PLAINTIFFS’ FIRST
AMENDED COMPLAINT
PURSUANT TO FEDERAL RULE
OF CIVIL PROCEDURE 60**

23 Plaintiffs filed an ex parte motion for leave to file a belatedly filed first amended
24 complaint (“FAC”) pursuant to Federal Rule of Civil Procedure (“Rule”) 60(b)(1) due to
25 a mistake and honest belief by counsel that the first amended complaint had been timely
26 filed with the Court based on clerical error. (Dkt. No. 27.) Defendant Esis, Inc. filed an
27 opposition arguing the legal basis of Plaintiffs’ argument is without merit, and the
28 proposed first amended complaint fails to correct the deficiencies the Court noted in its

1 order on Defendant’s motion to dismiss; therefore, the proposed amendment is futile and
2 would be subject to dismissal based on the Court’s prior order on Defendant’s motion to
3 dismiss. (Dkt. No. 29.)

4 The Court agrees with Defendant that Rule 6(b)(1)(B) applies to the relief sought
5 by Plaintiffs, and not Rule 60(b). See Fed. R. Civ. P. 6(b)(1)(B); (b)(2).

6 Rule 6(b)(1)(B) provides that when an act must be done within a specified time,
7 the “court may, for good cause, extend the time . . . if the party failed to act because of
8 excusable neglect.” Fed. R. Civ. P. 6(b)(1)(B). The district court has discretion to
9 determine whether a party’s failure to act was excusable neglect. Pincay v. Andrews, 389
10 F.3d 853, 858 (9th Cir. 2004).

11 Under Pioneer Investment Servs. Co. v. Brunswick Assocs. Ltd. P’ship, 507 U.S.
12 380 (1993), in determining whether a party’s neglect was excusable, a court must
13 examine “(1) the danger of prejudice to the non-moving party, (2) the length of delay and
14 its potential impact on judicial proceedings, (3) the reason for the delay, including
15 whether it was within the reasonable control of the movant, and (4) whether the moving
16 party’s conduct was in good faith.” Mendez v. Knowles, 556 F.3d 757, 765 (9th Cir.
17 2009) (applying the Pioneer Investment test).

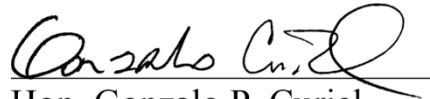
18 Neither party has addressed these factors. Based on the Court’s review of the
19 history of this case, the Court concludes that Defendant will not be prejudiced by the
20 filing of the Court ordered filing of the FAC that was filed as an attachment to the ex
21 parte motion five days past the deadline. Next, five days is a brief delay and will not
22 impact the proceedings. As to factors three and four, the Court looks to Plaintiffs’
23 counsel’s declaration. (Dkt. No. 27-2, Licata Decl.) Licata states she completed drafting
24 the FAC on July 2, 2018, four days before the due date and provided it to the legal
25 secretary for filing and service. (Id. ¶ 6.) On July 9, 2018, defense counsel advised that
26 he had not received the FAC. (Id. ¶ 7.) Licata investigated and learned that due to her
27 mistake, she must have accidentally misplaced the document, and in fact, did not give the
28 document to her legal secretary for filing and service. (Id. ¶ 8.) She states this is the first

1 deadline she has ever missed in state or federal court, that it was an “honest mistake” and
2 apologizes for her mistake and any inconvenience. (Id. ¶ 9.) Based on Plaintiffs’
3 counsels’ declaration, the Court concludes that while the reason for the delay was within
4 counsel’s control, her conduct was in good faith.

5 After reviewing the Pioneer factors, the Court exercises its discretion and
6 GRANTS Plaintiffs’ ex parte application seeking leave to belatedly file Plaintiffs’ First
7 Amended Complaint. Plaintiffs shall file the First Amended Complaint within 2 days of
8 the filed date of this Order.

9 IT IS SO ORDERED.

10 Dated: July 16, 2018

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12 Hon. Gonzalo P. Curiel
13 United States District Judge
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