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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ROBERT GREENE, THOMAS SCHEMKES,)
and GREGORY GREEN on behalf of)
themselves and all others similarly situated,)
)
Plaintiffs,)
v.)
)
JACOB TRANSPORTATION SERVICES,)
LLC, a Nevada Corporation, doing business)
as Executive Las Vegas; JAMES)
JIMMERSON, an individual, CAROL)
JIMMERSON, an individual, and Does 1-50,)
Inclusive)
Defendants.)
_____)

Lead Case No. 2:09-CV-00466-GMN-CWH
Consolidated with:
Member Case No. 2:11-CV-00355-JAD-NJK

**NOTICE OF MOTION AND MOTION
FOR LEAVE TO FILE FIRST
AMENDED CONSOLIDATED CLASS
AND COLLECTIVE ACTION
COMPLAINT PURSUANT TO
FEDERAL RULES OF CIVIL
PROCEDURE 15(a) AND 60(b)**

1 TO THE HONORABLE COURT, ALL PARTIES, AND COUNSEL:

2 Consolidated Plaintiffs Robert Greene, Thomas Schemkes, and Gregory
3 Green (“Plaintiffs”), on behalf of themselves and all others similarly situated, by
4 and through their attorneys of record, hereby move this Court to allow the late
5 filing of Plaintiffs’ First Amended Consolidated Class and Collective Action
6 Complaint (“Consolidated Complaint”), attached hereto as Exhibit A. Plaintiffs’
7 Consolidated Complaint was originally ordered by the Court to be filed on
8 October 19, 2015. (ECF No. 200.) For the reasons stated herein, Plaintiffs hereby
9 request leave to file their Consolidated Complaint pursuant to Federal Rules of
10 Civil Procedure 15(a) and 60(b).

11 This Motion is based on this Notice and Motion, the foregoing
12 Memorandum of Points and Authorities, Plaintiffs’ Consolidated Complaint
13 (attached as Exhibit A), the Declaration of Jason Kuller (attached as Exhibit B),
14 all the files and records of this consolidated action and any predecessor or related
15 action, and any additional material that may be submitted or heard prior to the
16 Court’s decision on this Motion.

17
18 Respectfully submitted:

19 THIERMAN BUCK LLP
20 KULLER LAW PC

21 DATED: November 15, 2015

22 By: /s/ Jason Kuller
23 Attorney for Plaintiff
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

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3 I. **INTRODUCTION AND BACKGROUND**

4 These consolidated cases have been pending over six years since 2009. In
5 all that time, Defendants have never filed an answer in Lead Case No. 2:09-CV-
6 00466-GMN-CWH. More recently, Defendants refused to accept and otherwise
7 evaded service of Plaintiff Greene’s First Amended Class Action Complaint in the
8 Lead Case. (*See* ECF Nos. 194, 197-99.)

9 On September 17, 2015, the Court held a joint status conference for both
10 the Lead Case and Member Case No. 2:11-CV-00355-JAD-NJK. (*See* ECF No.
11 196.) On September 28, 2015, the Court issued an Order Consolidating Cases
12 (“Order”) consolidating the Lead and Member Cases. (*See* ECF No. 200.)
13 Among other things, the Court’s Order directed Plaintiffs to file an amended
14 consolidated complaint within 21 days, which was October 19, 2015. (*Id.* at 3.)
15 Due to mistake, inadvertence, surprise, or excusable neglect, counsel did not learn
16 of the Court’s Order until approximately 10:25 PM on November 10, 2015. (*See*
17 Declaration of Jason Kuller [“Kuller Decl.”], attached hereto as Exhibit B, at ¶¶ 3-
18 5.) At that time, Plaintiffs’ counsel was committed to other business the next
19 business day and on his way out of the country from November 12 to 15. (*See id.*
20 at ¶¶ 6-7.) Upon his return to the United States on November 15, 2015, counsel
21 prepared the Consolidated Complaint, the accompanying Declaration, and the
22 instant Motion. (*See id.* at ¶ 9.)

23 By this Motion, Plaintiffs seek an order from the Court granting leave to
24 file the Consolidated Complaint twenty-eight days beyond the October 19th
25 deadline originally imposed by the Court. (*See* ECF No. 200.) Leave should be
26 granted pursuant to both Federal Rules of Civil Procedure 15(a) and 60(b).

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1 **II. LEAVE SHOULD BE GRANTED UNDER THE LIBERAL PLEADING**
2 **STANDARD OF RULE 15(a).**

3 Federal Rule of Civil Procedure 15 provides that “leave to amend shall be
4 freely given when justice so requires.” Fed. R. Civ. P. 15 (a). “[T]here exists a
5 *presumption* under Rule 15(a) in favor of granting leave to amend.” *Eminence*
6 *Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) (emphasis
7 added); *see also Allwaste, Inc. v. Hecht*, 65 F.3d 1523, 1530 (9th Cir. 1995)
8 (reviewing denial of leave to amend “light of the strong policy permitting
9 amendment”). The United States Supreme Court has stated that leave should be
10 readily granted because a plaintiff “ought to be afforded an opportunity to test his
11 claim on the merits.” *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed.
12 2d 222 (1962). Exceptions to the strong presumption in favor of permitting leave
13 to amend a complaint are available only if the opposing party makes a showing of
14 undue delay, bad faith, undue prejudice, or futility of amendment on the part of
15 the moving party. *See id.* None of those factors are present here. (See Kuller
16 Decl. at ¶¶ 2-14.) In fact, Plaintiffs’ Consolidated Complaint is intended to satisfy
17 the Court’s Order consolidating – and thereby simplifying – the Lead and Member
18 Cases. (See ECF No. 200.)

19 **III. LEAVE IS ALSO WARRANTED UNDER RULE 60(b)(1) DUE TO**
20 **“MISTAKE, INADVERTENCE, SURPRISE, OR EXCUSABLE**
21 **NEGLECT.”**

22 Federal Rule of Civil Procedure 60(b)(1) provides that the court may relieve
23 a party or its legal representative from a final judgment, order, or proceeding on
24 the basis of mistake, inadvertence, surprise, or excusable neglect. *See Fed. R.*
25 *Civ. P. 60(b)(1)*. Under Rule 60(b)(1), “excusable neglect” covers situations in
26 which the failure to comply with a filing deadline is attributable to counsel’s
27 negligence or carelessness. *Briones v. Riviera Hotel & Casino*, 116 F.3d 379, 381
28 (9th Cir. 1997). The determination whether neglect is excusable is an equitable

1 one depending on four non-exhaustive factors: (1) the danger of prejudice to the
2 opposing party; (2) the length of the delay and its potential impact on the
3 proceedings; (3) the reason for the delay; and (4) whether the movant acted in
4 good faith. *See id.* Here, all four factors weigh in favor of granting leave to allow
5 the filing of Plaintiffs' Consolidated Complaint. *See generally Bateman v. U.S.*
6 *Postal Service*, 231 F.3d 1220 (9th Cir. 2000) (finding district court abused its
7 discretion in denying relief under Rule 60(b)(1) where plaintiff failed to timely
8 respond to summary judgment motion in employment discrimination action and
9 such failure occurred because plaintiff's attorney went to Nigeria for 19 days, and
10 then did not contact court until 16 days after his return, constituting "excusable
11 neglect").

12 First, there is no prejudice to Defendants who have never filed an answer in
13 the Lead Case in over six years of litigation. Defendants cannot show prejudice
14 from having to file an answer a mere 28 days beyond the original timeline set by
15 the Court. This 28-day delay has practically no impact on the proceedings, which
16 again have been pending over six years. Indeed, the extended duration of these
17 proceedings owes much to the dilatory tactics of Defendants. Finally, the reason
18 for the delay is counsel's mistake, inadvertence, surprise, or excusable neglect,
19 and counsel has acted diligently in good faith to file the Consolidated Complaint
20 at the earliest possible opportunity. (*See Kuller Decl.* at ¶¶ 2-14.)

21 **IV. CONCLUSION**

22 For all these reasons, the Court should grant Plaintiffs leave to file their
23 Consolidated Complaint in order to allow the Lead and Member Cases to be
24 decided on their merits. *See Thompson v. Housing Auth.*, 782 F.2d 829, 831 (9th
25 Cir. 1986) (stating that there is a public policy favoring disposition of cases on
26 their merits and this is one factor to be considered by court in weighing whether
27 to dismiss a case for failure to comply with pretrial procedures mandated by
28 local rules and court orders).

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Dated this 15th day of November, 2015.

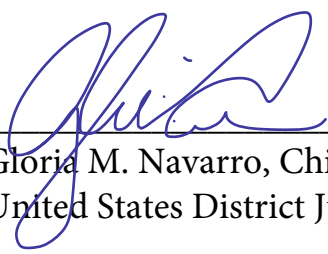
THIERMAN BUCK LLP
KULLER LAW PC

By: /s/ Jason Kuller
Attorney for Plaintiff

IT IS HEREBY ORDERED that Plaintiff's Motion for Leave to File First Amended Complaint (ECF No. 202) is **GRANTED**. The Clerk of Court shall file the Proposed Amended Complaint (ECF No. 202-1) attached as Exhibit A to the motion on the docket as Plaintiff's First Amended Complaint.

Plaintiff's counsel is warned that failure to comply with future deadlines in this case may result in sanctions, including dismissal of the case with prejudice.

Dated this 18 day of November, 2015.


Gloria M. Navarro, Chief Judge
United States District Judge