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17 **IN THE UNITED STATES DISTRICT COURT**
 18 **FOR THE DISTRICT OF ARIZONA**

19 Virginia Van Dusen, et al.,

21 Plaintiffs,

22 vs.

24 Swift Transportation Co., Inc., et al.,

25 Defendants.

No. CV 10-899-PHX-JWS

20)
 21) **PLAINTIFFS' MOTION FOR LATE**
 22) **FILING OF REPLY FOR**
 23) **PLAINTIFFS' MOTION FOR**
 24) **SANCTIONS [DOC. 684]**

INTRODUCTION

1 Pursuant to L.R. Civ. 7.3 and Fed. R. Civ. P. 6(b)(1)(B), Plaintiffs hereby move to
2 file a late reply for Plaintiffs' Motion for Sanctions [Doc. 684] (attached hereto as Exhibit
3 A). A proposed order is attached. This is the first request for this relief. Defendants do
4 not consent to Plaintiffs' late filing. Due to an inadvertent calendaring error, Plaintiffs did
5 not file their reply for Plaintiffs' Motion for Sanctions [Doc. 684] within the time
6 prescribed by L.R. Civ. 7.2(d). It is necessary for Plaintiffs to file a reply in order to
7 address the inaccurate and irrelevant arguments raised by Defendants in their opposition
8 to Plaintiffs' motion.
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ARGUMENT

10 Rule 6(b)(1)(B) of the Federal Rules of Civil Procedure states that “[w]hen an act
11 may or must be done within a specified time, the court may, for good cause, extend the
12 time... on motion made after the time has expired if the party failed to act because of
13 excusable neglect.” Rule 6(b)(1) “[is] to be liberally construed to effectuate the general
14 purpose of seeing that cases are tried on the merits.” *Ahanchian v. Xenon Pictures, Inc.*,
15 624 F.3d 1253, 1258-59 (9th Cir. 2010). “Good cause” is a non-rigorous standard that has
16 been construed broadly across procedural and statutory contexts. *Id.* at 1259. Similarly,
17 Rule 60(b) provides that a court “may relieve a party or its legal representative from a
18 final judgment, order, or proceeding” on the basis of “mistake, inadvertence, surprise, or
19 excusable neglect.” Fed. R. Civ. P. 60(b). “Rule 60(b) is ‘remedial in nature and ... must
20 be liberally applied.’” *Ahanchian* at 1262. To determine whether a party’s failure to meet
21 a deadline constitutes “excusable neglect,” courts must apply a four-factor equitable test,
22 examining: (1) the danger of prejudice to the opposing party; (2) the length of the delay
23 and its potential impact on the proceedings; (3) the reason for the delay; and (4) whether
24 the movant acted in good faith. *Warkentin v. Federated Life Ins. Co.*, 594 F. App'x 900,
25 901 (9th Cir. 2014), *citing Ahanchian* at 1261. A district court abuses its discretion by
26 failing to engage in this four-factor test. *Id.* Here, the four factors weigh heavily in favor
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1 of granting Plaintiffs' motion.

2 First, there is no prejudice to Defendants in allowing Plaintiffs to file a reply.
3 Defendants do not have any right to a sur-reply and are thus cannot argue that they are
4 somehow being deprived of any opportunity to address Plaintiffs' reply. *See, e.g.,*
5 *Richards v. City of Richfield*, No. CV 04-048-S-LMB, 2005 WL 1694071, at *2 (D.
6 Idaho July 18, 2005) (no prejudice to defendants in accepting plaintiff's late filing
7 because "Defendants could not have submitted a memorandum in response to Plaintiff's
8 May 30, 2005 filings even if they had been timely because the Local Rules do not
9 provide for sur-reply briefs"); *see also Lane v. Page*, 250 F.R.D. 634, 642 (D.N.M. 2007)
10 ("Because of the procedural posture of this case, and the timing in which the Court is
11 reviewing the parties' substantive motions, the Court does not believe that considering
12 [plaintiff-intervenor's] Reply will prejudice any of the parties or unnecessarily prolong
13 this litigation. [Plaintiff-intervenor] had a right to file a timely reply; that he filed a late
14 reply does not give him any strategic advantage that he otherwise would not have."). Nor
15 does the filing of a mere 3-day late reply delay this case in any way, as there are several
16 other motions pending in front of the Court for which the deadlines in this case will need
17 to be extended in any case. Further, this is Plaintiffs' motion for sanctions for
18 Defendants' failure to comply with this Court's discovery orders. If there is any delay at
19 all in the Court's rendering of a decision on Plaintiffs' motion due to the late filing, it
20 only benefits Defendants.

21 Second, Plaintiffs' reply is only 3 days late. This is a negligible delay. This Court
22 and the Ninth Circuit have accepted much later filings of more consequential documents.
23 *See, e.g., Pincay v. Andrews*, 389 F.3d 853 (9th Cir. 2004) (24-day late filing of notice of
24 appeal); *Bateman v. U.S. Postal Serv.*, 231 F.3d 1220 (9th Cir. 2000) (month-late filing of
25 opposition to motion for summary judgment); *Skinner v. Ryan*, No. CV-12-1729-PHX-
26 SMM, 2014 WL 99030, at *2 (D. Ariz. Jan. 10, 2014) (six-month long delay in filing
27 answer); *Travelers Indem. Co. v. Crown Corr, Inc.*, No. CV 11-0965-PHX-JAT, 2011
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1 WL 6780885, at *2 (D. Ariz. Dec. 27, 2011), *aff'd on other grounds*, 589 F. App'x 828
2 (9th Cir. 2014) (15-day late filing of opposition to motion to dismiss).

3 Third, Plaintiffs' reason for the late filing is excusable. Defendants are located on
4 the West Coast, while Plaintiffs are located on the East Coast. Defendants filed their
5 opposition on Friday, October 9, 2015 at 6:26pm Eastern Time when Plaintiffs' counsel
6 had already left for the day. When Plaintiffs' counsel returned to the office on Monday
7 morning, counsel inadvertently overlooked the ECF notice and the deadline for reply was
8 not calendared. This type of inadvertence is well within what constitutes excusable
9 neglect, which includes even carelessness and negligence, and is not limited to omissions
10 caused by uncontrollable circumstances. *See Pioneer Inv. Servs. Co. v. Brunswick*
11 *Associates Ltd. P'ship*, 507 U.S. 380, 388, 113 S. Ct. 1489, 1495, 123 L. Ed. 2d 74
12 (1993) (excusable neglect under Rule 6(b) includes "inadvertence, mistake, or
13 carelessness" and "is a somewhat 'elastic concept' ... not limited strictly to omissions
14 caused by circumstances beyond the control of the movant"); *Bateman* at 1224
15 ("excusable neglect" includes cases of negligence).

16 Indeed, the Ninth Circuit has found that this type of calendaring error can warrant
17 a late filing pursuant to Rule 6 or Rule 60, particularly in cases like this one, where the
18 other factors also weigh in favor of accepting the late filing. *See, e.g., Ahanchian* (district
19 court erred in denying Ahanchian's motion to allow a three-day late-filed opposition to
20 motion for summary judgment where late filing was due to "a calendaring mistake and
21 computer problems"); *Pincay* (affirming district court's finding of excusable neglect
22 where 24-day late filing was due to calendaring mistake caused by attorneys and
23 paralegals misapplying a clear legal rule); *Bateman* (district court's denial of motion for
24 late filing of opposition to motion for summary judgment reversed where late filing was
25 due to plaintiff's 16-day delay in contacting court after trip abroad and unawareness that
26 a motion for summary judgment had been filed).

27 Fourth, Plaintiffs have acted in good faith. After Plaintiffs discovered their error,
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1 they immediately sent an email to Defendants' counsel notifying them of the error and
2 requesting they consent to the late filing. Defendants refused to consent, even though
3 Plaintiffs have agreed to extensions requested by Defendants. *See, e.g.*, Doc. 665-4
4 (emails between counsel showing that Plaintiffs agreed to a two-week extension for
5 Defendants to provide long overdue responses to Plaintiffs' discovery requests).
6 Plaintiffs' missed deadline occurred due to their mistake, not any bad faith. *See Bateman*
7 *at 1225* (reversing district court's denial of plaintiff's Rule 60(b)(1) motion because
8 counsel's errors resulted from "negligence and carelessness, not from deviousness or
9 willfulness").

10 CONCLUSION

11 Rule 6(b)(1)(B) and Rule 60 of the Federal Rules of Civil Procedure, which
12 permit late filings due to excusable neglect, must liberally construed. Plaintiffs'
13 inadvertent omission constitutes excusable neglect, which includes not only inadvertence
14 and mistake, but even carelessness and negligence that has not been exhibited by
15 Plaintiffs. Here, the four-factor balancing test that this Court must undertake weighs
16 heavily in favor of granting Plaintiffs' motion. For all these reasons, Plaintiffs' motion
17 should be granted in its entirety and Plaintiffs granted leave to file their Reply for
18 Plaintiffs' Motion for Sanctions, attached hereto as Exhibit A.

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20 Respectfully submitted this 22 day of October, 2015.

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CERTIFICATE OF SERVICE

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I hereby certify that on October 22, 2015, I electronically transmitted the attached document to the Clerk’s Office using the CM/ECF System for filing and transmittal of a Notice of Electronic filing to the following CM/ECF registrants:

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s/Anibal Garcia