

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

DR. DANIEL HALLER and LONG ISLAND
SURGICAL PLLC,

Plaintiffs,

v.

U.S. DEPARTMENT OF HEALTH AND
HUMAN SERVICES *et al.*,

Defendants

**NOTICE OF MOTION TO
EXTEND TIME
TO FILE A NOTICE OF APPEAL**
No. 21-cv-7208-AMD

**NOTICE OF MOTION TO EXTEND PLAINTIFFS' TIME TO FILE A NOTICE OF
APPEAL**

Please take notice that, upon the Affirmation of attorney Nick Wilder, Esq, counsel for plaintiffs, dated October 31, 2022, plaintiffs in the above-captioned action will and hereby do move this Court before the Honorable Ann M. Donnelly, United States District Judge, at the United States District Court for the Eastern District of New York, located at 225 Cadman Plaza East, Brooklyn, New York 11201, to extend plaintiff's time to file a notice of appeal, pursuant to Rule 4(a)(5), of the Decision and Order, entered August 11, 2022, denying plaintiffs' motion for a temporary restraining order and injunction, and granting defendants' motion to dismiss all causes of action, including the seventh amendment claim, fifth amendment takings claim and due process claim, deprivation of common law claims, and claims the Regulations exceeding authority by the Act.

Dated: October 31, 2022

Respectfully Submitted

/s/ Nick Wilder, Esq.
The Wilder Law Firm
301 West 57 Street, Suite 19B
New York, NY 10019
(212) 951-0042
nick@wilder.law
Counsel for plaintiffs

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK**

DR. DANIEL HALLER and LONG ISLAND
SURGICAL PLLC,

Plaintiffs,

v.

U.S. DEPARTMENT OF HEALTH AND
HUMAN SERVICES *et al.*,

Defendants

**AFFIRMATION OF NICK WILDER,
ESQ. IN SUPPORT OF
PLAINTIFFS' MOTION TO
EXTEND TIME
TO FILE A NOTICE OF APPEAL
No. 21-cv-7208-AMD**

NICK WILDER, ESQ., an attorney licensed to practice law in the State of New York, and the United States District Court for the Eastern District Court of New York, under penalty of perjury affirms as follows:

1. I am counsel for plaintiffs DANIEL HALLER, MD, and LONG ISLAND SURGICAL PLLC, and fully familiar with the facts and circumstances herein. Due to serious illness, recent major surgery, and damage from powerful opioid medications, which constitute good cause, I make this application for an extension of time, pursuant to Rule 4(a)(5), to file plaintiffs' notice of appeal.

2. Plaintiff instituted an action for a declaration that three provisions of the No Surprises Act, Pub. L. 116-260 (the "Act"), are unconstitutional, and for an injunction prohibiting its enforcement. In addition the action challenges the Administrative Procedure Act to set aside specific provisions of an interim final rule entitled "Requirements Related to Surprise Billing; Part II," 86 Fed. Reg. 55,980 (Oct. 7, 2021).

3. On August 11, 2022 Judgment was entered upon this Court Court's Decision and Order denying plaintiffs' motion for a temporary restraining order and injunction, and granting defendants' motion to dismiss all causes of action, including the seventh amendment claim, fifth amendment takings claim and due process claim, deprivation of common law claims, and claims the Regulations exceeding authority by the Act . At the time, Plaintiffs were represented by Abrams Fensterman, LLP (herein "prior counsel"). A true copy of the Judgment is annexed as **Exhibit A**. Since that time the Act has been amended.

4. This past September 16, 2022, plaintiff's prior counsel filed its letter-motion to withdrawal from representation. On or about September 20, 2022, Plaintiffs' retained my firm to represent them on appeal. On September 28, 2022 this Court granted Plaintiffs' prior firm's motion to withdraw.

5. Pursuant to Rule 4(a)(1)(B), a notice of appeal may be filed within 60 days of notice of entry of the judgment in which a party is the United States or a United States agency. In this matter that date fell on October 11, 2022.

6. I was retained by Plaintiffs' in this matter to substitute for outgoing counsel Abrams Fensterman, on or about September 20, 2022. However, two days later a fistula (a rewiring of arteries and veins in the arm to accommodate dialysis), burst open nearly leading to death due to lose of 1/3 of my blood, and I had major surgery on September 23, 2022. I have been in a very difficult recovery since then. During surgery arteries and veins in my arm were removed, and resected. During the process nerves in my arm were severely disturbed. Since then I was not able to make use of my left arm and hand, and unable to type. Pain increased over time and I was at level 10 pain, and heavily medicated with Oxycodone, which was severely mentally incapacitating. I was both physically and mentally severely incapacitated, before, during, and

after, the time to file the notice of appeal on October 11, 2022. As documentary support, a true copy of the medical documentation from my physician, Dr. Samuel Sultan, dated October 20, 2022 is annexed as **Exhibit B**. I further attach a true copy of the surgery notes from the actual surgery on September 23, 2022 as **Exhibit C**.

7. In addition to the physical incapacitation, the effects of Oxycodone were extreme. I developed a quick tolerance, and had to take higher and higher doses. Contrary to the stereotype of “happy feeling” from these drugs, for me my cognitive and executive function were severely impaired and the opioids made me feel depressed. This was all occurring during the deadline date of October 11, 2022. Despite a short term use, given the high doses of Oxycodone, I had to taper off of it for several days.

8. As of this time I am free of the medication, and have regained adequate use of my body, arms, and hands, and all of my mental faculties.

9. I am a solo practitioner and do not have any associates or other regular support staff. I have for several years utilized, from time to time, the services of a freelance paralegal, Mr. David Goldberg. Shortly after the surgery I contacted Mr. Goldberg who helped file papers immediate deadlines in two other matters; however, he then left town urgently. He had a family issue to attend to in Florida and became unavailable. As the deadline for filing the notice of appeal approached, he was simply not able to assist. See Affidavit of David Goldberg annexed as **Exhibit D**. Note, I was responsible for this filing, not the freelance paralegal, but he is mentioned as my back up system I attempted to use while I was incapacitated.

10. Given the extreme physical and mental incapacitation, prior to and including the deadline of October 11 for filing the notice of appeal, I was left with no option but to submit this

application for a late notice of appeal, pursuant to Rule 4(a)(5). A true copy of the Notice of Appeal is annexed as **Exhibit E**.

11. I respectfully submit to this Court that these circumstances, which were completely beyond my control, constitute “good cause”, and request the Court grant plaintiffs’ request to file a late notice of appeal, pursuant to Rule 4(a)(5).

Dated: October 31, 2022

Respectfully Submitted

/s/ Nick Wilder, Esq.
The Wilder Law Firm
301 West 57 Street, Suite 19B
New York, NY 10019
(212) 951-0042
nick@wilder.law
Counsel for plaintiffs

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
DR. DANIEL HALLER and LONG
ISLAND SURGICAL PLLC,

Plaintiffs,

JUDGMENT

v.

21-CV-7208 (AMD) (AYS)

U.S. DEPARTMENT OF HEALTH AND HUMAN
SERVICES, XAVIER BECERRA, in his official
capacity as Secretary of Health and Human Services,
U.S. OFFICE OF PERSONNEL MANAGEMENT,
KIRAN AHUJA, in her official capacity as Director
of the U.S. Office of Personnel Management,
U.S. DEPARTMENT OF LABOR, MARTIN J.
WALSH, in his official capacity as Secretary of Labor,
U.S. DEPARTMENT OF THE TREASURY, and
JANET YELLEN, in her official capacity as
Secretary of the Treasury,

Defendants.

-----X

A Memorandum, Decision and Order of Honorable Robert M. Levy, United States

Magistrate Judge, having been filed on August 10, 2022, denying the plaintiffs' motion for preliminary injunction; dismissing the plaintiffs' Seventh Amendment and takings claims with prejudice; and dismissing their due process claim for lack of subject matter jurisdiction without prejudice; it is

ORDERED and ADJUDGED that the plaintiffs' motion for preliminary injunction is denied; that the plaintiffs' Seventh Amendment and takings claims are dismissed with prejudice; and that their due process claim is unripe and is dismissed for lack of subject matter jurisdiction without prejudice.

Dated: Brooklyn, New York
August 11, 2022

Brenna B. Mahoney
Clerk of Court

By: /s/Jalitza Poveda
Deputy Clerk

Hackensack University Medical Group
Organ Transplantation
20 Prospect Ave, Suite 406
Hackensack, NJ 07601
551-996-2608

October 20, 2022

Patient: Nicholas Joseph Wilder
Date of Birth: 04/03/1969

Ann M. Donnelly
United States District Judge
United States District Court
for the Eastern District of New York
225 Cadman Plaza East,
Brooklyn, New York 11201

To the Court:

I am a transplant-surgeon at Hackensack Meridian Health. As a result of his kidney failure, I performed a kidney transplant for Nicholas Wilder in April 2022, and he has been under my care since. In September of 2022, he had very large aneurysms on his left arm (from a prior fistula) which ruptured causing a life-threatening loss of blood and injury. On September 23, 2022, major surgery was performed, at my recommendation at New York Presbyterian Hospital, to resect the damaged veins from his arm. He has kept in close contact with me since, and I last examined him on October 13, 2022.

Following the surgery and up to my most recent examination on October 13, 2022, he has had a difficult recovery, and has been unable to use his left arm and hand. Moreover, as expected following such surgery he was in extreme pain requiring Codeine and Oxycodone, which are well known to present significant mental effects. His condition was one of overwhelming physically and mentally disabling effects through my last examination on October 13, 2022.

If you have any questions or concerns, please do not hesitate to contact me.

Sincerely,



Samuel Sultan, MD, FACS
Transplant Surgeon
Hackensack Meridian Health

Note From Your Admission on 09/23/22

Op Note by Christopher J. Agrusa, MD at 9/23/2022 5:29 PM

NY Presbyterian Hospital - Cornell
Operative Report WC
Name: Nicholas J Wilder
MRN: 1010536654
ATT:
DICT: Christopher James Agrusa, MD
Procedure Date: 9/23/2022
SURGEON: Christopher James Agrusa, MD
ASSISTANT: Dr. Rowza Rumma

PREOPERATIVE DIAGNOSIS: Aneurysmal Left Upper Extremity Arteriovenous Fistula with ulcer

POSTOPERATIVE DIAGNOSIS: Aneurysmal Left Upper Extremity Arteriovenous Fistula with ulcer

OPERATION: Ligation and Excision of Left Upper Extremity Arteriovenous Fistula

ANESTHESIA: Regional
ESTIMATED BLOOD LOSS: Minimal
SPECIMENS: Left Upper Extremity Arteriovenous Fistula
DRAINS: NONE
COMPLICATIONS: NONE

INDICATION:
Mr. Wilder is a 53-year-old man with a history of end-stage renal disease now status post kidney transplantation. He was previously dialyzed through a left upper extremity radiocephalic AV fistula. Last week the fistula became increasingly erythematous and eventually ruptured. Fortunately, the patient was able to control the bleeding with manual pressure and this resulted in the fistula thrombosing from the arterial anastomosis up to the antecubital fossa. There was still an open ulceration overlying the fistula with a dry eschar. There is no identifiable purulence but given the open ulceration fistula is likely infected. Therefore it was recommended that the patient undergo ligation and excision of the forearm AV fistula. The risks and benefits were discussed the patient consented to the surgery.

FINDINGS:
Successful ligation and excision of a left arteriovenous fistula. Palpable left radial arterial pulse at the conclusion of the case.

DESCRIPTION OF PROCEDURE:
The patient was brought to the operating room placed in a comfortable supine position. Preoperatively, the anesthesia regional block team performed a left upper extremity regional block. Appropriate lines and monitors were established. The left upper extremity was prepped and draped circumferentially in the usual sterile fashion and extended out onto an arm board. The patient received prophylactic antibiotics within 1 hour of skin incision. A time-out was performed.

Under ultrasound guidance, the arteriovenous fistula was identified and the arterial anastomosis was marked on the skin with a marking pen. With a 15 blade, the skin was incised longitudinally directly overlying the aneurysmal segment of the fistula down towards the anastomosis. The subcutaneous tissue was dissected away from the fistula carefully with electrocautery and sharp dissection. The proximal portion of the fistula just distal to the arterial anastomosis was circumferentially dissected with a combination of sharp dissection and electrocautery and was controlled with a double-looped vessel loop. Test clamping of this segment of the fistula confirmed we were distal to the arterial anastomosis as there was an easily palpable radial pulse at the level of the wrist.

The remaining segment of the aneurysmal fistula was circumferentially dissected with a combination of sharp dissection and electrocautery. The fistula cephalad to the aneurysmal segment was circumferentially dissected and controlled with a double-looped vessel loop. Having successfully circumferentially dissected the entire length of the fistula within the segment, clamps were placed at the proximal aspect of the fistula just distal to the arterial anastomosis and the fistula was divided. The proximal stump was oversewn with a 2-0 silk suture ligature. Hemostasis was excellent. The distal aspect of the fistula was also controlled between vascular clamps. The fistula was excised and sent off to pathology. The distal stump was oversewn with a 2-0 silk suture ligature. Hemostasis was excellent.

The wound was thoroughly irrigated with normal saline. Hemostasis was meticulously achieved. Both proximal and distal stumps of the excised fistula were hemostatic. There was an easily palpable radial pulse at the level of the wrist. The deep dermis was closed with interrupted 3-0 Vicryl sutures. The skin was closed with a running 4-0 subcuticular Biosyn stitch. A dry sterile dressing was placed. The arm was wrapped in a compressive Ace wrap. The patient tolerated the procedure well was transported to postanesthesia care unit in stable condition.

All instrument and sponge counts were correct at the conclusion of the case.

As the attending surgeon, I was present for the critical portions of this procedure and I was immediately available for the entire procedure.

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Plaintiffs,

v.

U.S. DEPARTMENT OF HEALTH AND
HUMAN SERVICES *et al.*,

Defendants

**AFFIDAVIT OF DAVID
GOLDBERG**

No. 21-cv-7208-AMD

STATE OF NEW YORK)

) SS:

COUNTY OF NEW YORK)

DAVID GOLDBERG, a resident of the State of New York, being duly sworn deposes
and says:

1. I am a freelance paralegal, and have from time-to-time assisted Nick Wilder, Esq.
of the Wilder Law Firm, in various legal matters.

2. In the last week of September, Mr. Wilder, informed me that he had major
surgery and was unable to perform his work, normally. Upon visiting him, I saw him with a cast
on his arm, and he was generally in mentally poor condition, which he attributed to the
medication Oxycodone.


3. At the time he indicated he had immediate deadlines in a couple of cases, which I was familiar, and he told me to draft papers for him, reusing prior facts and arguments responsive to opposing papers. Normally he does all his own drafting. Upon his approval they were filed. He also notified me he had another critical matter coming up to help with in a federal appeals case, but I had to depart urgently due to a family emergency.

4. At this time his speech was slurred, he appeared in great pain, and had his arm in a cast and elevated, while lying in bed.


6. Upon hearing again from Mr. Wilder that he still needed further assistance with a new federal case, I advised him I was totally unavailable for work in any fashion.

7. I returned to New York on October 29, and have found that Mr. Wilder is in considerably better condition, and he indicated he no longer required assistance, at this time.

Dated: October 30, 2022
New York, New York



DAVID GOLDBERG
72-10 136 St.
Flushing, New York
11367

On the 30th day of October, 2022, the undersigned appeared before me, presented his  and acknowledged to me that he executes the above affidavit by his signature.



Notary Public

DAVID REICH
Notary Public, State Of New York
No. 02RE4989171
Qualified In Queens County
Commission Expires February 15, 20 22

NOTICE OF APPEAL
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

DR. DANIEL HALLER and LONG ISLAND
SURGICAL PLLC,

Plaintiffs,

v.

U.S. DEPARTMENT OF HEALTH AND
HUMAN SERVICES *et al.*,

Defendants

NOTICE OF APPEAL

No. 21-cv-7208-AMD

Notice is hereby given that DR. DANIEL HALLER and LONG ISLAND SURGICAL PLLC, hereby appeal to the United States Court of Appeals for the Second Circuit from the Decision and Order of the Honorable Ann M. Donnelly, denying plaintiffs' motion for a temporary restraining order and injunction, and granting defendants' motion to dismiss all causes of action, including the seventh amendment claim, fifth amendment takings claim and due process claim, deprivation of common law claims, and claims the Regulations exceeding authority by the Act, and entered as a judgment on August 11, 2022.

Dated: October 31, 2022

Respectfully Submitted

/s/ Nick Wilder, Esq.
The Wilder Law Firm
301 West 57 Street, Suite 19B
New York, NY 10019
(212) 951-0042
nick@wilder.law
Counsel for plaintiffs

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK**

DR. DANIEL HALLER and LONG ISLAND
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Plaintiffs,

v.

U.S. DEPARTMENT OF HEALTH AND
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Defendants

Civil Action No. 21-cv-7208-AMD

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO
EXTEND THE TIME TO FILE THEIR NOTICE OF APPEAL**

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For the reasons set forth below, Plaintiffs respectfully request this Court grant their motion to extend the time to file their notice of appeal.

INTRODUCTION

Plaintiffs instituted an action for a declaration that three provisions of the No Surprises Act, Pub. L. 116-260 (the “Act”), are unconstitutional, and for an injunction prohibiting its enforcement. In addition, the action challenges the Administrative Procedure Act to set aside specific provisions of an interim final rule entitled “Requirements Related to Surprise Billing; Part II,” 86 Fed. Reg. 55,980 (Oct. 7, 2021).

This Court’s Decision and Order concerning this matter was entered on August 11, 2022 denying Plaintiffs’ motion for injunctive relief and granting defendants’ motion to dismiss all claims. The claim for deprivation of property without Due Process was without prejudice, due to amendments to the Rule which have now been made.

Your affirmant was retained to file this appeal on or about September 20, 2022, after prior counsel had filed their motion to withdrawal, but before the Court granted the motion on September 28, 2022.

As discussed in my affidavit in support (herein “Wilder Aff.”), days after being retained, I had a fistula used for dialysis (a rewiring of arteries and veins), which literally burst open and I lost 1/3 of my blood. I then had major surgery on September 23, 2022. The recovery was extreme, and I was in level 10 pain since then, and due to the surgery, and nerve damage was unable to use my left arm or hand. See Wilder Aff., Physician’s Note, Ex. A. I was also prescribed heavy doses of both Codeine and Oxycodone. I could not type and I was left physically and mentally overwhelmingly debilitated. The Oxycodone caused severe cognitive

and executory debilitation and depression. Wilder Aff., pp.5-6. This physical and mental debilitation occurred before, during, and after the deadline of October 11. *Id.* As a result I was not able to file the notice of appeal on time, and move for this extension, pursuant to Federal Rule of Appellate Procedure (“FRAP”) 4(a)(5).

ARGUMENT

In a civil suit in which the United States or its officer or agency is a party, a notice of appeal must be filed within sixty days from the entry of judgment. FRAP 4(a)(1)(B). Under FRAP 4(a)(5), the district court may extend the time to file notice of appeal if a party so moves no later than thirty days after the original deadline for the filing of notice of appeal. Regardless of whether the motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, the party may obtain an extension upon a showing of excusable neglect or **good cause**.

This Court’s Decision and Order was entered on August 11, 2022, and the sixty day, deadline was October 11, 2022. This motion and the notice of appeal are herein filed on October 31, 2022, twenty days after the original deadline, and well within the thirty day allowance to request an extension under FRAP 4(a)(5).

I.

This Application is Based upon *Good Cause*, under FRAP 4(a)(5), Not Excusable Neglect,

This application is based upon illness of plaintiffs’ attorney which is “good cause” and *not* for “excusable neglect”, the latter being a different and stricter standard. Although often used interchangeably, “excusable neglect” as the terms suggests is a more stringent standard than “good cause”. Although several supportive cases cited herein refer to “excusable neglect”, this

application is for good cause, and if those cases referring to “excusable neglect” are supportive, certainly they are supportive of the more lenient “good cause” application.

Some clarification about applicability of the good cause standard must be made. Prior to the 2002 amendments to Rule 4(a)(5)(A), it was thought that good cause only applied to applications made before the original deadline expired, and excusable neglect applied after. This is incorrect. Both good cause and excusable neglect may be made after the original deadline. And in this case, the more “lenient” standard of “good cause” is fully applicable. *See Gibbons v. United States*, 317 F.3d 852, 854-55 (8th Cir. 2003), where the Court of Appeals noted:

As explained in the advisory committee note to the 2002 Amendment to Rule 4(a)(5), effective December 1, 2002, **a motion brought under Rule 4(a)(5) may be granted for either excusable neglect or good cause.** *See* Fed. R.App. P. 4 advisory committee's note. The amendment **corrects the previous interpretation** ... which held that the "good cause" standard applies only to motions brought prior to the expiration of the original deadline and that motions brought during the thirty days after the original deadline must satisfy the **more exacting "excusable neglect" standard.** (*internal citations omitted*). As further explained in the advisory notes, **the good cause standard ‘applies in situations where there is no fault...the need for an extension is ... occasioned by something that is not within the control of the movant.’**

Id at FN 3 (emphasis added).

Therefore, “In light of the 2002 amendment to Rule 4(a)(5)(A)(ii), motions filed after the original appeal period expires are no longer subject solely to the excusable neglect standard”, but permit application of the “good cause standard”. *Sherman v. Quinn*, 668 F. 3d 421, 425 (7th Circuit 2012).

The Committee Note state:

The rule is amended to permit a court to extend the time for “good cause” as well as for excusable neglect. The amendment does not limit extensions for good cause to instances in which the motion for extension of time is filed before the original time has expired.

Fed. R.App. P. 4(a)(5)(A)(ii) (2002 Committee Note) (emphasis added).

II.

What Good Cause Means and Its Application Here

The Committee Note to the amendment highlights the difference between the excusable neglect and good cause standards, and explains the showing for "good cause" to extend the time to file a notice of appeal. The Committee Note states:

The good cause and excusable neglect standards have ‘different domains. They are not interchangeable, and one is not inclusive of the other. The excusable neglect standard applies in situations in which there is fault; in such situations, the need for an extension is usually occasioned by something within the control of the movant. *The good cause standard applies in situations in which there is no fault—excusable or otherwise. In such situations, the need for an extension is usually occasioned by something that is not within the control of the movant.*

Id (emphasis added).

The Good cause standard is less stringent than “excusable neglect.” “Excusable neglect has been held to be a strict standard which is met only in extraordinary cases.” On the other hand **“Good cause will be found where forces beyond the control of the appellant prevented her from filing a timely notice of appeal”**. *Nicholson v. City of Warren*, 467 F. 3d 525,526 (6th Circuit 2006)(emphasis added). In the instant case, the application is for “good cause”, i.e., **severe illness** of the attorney. Good cause is utilized here not because it is “less stringent” but because there was no issue in this matter of “excusable neglect” but only illness beyond my control.

“Unforeseen or uncontrollable events (*e.g.*, a death in the family, illness, or active engagement at trial) lie at the heart of the "good cause" requirement for additional time.” *Joseph v. Hess Oil Virgin Islands Corp.*, 651 F. 3d 348 (3rd Circuit 2011)(emphasis added).

Numerous cases have found attorney illness to be sufficient to permit extension of time (regardless of whether the good cause or excusable neglect standard was applied). See *Harris v. Biddle*, Dist. Court, WD Tennessee, No. 2:18-cv-02631-MSN-tmp, 2021 (“Illness” is “sufficient to establish good cause” because it involves “forces beyond the control of the appellant”); *Hernandez v. Kirby Forensic Psychiatric Hosp.*, Dist. Court, SD New York 2019, No. 14-cv-5910 (AJN) (“good cause” found where plaintiff stated he had bronchitis, secondary to a chronic illness, and filed for an extension within 30 days of the expiration of the notice of appeal); *US v. Cruz*, Dist. Court, Criminal Action No. 2:17cr27-MHT (MDA 2017)(attorney illness good cause to extend filing of notice of appeal); *Bank Of The Ozarks v. Prince Land, LLC*, No. CV 212-013, (SDG 2013) (“this Court finds that [appellant’s] attorney’s heart attack warranted extension of time to file the notice of appeal”)

Documentation by my physicians show overwhelmingly that I had good cause for being unable to file the notice of appeal by October 11. Wilder Aff., Ex. B & C. Indeed, my physician describes his examination of me was just two days after that deadline. *Id.*, Ex. B. I was severely debilitated from major surgery, I was mentally incapacitated by Oxycodone, and I could not type. The mental incapacitation from Oxycodone was extreme. I have no associates or secretaries. For a brief time in September, I utilized a part-time paralegal, but he became unavailable in early October 2022. Wilder Aff. Ex. D, Aff. of David Goldberg.

III

The Standard Invoked Is “Good Cause” But Even “Excusable Neglect” Supports Granting The Late Notice of Appeal

Even if one were to invoke the “excusable neglect” standard which I do not, because this was not neglect of any kind but “good cause”, the motion should be granted.

The United States Supreme Court in *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993), clarified the meaning of “excusable neglect”. The United States Supreme Court utilizes a more “flexible” standard in applying “excusable neglect”. *Id* at 389. The Court held it is an "elastic concept". *Id* at 392. See also *Robb v. Norfolk & Western Ry. Co.*, 122 F. 3d 354 (7th Circuit 1997)(finding excusable neglect and noting "*Pioneer* broadened the definition of `excusable neglect"); *United States v. Thompson*, 82 F.3d 700, 702 (6th Cir.1996) (*Pioneer* establishes "a more liberal definition of what constitutes excusable neglect when an individual seeks a motion for an extension of time in the district court under Fed. R.App. P. 4", remanding to the district court to examine the record accordingly); *United States v. Hooper*, 9 F.3d 257, 258 (2nd Cir.1993) (*Pioneer* advances "a more lenient interpretation" of excusable neglect, vacating the district court’s denial and remanding accordingly); *Islamic Republic of Iran v. Boeing Co.*, 739 F. 2d 464,465 (9th Circuit 1984)(permitting late notice of appeal under Rule 4(a)(5), where attorney was a solo practitioner and his illness was “supported by counsel's sworn affidavit that his illness involved diarrhea, vomiting, and a five pound weight loss”).

See also *Active Glass Corp. v. Architectural And Ornamental Iron Workers*, 899 F. Supp. 1228, 1231 (SDNY 1995)(“Illness of counsel has been regarded as valid grounds for excusable neglect where ‘the illness is.. physically and mentally disabling’); *JP Fyfe, Inc. of Florida v. Bradco Supply Corp.*, 96 BR 479,483 (D.N.J 1989)(good cause found where medications taken by attorney for illness were incapacitating, “a showing of excusable neglect due to illness requires only that Ms. Klar have been "unable to file the appeal”); *United States v. Wrice*, 954 F.2d 406, 408-409 (6th Cir. 1992) (excusable neglect where attorney explained to trial court that he was suffering from severe depression); *Islamic Republic of Iran v. Boeing Co.*, 739 F.2d 464,

465 (9th Cir. 1984) (excusable neglect when counsel was physically and mentally incapacitated, counsel's secretary was also ill, and nonmovant was not prejudiced); *United States v. Ward*, 696 F.2d 1315 (11th Cir. 1983) (Court of Appeals found plaintiff's falling "critically ill soon after sentencing hearing" grounds for extension, but remanded case to district court because such a finding was the district court's responsibility); *In re Mizisin*, 165 BR 834 - Bankr. Court, ND Ohio 1994 ("excusable neglect includes sudden death, disability or illness of counsel or the party").

Pursuant to *Pioneer*, the factors to consider in determining "excusable neglect" include: (1) the danger of prejudice to the nonmovant; (2) the length of the delay and its potential impact on judicial proceedings; (3) the reason for the delay, including whether it was within the reasonable control of the movant; and (4) whether the movant acted in good faith." *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993).

Clearly the facts presented meet even these more stringent requirements---if they were applied. There is no prejudice of any kind to defendants. The length of the delay is less than 3 weeks which has no impact on judicial proceedings. There is no conceivable claim that plaintiffs and I have proceeded in any manner other than good faith. Finally, the key element, "the reason for delay, including whether it was in the reasonable control of the movant" is compellingly in plaintiffs' favor. As discussed above, I have had a serious illness, requiring major surgery, extreme physical and mental debilitation from Oxycodone making earlier filing impossible. *Wilder Aff.*, pars. 5-6, Ex. B. This was entirely beyond my control.

In any event, as discussed above, the appropriate standard is "good cause". There was no neglect involved. "The good cause standard 'applies in situations where there is not fault-excusable or otherwise' i.e., 'the need for an extension is ... occasioned by something that is not

within the control of the movant.” *Gibbons v. United States*, 317 F.3d 852, 854-55 (8th Cir. 2003), quoting from Fed. R. App. P. 4(a)(5)(A)(ii) (2002 Committee Note). *Harris v. Biddle*, No. 2:18-cv-02631-MSN-tmp (*W.D.T* 2021) (“Illness” is “sufficient to establish good cause” because it involves “forces beyond the control of the appellant”)

I am a solo practitioner and experienced a near-death experience of massive blood loss, followed by emergency surgery, leaving me with no use of my left arm and hand, severe pain, and mental debilitation due to a constant diet of prescribed Oxycodone, creating extreme physical and mental debilitation through the time the notice of appeal was due, making such filing impossible. This was entirely beyond my control, and constituted “good cause”.

CONCLUSION

For all of the aforementioned reasons involving illness in the form of physical and mental debilitation beyond the attorney’s control, Plaintiffs respectfully request this Court grant their motion to extend time to file the notice of appeal, pursuant to FRAP 4(a)(5).

Respectfully Submitted

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