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8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA
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11 **NOEL RODRIGUEZ,**

12 Plaintiff,

13 v.

14 **ISAAC,**

15 Defendant.

1:11-cv-01914-AWI-EPG-PC

**ORDER DENYING DEFENDANT’S
MOTION TO STRIKE**
(Doc. 54)

**ORDER DENYING PLAINTIFF’S
MOTION FOR
RECONSIDERATION AND
MOTION FOR
DISQUALIFICATION OF
MAGISTRATE JUDGE**
(Doc. 53)

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18 **I. BACKGROUND**

19 Noel Rodriguez (“Plaintiff”) is a state prisoner proceeding *pro se* in this civil rights
20 action pursuant to 42 U.S.C. § 1983. On February 16, 2016, Plaintiff filed an “extraordinary
21 motion” which the Court construes as a motion for reconsideration of the Court’s order dated
22 February 5, 2016 granting Defendant’s motion for extension of time, and a motion for
23 disqualification of Magistrate Judge Erica P. Grosjean. (Doc. 53.) On March 3, 2016,
24 Defendant filed a motion to strike Plaintiff’s “extraordinary motion” as unauthorized. (Doc.
25 54.) On March 11, 2016, Plaintiff filed an opposition to the motion to strike. (Doc. 55.)

26 Defendant’s motion to strike, Plaintiff’s motion for reconsideration, and Plaintiff’s
27 motion to disqualify the Magistrate Judge are now before the Court.
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1 **II. MOTION TO STRIKE**

2 Defendant argues that Plaintiff’s “extraordinary motion” should be stricken as an
3 unauthorized motion, because the Court’s findings and recommendations, issued on December
4 30, 2015, authorized objections by the parties, but did not authorize any further motions
5 regarding the findings and recommendations.

6 Defendant’s motion to strike shall be denied. Defendant has not cited any authority,
7 and the Court finds none, supporting the argument that the Court’s findings and
8 recommendations precludes the parties from filing a motion such as Plaintiff’s, seeking
9 reconsideration of a prior order and disqualification of the Magistrate Judge.

10 **III. MOTION FOR RECONSIDERATION**

11 **A. Legal Standards**

12 Rule 60(b) allows the Court to relieve a party from an order for “(1) mistake,
13 inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with
14 reasonable diligence, could not have been discovered in time to move for a new trial under
15 Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or
16 misconduct by an opposing party; (4) the judgment is void; or (6) any other reason that justifies
17 relief.” Fed. R. Civ. P. 60(b). Rule 60(b)(6) “is to be used sparingly as an equitable remedy to
18 prevent manifest injustice and is to be utilized only where extraordinary circumstances . . .”
19 exist. Harvest v. Castro, 531 F.3d 737, 749 (9th Cir. 2008) (internal quotations marks and
20 citation omitted). The moving party “must demonstrate both injury and circumstances beyond
21 his control . . .” Id. (internal quotation marks and citation omitted). In seeking reconsideration
22 of an order, Local Rule 230(k) requires Plaintiff to show “what new or different facts or
23 circumstances are claimed to exist which did not exist or were not shown upon such prior
24 motion, or what other grounds exist for the motion.”

25 “A motion for reconsideration should not be granted, absent highly unusual
26 circumstances, unless the district court is presented with newly discovered evidence, committed
27 clear error, or if there is an intervening change in the controlling law,” *Marlyn Nutraceuticals,*
28 *Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 880 (9th Cir. 2009) (internal quotations

1 marks and citations omitted, and “[a] party seeking reconsideration must show more than a
2 disagreement with the Court’s decision, and recapitulation . . . ” of that which was already
3 considered by the Court in rendering its decision,” *U.S. v. Westlands Water Dist.*, 134
4 F.Supp.2d 1111, 1131 (E.D. Cal. 2001). To succeed, a party must set forth facts or law of a
5 strongly convincing nature to induce the court to reverse its prior decision. *See Kern-Tulare*
6 *Water Dist. v. City of Bakersfield*, 634 F.Supp. 656, 665 (E.D. Cal. 1986), affirmed in part and
7 reversed in part on other grounds, 828 F.2d 514 (9th Cir. 1987).

8 **B. Plaintiff’s Motion**

9 Plaintiff seeks reconsideration of the Court’s order of February 5, 2016 which granted
10 Defendant an extension of time to file a reply to Plaintiff’s objections to the findings and
11 recommendations. (Doc. 50.) Plaintiff’s argues that Defendant’s motion for extension of time
12 to file a reply was filed too late, because it was filed after the date the reply was due, and
13 therefore the Court should not have considered it. Plaintiff asserts that Defendant’s reply to the
14 objections was due “around January 25, 2016,” [but] Defendant waited till Feb 1, 2016 to
15 request an extension.” (*Id.* at 3 ¶4.) Plaintiff requests the Court to strike Defendant’s motion
16 for extension of time and Defendant’s reply to Plaintiff’s objections.

17 Plaintiff’s argument is unpersuasive, because Defendant’s motion was not filed late.
18 Plaintiff has miscalculated the deadline the reply was due.¹ Moreover, the Court has discretion
19 to grant an untimely motion for extension of time. Fed. R. Civ. P. 6(b)(1)(b).

20 Plaintiff also argues that the Court granted Defendant’s motion for extension of time
21 without considering Plaintiff’s opposition. Indeed, Plaintiff filed a timely opposition on
22 February 11, 2016, but the Court had already granted Defendant’s motion on February 5, 2016.
23 At this juncture, the Court has reviewed and considered Plaintiff’s opposition and is not
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27 ¹ The findings and recommendations required the parties to file and serve any reply to the
28 objections “within ten days after service of the objections.” (Doc. 47 at 12:12-13.) Here, pursuant to Local Rule
135(a), the Court electronically served Plaintiff’s objections on January 21, 2016. Ten days after January 21, 2016
is February 1, 2016. Therefore, Defendant’s deadline to file a reply was February 1, 2016, not January 25, 2016
under Plaintiff’s calculation.

1 persuaded to change its decision. Plaintiff's opposition is based on the argument that
2 Defendant's motion was untimely, and as discussed above, this argument is without merit.

3 Plaintiff has not set forth facts or law of a strongly convincing nature to induce the
4 Court to reverse its prior decision. Therefore, Plaintiff's motion for reconsideration shall be
5 denied.

6 **IV. DISQUALIFICATION OF THE MAGISTRATE JUDGE**

7 **A. Legal Standards – U.S.C. § 455**

8 Under 28 U.S.C. § 455(a), “[a]ny . . . judge . . . shall disqualify himself in any
9 proceeding in which his impartiality might reasonably be questioned.” *Pesnell v. Arsenault*,
10 543 F.3d 1038, 1043 (9th Cir. 2008). 28 U.S.C. § 455(b) provides in relevant part, “[h]e shall
11 also disqualify himself in the following circumstances: [w]here he has a personal bias or
12 prejudice concerning a party . . .” 28 U.S.C. §455(b)(1). A motion under § 455 is addressed to,
13 and must be decided by, the very judge whose impartiality is being questioned.” *Bernard v.*
14 *Coyne*, 31 F.3d 842, 843(9th Cir. 1994). “Section 455 clearly contemplates that decisions with
15 respect to disqualification should be made by the judge sitting in the case, and not by another
16 judge.” *Id.* (quoting *United States v. Balistrieri*, 779 F.2d 1191, 1202 (7th Cir. 1985)).
17 “[S]ection 455 includes no provision for referral of the question of recusal to another judge; if
18 the judge sitting on the case is aware of grounds for recusal under section 455, that judge has a
19 duty to recuse himself or herself.” *United States v. Sibla*, 624 F.2d 864, 868 (9th Cir. 1980)
20 (citing *Nicodemus v. Chrysler Corp.*, 596 F.2d 152, 157 & n.10 (6th Cir. 1979)). On the other
21 hand, “in the absence of a legitimate reason to recuse himself, a judge should participate in
22 cases assigned.” *United States v. Holland*, 519 F.3d 909, 912 (9th Cir. 2008).

23 The substantive standard is ““whether a reasonable person with knowledge of all the
24 facts would conclude that the judge's impartiality might reasonably be questioned.”” *Pesnell*,
25 543 F.3d at 1043 (quoting *United States v. Hernandez*, 109 F.3d 1450, 1453 (9th Cir. 1997)).
26 However, the bias must arise from an extra-judicial source and cannot be based solely on
27 information gained in the course of the proceedings. *Id.* (citing *Liteky v. United States*, 510
28 U.S. 540, 554-56 (1994). “Judicial rulings alone almost never constitute a valid basis for a bias

1 or partiality motion.” *In re Focus Media, Inc.*, 378 F.3d 916, 930 (9th Cir. 2004) (quoting
2 *Liteky*, 510 U.S. at 555). “In and of themselves . . . , they cannot possibly show reliance upon an
3 extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism
4 or antagonism required ... when no extrajudicial source is involved.” *Id.*

5 **B. Plaintiff’s Motion**

6 Plaintiff seeks disqualification of the Magistrate Judge from participating in this action,
7 and requests a Court order striking the findings and recommendations dated December 30,
8 2015 and the order dated February 5, 2016 granting Defendant’s motion for extension of time.
9 Plaintiff argues that the Magistrate Judge “maliciously abus[ed] her position to get plaintiff’s
10 case dismissed, by filing a false findings and recommendations, providing false info in a court
11 order dated 2-4-16, and granting extension of time to an untimely Request.” (Doc. 53 at 1.)
12 Plaintiff argues that the findings and recommendations presented false information “that a final
13 Judgement was entered in a previous case and Defendant was a party in that action and Res
14 Judicata Applies in this case.” (*Id.* at 3 ¶2.) Plaintiff contends that the Magistrate Judge’s
15 decisions, in the findings and recommendations and the order granting Defendant’s motion for
16 extension of time, support Defendant’s arguments, and thus the Magistrate Judge abused her
17 power and showed favoritism to Defendant.

18 **C. Discussion**

19 Plaintiff’s arguments are not sufficient to show personal bias or prejudice by the
20 Magistrate Judge. Plaintiff’s allegation that the Magistrate Judge’s orders show favoritism to
21 Defendant is “devoid of specific fact allegations tending to show personal bias stemming from
22 an extrajudicial source.” *Sibla*, 624 F.2d at 868. Plaintiff fails to allege any facts
23 demonstrating that the Magistrate Judge demonstrated prejudice towards Plaintiff. Plaintiff
24 does not offer any facts supporting his assertion that any of the Magistrate Judge’s decisions in
25 this case were made because of extrajudicial prejudice or bias.

26 Section 455 requires that a judge be *subjectively confident* of his or her ability to be
27 evenhanded. *Bernard v. Coyne*, 31 F.3d 842, 844 (9th Cir. 1994) (emphasis added). After
28 careful examination of the circumstances of this case, the Court does not find any bias for or

1 against any of the parties to this case by the Magistrate Judge. Thus, there are no grounds for
2 recusal on the basis of actual bias. Section 455 also requires that a judge be confident “that an
3 informed, rational, objective observer would not doubt his [or her] impartiality.” *Id.* After
4 careful consideration of all the circumstances of this case, the Court finds no reason that the
5 Magistrate Judge’s impartiality in this case might reasonably be questioned by an informed,
6 rational, objective observer. Plaintiff’s conclusory allegations would not lead a reasonable
7 person to conclude that the Magistrate Judge’s impartiality in this case might reasonably be
8 questioned. Accordingly, there is no appearance of bias or prejudice warranting
9 disqualification of the Magistrate Judge in this case.

10 For the foregoing reasons, Plaintiff’s motion to disqualify Magistrate Judge Erica P.
11 Grosjean from participating in this action shall be denied.

12 **IV. CONCLUSION**

13 Based on the foregoing, IT IS HEREBY ORDERED that:

- 14 1. Defendant’s motion to strike, filed on September 29, 2015, is DENIED; and
- 15 2. Plaintiff’s motion for reconsideration and motion to disqualify Magistrate Judge
16 Erica P. Grosjean are DENIED.

17 IT IS SO ORDERED.

18 Dated: March 25, 2016

19 
20 SENIOR DISTRICT JUDGE