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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA
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10 Sons of Hell Motorcycle Club, et al.,

11 Plaintiffs,

12 vs.

13 Arizona Department of Public Safety,
14 et al.,

15 Defendants.

No. CV-13-08192-PCT-PGR

ORDER

16 Pending before the Court is Plaintiffs' Motion for Relief From Order (Doc. 27),
17 wherein the plaintiffs seek to have the judgment dismissing their action vacated
18 pursuant to Fed.R.Civ.P. 60(b). Having considered the motion in light of the
19 defendants' Joint Response to Plaintiffs' Motion for Relief From Order (Doc. 28) and
20 the plaintiffs' failure to file any reply in support of their motion, the Court finds that the
21 motion should be denied.¹

22 Background

23 The plaintiffs, who consist of the Sons of Hell Motorcycle Club and fifteen
24 individuals, filed their Civil Rights Complaint Pursuant to 42 U.S.C. § 1983 on July
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The Court notes that no party has requested oral argument on the plaintiffs' motion.

1 19, 2013, through attorney Philip A. Seplow of Phoenix. The complaint alleges that
2 the defendants, who consist of three Arizona and Coconino County law enforcement
3 agencies or organizations and eighteen state and county law enforcement officers
4 and seventeen of their spouses, violated several of the plaintiffs' constitutional rights
5 on July 23, 2011 during a multiple homicide investigation.

6 On November 27, 2013, the defendants filed a Joint Motion to Exceed Page
7 Limit, wherein they requested permission to file an overlength motion to dismiss this
8 action; the defendants served their motion on Mr. Seplow. On December 9, 2013,
9 attorney Stephen P. Stubbs of Las Vegas filed an application pursuant to LRCiv
10 83.1(b)(2) to appear in this action *pro hac vice* on behalf of the plaintiffs; the Clerk
11 of the Court granted that application on December 9, 2013. On January 2, 2014, the
12 Court vacated the Scheduling Conference that had been set for January 13, 2014,
13 and granted the defendants leave to file their lodged motion to dismiss; notice of the
14 Court's order was given to both Mr. Seplow and Mr. Stubbs. The Defendants' Joint
15 Motion to Dismiss All Claims was filed on January 2, 2014, and notice of that filing
16 was given to both Mr. Seplow and Mr. Stubbs. The defendants' twenty-two page
17 motion sought the dismissal of the plaintiffs' complaint in its entirety principally
18 pursuant to Fed.R.Civ.P. 12(b)(6).

19 The Court granted the defendants' motion to dismiss on June 9, 2014,
20 pursuant to LRCiv 7.2(i) due to the plaintiffs' failure to respond in any manner to the
21 motion.² The Clerk of the Court entered judgment for the defendants that same day.

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24 Since the defendants' motion to dismiss was premised in part on a
25 standing-related lack of subject matter jurisdiction argument, the plaintiffs had thirty
26 days after service to respond to the motion. LRCiv 12.1(b). The Court waited four
months after the plaintiffs' response was due before granting the motion to dismiss,
during which time the plaintiffs did nothing of record.

1 On July 7, 2014, the plaintiffs, through their Las Vegas counsel, Stephen
2 Stubbs, filed a Motion for Relief From Order, wherein they seek to have the
3 judgment against them vacated pursuant to Fed.R.Civ.P. 60(b) so that they can now
4 respond to the defendants' motion to dismiss. The defendants filed their Joint
5 Response to Plaintiffs' Motion for Relief From Order on July 18, 2014. The plaintiffs
6 have not filed any reply in support of their motion, and their time to do so pursuant
7 to LRCiv 7.2(d) expired on July 28, 2014.

8 Discussion

9 The plaintiffs seek to vacate the judgment entered against them pursuant to
10 one or more portions of Fed.R.Civ.P. 60(b) solely on the ground that their failure to
11 respond to the motion to dismiss was caused by Stephen Stubbs' "inexperience in
12 Arizona and Federal judicial procedures." The Court concludes that the plaintiffs
13 have failed to meet their burden of establishing that the judgment in this action
14 should be vacated under any provision of Rule 60(b).

15 A. Failure to Discuss Co-Counsel

16 The Court initially notes that the plaintiffs' motion is fatally flawed from the
17 outset because it relies solely on Mr. Stubbs' conduct while totally ignoring the fact
18 that at the time this action was dismissed the plaintiffs were also represented by
19 Philip Seplow, the attorney who filed this action on their behalf.³ Nothing is said by
20 the plaintiffs about Mr. Seplow's subsequent role in their representation or why he
21 never responded to the motion to dismiss on their behalf. Under LRCiv 83.3, Mr.
22 Seplow remained a counsel of record for the plaintiffs throughout the prosecution of

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25 The Court notes that Mr. Seplow is known to it as being a very
26 experienced criminal defense attorney.

1 this action, and still so remains, because their Rule 60(b) motion was filed prior to
2 the expiration of the appeal period and because no motion seeking his withdrawal
3 has ever been filed, much less approved by the Court.⁴ The plaintiffs' inexplicable
4 failure to raise any Rule 60(b)-related argument regarding Mr. Seplow's inaction
5 regarding the motion to dismiss is in and of itself a sufficient basis to deny them Rule
6 60(b) relief.

7 B. Rule 60(b)(1)

8 Even if Mr. Seplow's presence as co-counsel was not a determinative factor
9 into the Court's reasoning, the Court would still decline to vacate the judgment
10 because what minimal reasoning the plaintiffs have put forth is simply unpersuasive.
11 Although it is not clear from their motion, it appears that the plaintiffs are relying
12 mainly on Rule 60(b)(1), which provides that "[o]n motion and just terms, the court
13 may relieve a party or its legal representative from a final judgment ... for the
14 following reasons: (1) mistake, inadvertence, surprise, or excusable neglect[.]"⁵ The
15 Court presumes from the plaintiffs' argument that they are relying on the defense of
16 excusable neglect based on Stephen Stubbs' inexperience in litigating this type of
17 case. Although the plaintiffs never discuss what the concept of excusable neglect

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19 LRCiv 83.3(a) provides in relevant part that "[a]n attorney of record shall
20 be deemed responsible as attorney of record in all matters before and after judgment
21 until the time for appeal expires or until there has been a formal withdrawal from or
22 substitution in the case." LRCiv 83.3(b) provides in relevant part that "[n]o attorney
shall be permitted to withdraw or be substituted as attorney of record in any pending
action except by formal written order of the Court, supported by written application[.]"

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24 The Court is not sure exactly which portions of Rule 60(b) the plaintiffs
25 are basing their motion on because they never sufficiently say so. While the
26 plaintiffs specifically cite only to Rule 60(b)(1), their motion quotes the entirety of
Rule 60(b) with subsections (b)(1), (2), and (6) italicized; they do not, however, ever
explain whether all of the italicized portions form the basis of their motion.

1 entails, they state that no response was filed to the defendants' motion to dismiss
2 because Mr. Stubbs' law practice started as a tax law-only practice and he is "now
3 starting to work on personal injury and civil rights matters," he "is new to Federal
4 procedures and duties of civil procedure when a motion is filed by another party," he
5 "was not aware of all the technicalities of responding to a formal Motion to Dismiss,"
6 and he "is not specifically aware of Arizona and Federal rules of procedure." The
7 plaintiffs also state that Mr. Stubbs reasonably determined that the plaintiffs "did not
8 need to formal[ly] oppose the Motion on the merits [because] Plaintiffs' claims were
9 clearly outlined in the Complaint" and "a response would have entailed the same
10 facts presented in Plaintiffs' Complaint." They further state that Mr. Stubbs "expected
11 to argue the details in person at the hearing of Defendants' Motion to Dismiss."

12 Leaving aside the issue of whether the plaintiffs' response represents an
13 admission that Mr. Stubbs was not competent to represent the plaintiffs in this action
14 when he was granted *pro hac vice* admission⁶, the plaintiffs have not established
15 that his purported lack of knowledge of applicable procedural rules amounts to
16 excusable neglect under the totality of the relevant circumstances. As the
17 defendants correctly point out, LRCiv 83.1(b)(2), which governs Mr. Stubbs' *pro hac*
18 *vice* admission, provides in part that "[a]ttorneys admitted to practice *pro hac*
19 *vice* must comply with the Rules of Practice of the United States District Court for the
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22 LRCiv 83.2(e) provides that "[t]he 'Rules of Professional Conduct,' in the
23 Rules of the Supreme Court of the State of Arizona, shall apply to attorneys admitted
24 or otherwise authorized to practice before the United States District Court for the
25 District of Arizona." Arizona's ER 1.1 requires a lawyer to "provide competent
26 representation to a client" by employing "legal knowledge, skill, thoroughness and
preparation reasonably necessary for the representation." Nevada, the jurisdiction
in which Mr. Stubbs is licensed, has the same ethical rule regarding attorney
competency.

1 District of Arizona.” (“Local Rules”); furthermore, by signing the *pro hac vice*
2 application form, Mr. Stubbs specifically certified that he would comply with the
3 Court’s Local Rules. These rules, which Mr. Stubbs clearly did not review as
4 required, specifically provide a time period for responding to a motion to dismiss, see
5 LRCiv 7.2(c) (fourteen days after service) and LRCiv 12.1(b) (30 days after service
6 if a jurisdictional defense is raised in the motion), and they specifically set forth the
7 potential consequence for failing to oppose a motion. See LRCiv 7.2(i) (“... if ...
8 counsel does not serve and file the required answering memoranda, ... such non-
9 compliance may be deemed a consent to the ... granting of the motion and the Court
10 may dispose of the motion summarily.”) The Local Rules also specifically state that
11 even if a party requests oral argument on a motion, which the defendants did do with
12 their motion to dismiss, the granting of oral argument is nevertheless solely within
13 the Court’s discretion and in this case the Court never set a hearing on the
14 defendants’ motion. See LRCiv 7.2(f) (“The Court may decide motions without oral
15 argument. If oral argument is granted, notice will be given in a manner directed by
16 the Court.”)

17 As the Supreme Court has stated, “inadvertence, ignorance of the rules, or
18 mistakes construing the rules do not usually constitute ‘excusable’ neglect[.]”
19 Pioneer Investment Services Co. v. Brunswick Associates Ltd. P’ship, 507 U.S. 380,
20 392 (1993); *accord*, Pincay v. Andrews, 389 F.3d 853, 860 (9th Cir.2004) (en banc)
21 (“We agree that a lawyer’s mistake of law in reading a rule of procedure is not a
22 compelling excuse.”) Nevertheless, there is no per se rule requiring the denial of a
23 Rule 60(b) motion based on an attorney’s ignorance of procedural rules. Pincay, at
24 860. The determination of whether an attorney’s neglect is excusable is an equitable
25 one that depends on at least four nonexclusive factors: (1) the danger of prejudice
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1 to the opposing party; (2) the length of the delay and its potential impact on the
2 proceedings; (3) the reason for the delay; and (4) whether the movant has acted in
3 good faith. Bateman v. U.S. Postal Service, 231 F.3d 1220, 1223-24 (9th Cir.2000).

4 The Court concludes that the first two first factors militate against granting the
5 plaintiffs' motion. The plaintiffs make no effort to discuss the related prejudice and
6 impact factors and thus have not established that the defendants would not be
7 unduly prejudiced or that this litigation would not be adversely impacted if the
8 judgment is vacated. The Court concludes that the adverse effect on the defendants
9 would be more than minimal if this case is allowed to proceed. This is because this
10 action represents the second time the plaintiffs have sued the defendants in this
11 Court over their actions during the July 23, 2011 incident that allegedly violated the
12 plaintiffs' constitutional rights and the second time the plaintiffs' action has been
13 dismissed due to the failure of their chosen counsel to respond to the defendants'
14 motion to dismiss. The first action, Sons of Hell Motorcycle Club v. Arizona
15 Department of Public Safety, CV-12-08145-PCT-JAT, was commenced on July 20,
16 2012 and was dismissed without prejudice on March 19, 2013 when the Court
17 granted the defendants' motion to dismiss after the plaintiffs, through different
18 counsel of record, failed to do anything to oppose the motion to dismiss.⁷ The
19 plaintiffs filed this action four months later. Now, three years after the incident
20 occurred and two years after the first action was filed, the plaintiffs, without ever
21 disclosing in their motion the existence of the first action, are seeking to vacate the
22 dismissal of their second action so that they can begin to litigate their claims against

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25 All but one of the plaintiffs in this action were named plaintiffs in the first
26 action, and every defendant named in this action was also a named defendant in the
first action.

1 the defendants. The Court agrees with the defendants that principles of equity
2 prevent the plaintiffs, regardless of whatever unargued prejudice will befall them if
3 the judgment is not vacated, from being able to resurrect increasingly stale claims
4 that they have now twice filed and have twice failed to litigate properly.

5 The last two factors also weigh against the granting of the motion. The
6 plaintiffs conclusorily contend that their failure to respond to the defendants' motion
7 to dismiss during the five months between the filing of the motion and the Court's
8 granting of the motion was due to Mr. Stubbs' inexperience with the federal civil
9 judicial system, his lack of specific awareness of Arizona and Federal procedural
10 rules, and his lack of understanding of how to respond to a motion to dismiss. Not
11 only is Mr. Stubbs' failure to understand and abide by applicable procedural rules
12 "one of the least compelling excuses that can be offered" to support a Rule 60(b)
13 motion, Pincay, 389 F.3d at 859; see *a/so*, Dela Rosa v. Scottsdale Memorial Health
14 Systems, Inc., 136 F.3d 1241, 1244 (9th Cir.1998) ("The fact that an attorney's
15 federal practice is rare or infrequent, however, is no excuse for ignoring the rules of
16 [the] court."), the plaintiffs' underlying contention that Mr. Stubbs "is new to Federal
17 procedures and duties of civil procedure when a motion is filed by another party" is
18 at the very least a prevarication that represents an unacceptable lack of candor. It
19 is clear, as the defendants correctly detail, that Mr. Stubbs well knew during the
20 relevant time period that a motion to dismiss required a written response and that the
21 failure to respond could result in the summary granting of the motion.

22 First, Mr. Stubbs is not some newly admitted member of the bar. At the time
23 Mr. Stubbs applied for *pro hac vice* admission in this action in December 2013 he
24 had been a member of the Nevada bar for almost seven years.

25 Second, this action is not the first federal court action of this type litigated by
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1 Mr. Stubbs. The public dockets of the District of Nevada, of which the Court takes
2 judicial notice, establish that Mr. Stubbs first began litigating civil rights actions
3 pursuant to 42 U.S.C. § 1983 in federal court in June 2012 in the ongoing case of
4 Southern Nevada Confederation of Clubs, Inc. v. Las Vegas Metropolitan Police
5 Dept., 2:12-cv-01093-RFB-VCF.

6 Third, at the time a response to the motion to dismiss in this action should
7 have been filed in February 2014, Mr. Stubbs had already filed several formal
8 responses to motions to dismiss in his District of Nevada § 1983 actions: in the
9 Southern Nevada Confederation of Clubs case, he filed a response in January 2013
10 and two more in October 2013; and in early February 2014, at the same time he
11 should have filed his response in this action, Mr. Stubbs filed two responses to
12 motions to dismiss in another District of Nevada § 1983 case, AMC Property
13 Holdings, LLC v. Las Vegas Metropolitan Police Dept., 2:13-cv-01591-RFB-VCF.

14 Fourth, Mr. Stubbs had already been formally put on notice prior to the
15 February 2014 deadline for the plaintiffs to respond to the motion to dismiss in this
16 action that his failure to respond to a motion could lead to it being summarily granted
17 in that the court in the Southern Nevada Confederation of Clubs case entered an
18 order on June 26, 2013 that granted the defendants' motion to strike the plaintiffs'
19 second amended complaint due to Mr. Stubbs' failure to file an opposition to the
20 motion; in so doing, the court stated that "[t]he failure of an opposing party to file a
21 response to any motion constitutes consent to the granting of the motion" pursuant
22 to a District of Nevada local rule that is effectively identical to this Court's local rule.
23 Furthermore, in the dismissal order in March 2013 in CV-12-08145-PCT-JAT, the
24 plaintiffs' first version of this action in this Court, which Mr. Stubbs clearly had an
25 ethical obligation to be aware of, Judge Teilborg, noting that the plaintiffs had failed
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1 to oppose the motion to dismiss, specifically relied on LRCiv 7.2(i) by stating that
2 “[t]he Court’s decision to grant the motions in these circumstances is further
3 supported by the fact that it is premised upon a local rule that expressly permits the
4 Court to summarily grant unopposed motions.”

5 The plaintiffs’ contention that they acted in good faith in failing to respond to
6 the motion to dismiss is not sufficiently supported by the record, and is made even
7 less persuasive by their failure to make any effort to rebut the defendants’ contrary
8 arguments through the filing of a reply in support of their motion.

9 What the record establishes is that Mr. Stubbs, although knowing at the
10 relevant time that he needed to formally respond to the motion to dismiss to prevent
11 the possibility of it being summarily granted, made the deliberate decision that a
12 written response was not necessary. As the Ninth Circuit has stated,

13 Rule 60(b)(1) is not intended to remedy the effects of a litigation
14 decision that a party later comes to regret through subsequently-gained
15 knowledge that corrects the erroneous legal advice of counsel. For
16 purposes of [Rule 60](b)(1), parties should be bound by and
17 accountable for the deliberate action of themselves and their chosen
counsel. This includes not only an innocent, albeit careless or
negligent, attorney mistake but also intentional attorney misconduct.
Such mistakes are more appropriately addressed through malpractice
claims.

18 Latshaw v. Trainer Wortham & Co., Inc., 452 F.3d 1097, 1101 (9th Cir.2006); *accord*,
19 Casey v. Albertson’s Inc., 362 F.3d 1254, 1260 (9th Cir.2004) (“As a general rule,
20 parties are bound by the actions of their lawyers, and alleged attorney malpractice
21 does not usually provide a basis to set aside a judgment pursuant to Rule 60(b)(1).”)

22 C. Rule 60(b)(2)

23 The plaintiffs state in their motion, without any elaboration, that Mr. Stubbs
24 became aware on July 2, 2014 of a newly issued Ninth Circuit decision, Sandoval
25 v. Las Vegas Metropolitan Police Dept., 2014 WL 2936254 (9th Cir. July 1, 2014),
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1 that constitutes new case law that “favors” their defense to the defendants’ motion
2 to dismiss. The Court does not know if this contention is meant to raise an issue
3 under Rule 60(b)(2), which pertains to vacating a judgment due to newly discovered
4 evidence. If it is, there is no merit to it since new case law does not constitute new
5 “evidence” for purposes of the rule. See 12 Moore’s Federal Practice, § 60.42[3][b]
6 (3rd Ed.) (“Not surprisingly, no court has ever considered changes in the ‘law’ after
7 trial to constitute newly-discovered ‘evidence’ so as to justify relief from the judgment
8 under Rule 60(b)(2).”)

9 D. Rule 60(b)(6)

10 The plaintiffs also argue that justice would not be served if they are precluded
11 from fairly adjudicating the merits of their claims merely because of their counsel’s
12 inexperience. If this is meant to be an argument for vacating the judgment pursuant
13 to Rule 60(b)(6)’s “any other reason that justifies relief,” the Court concludes that it
14 has no merit. Because Rule 60(b)(6) must be used “sparingly as an equitable
15 remedy to preserve manifest injustice,” the plaintiffs are not entitled to relief under
16 this rule unless they demonstrate that they were prevented from prosecuting this
17 action due to “extraordinary circumstances.” Lal v. California, 610 F.3d 518, 524 (9th
18 Cir.2010); *accord*, Harvest v. Castro, 531 F.3d 737, 749 (9th Cir.2008) (“A party
19 moving for relief under Rule 60(b)(6) must demonstrate both injury and
20 circumstances beyond his control that prevented him from proceeding with the action
21 in a proper fashion.”) (Internal quotation marks omitted.) No extraordinary
22 circumstances are present here; rather, the Court granted the motion to dismiss as
23 a result of Mr. Stubbs’ considered decision not to file a written opposition to the
24 motion. See Ackermann v. United States, 340 U.S. 193, 198 (1950) (noting that
25 “free, calculated, deliberate choices are not to be relieved from” under Rule
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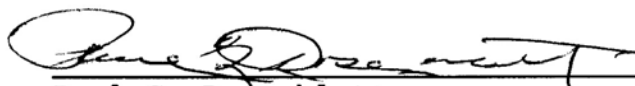
1 60(b)(6).)

2 While the Ninth Circuit recognizes that Rule 60(b)(6) relief may be available
3 to vacate a judgment entered as a result of an attorney's gross negligence, *i.e.*,
4 neglect that is so gross as to be inexcusable, such as an attorney's virtual
5 abandonment of his client, Mackey v. Hoffman, 682 F.3d 1247, 1251 (9th Cir.2012),
6 the plaintiffs make no such argument here. In any case, the record does not
7 establish any such gross negligence on Mr. Stubbs' part. While his decision to forgo
8 a written response to the motion to dismiss in favor of presenting the plaintiffs'
9 opposition through oral argument at a non-scheduled hearing certainly amounts to
10 an unaccountable lapse in basic legal knowledge, it was not so grossly negligent as
11 to "vitiate[] the agency relationship that underlies our general policy of attributing to
12 the client the acts of his attorney." *Id.*

13 The determination of whether Rule 60(b) relief, particularly (b)(1) relief, is
14 warranted "is at bottom an equitable one, taking account of all relevant
15 circumstances surrounding the party's omission." Pioneer Investment Services Co.,
16 507 U.S. at 395. Given the plaintiffs' inexplicable failure to ensure that this action
17 was properly litigated despite knowing that their predecessor action was similarly
18 not properly litigated, coupled with the lack of candor underlying their Rule 60(b)
19 motion, the Court concludes that it would be equitable to hold them accountable for
20 the acts and omissions of their chosen counsel. Therefore,

21 IT IS ORDERED that Plaintiffs' Motion for Relief From Order (Doc. 27) is
22 denied.

23 DATED this 25th day of August, 2014.

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25 
26 Paul G. Rosenblatt
United States District Judge