

1 Federated removed the action to this Court on February 10, 2010, and filed an answer.

2 On January 18, 2012, pursuant to a stipulation by the parties, Plaintiff filed a First
3 Amended Complaint (“FAC”) regarding denial of benefits under a single disability income
4 insurance policy issued by Federated on September 8, 2005. Federated filed an answer to the
5 FAC, along with a counterclaim, on January 31, 2012.

6 On February 14, 2012, Federated filed a motion for summary judgment.

7 On February 21, 2012, Plaintiff filed an answer to the counterclaim, along with a motion
8 to strike certain affirmative defenses and the counterclaim.

9 On March 16, 2012, Federated filed a reply to its motion for summary judgment.
10 Federated pointed out that Plaintiff had failed to file any opposition to the motion. Doc. 56.

11 On March 22, 2012, at approximately 7:33 p.m., on the eve before the summary judgment
12 motion hearing, Plaintiff filed his purported opposition. Docs. 57-59. The opposition was not
13 timely pursuant to [Federal Rule of Civil Procedure 56 and Rule 230](#) of the Local Rules of the
14 United States District Court, Eastern District of California. Given this failure, Plaintiff was not
15 entitled to be heard in opposition to the motion at oral argument. Local Rule 230(c).

16 On March 23, 2012, the Court held a hearing on Federated’s motion for summary
17 judgment and Plaintiff’s motion to strike affirmative defenses and counterclaim. Counsel for
18 both parties appeared at the hearing and participated in oral argument.

19 On March 26, 2012, the Court denied Plaintiff’s motion to strike Federated’s affirmative
20 defenses and counterclaim.

21 On March 28, 2012, the Court granted Federated’s Motion for Summary Judgment, and
22 the Clerk of the Court entered judgment for Federated.

23 On April 11, 2012, Plaintiff filed the instant motion for clarification of the Court’s orders
24 and reconsideration of the Court’s order granting summary judgment. Federated opposed the
25 motion on April 16, 2012. Plaintiff filed an untimely reply on May 23, 2012.¹ Local Rule

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27 ¹Reply briefs must be filed not less than seven (7) days preceding the date of the hearing. Local Rule
28 230(d). Plaintiff filed his reply two (2) days before the scheduled hearing date and one (1) day after the Court took the matter under submission. Plaintiff’s reply is untimely and is DISREGARDED. Following counsel’s repeated failures to file timely briefs, the Court admonishes counsel that he should apprise himself of, and comply with, the

1 230(d).

2 **DISCUSSION**

3 **I. MOTION FOR CLARIFICATION**

4 Plaintiff moves the Court for clarification of its order denying Plaintiff’s motion to strike
5 and granting Federated’s motion for summary judgment. Plaintiff’s request for clarification is
6 styled as a series of interrogatories for the Court to answer and to provide an explanation. For
7 example, the request states:

- 8 1. In the Court’s Order granting Defendant’s Motion for Summary Judgment,
9 the court stated, “the parties filed a stipulation to allow Warkentin to file a
10 First Amended Complaint (“FAC”) and to allow Federated to file a
11 response” (1:26-27). In granting the Defendant’s Motion for Summary
12 Judgment, was it necessary for the court to find that Plaintiff’s attorney’s
13 stipulation allowed Defendant to file a counterclaim?

14 YES NO. Court’s comments:
15 _____

16 Doc. 71, p. 2. Rather than a clarification, Plaintiff essentially asks the Court for reconsideration
17 of its analysis. Thus, the request for clarification will be denied.

18 **II. MOTION FOR RECONSIDERATION**

19 **A. Legal Standard**

20 A motion for reconsideration filed within 28 days of a judgment is treated as a Rule 59(e)
21 motion to alter or to amend the judgment. [Fed. R. Civ. P. 59\(e\)](#). Generally, there are four
22 grounds upon which a Rule 59(e) motion may be granted: “(1) if such motion is necessary to
23 correct manifest errors of law or fact upon which the judgment rests; (2) if such motion is
24 necessary to present newly discovered or previously unavailable evidence; (3) if such motion is
25 necessary to prevent manifest injustice; or (4) if the amendment is justified by an intervening
26 change in controlling law.” [Allstate Ins. Co. v. Herron, 634 F.3d 1101, 1111 \(9th Cir. 2011\)](#).
27 Amending a judgment is “an extraordinary remedy which should be used sparingly.” [Id.](#); [see also](#)
28 [Kona Enterprises, Inc. v. Estate of Bishop, 229 F.3d 877, 890 \(9th Cir. 2000\)](#) (reconsideration is
an “extraordinary remedy, to be used sparingly in the interests of finality and conservation of

deadlines set forth in the Federal Rules of Civil Procedure and this Court’s Local Rules

1 judicial resources;” reconsideration “should not be granted, absent highly unusual
2 circumstances”). “A Rule 59(e) motion may *not* be used to raise arguments or present evidence
3 for the first time when they could reasonably have been raised earlier in the litigation.” Kona
4 Enterprises, 229 F.3d at 890 (emphasis in original).

5 Plaintiff seeks reconsideration pursuant to Local Rule 230. In relevant part, Local Rule
6 230 provides as follows:

7 Whenever any motion has been granted or denied in whole or in part, and a
8 subsequent motion for reconsideration is made upon the same or any alleged
9 different set of facts, counsel shall present to the Judge or Magistrate Judge to
10 whom such subsequent motion is made an affidavit or brief, as appropriate, setting
11 forth the material facts and circumstances surrounding each motion for which
12 reconsideration is sought, including:

- 13 (1) when and to what Judge or Magistrate Judge the prior motion was
14 made;
- 15 (2) what ruling, decision, or order was made thereon;
- 16 (3) what new or different facts or circumstances are claimed to exist which
17 did not exist or were not shown upon such prior motion, or what other
18 grounds exist for the motion; and
- 19 (4) why the facts or circumstances were not shown at the time of the prior
20 motion.

21 Local Rule 230(j).²

22 B. Analysis

23 Plaintiff argues that reconsideration is appropriate because (1) facts or circumstances
24 exist that are different from Federated’s representations to the Court and (2) a misapplication of
25 the law unknown to Plaintiff’s attorney at the time of the summary judgment hearing.

26 1. Different Facts or Circumstances

27 Plaintiff contends that new facts or circumstances exist based on alleged
28 misrepresentations to the Court by Federated in its briefing on the motion to strike and in its
statement of undisputed facts in support of the motion for summary judgment. As a general

²Federated contends that the motion for reconsideration is untimely pursuant to Rule 303 of the Local Rules of the United States District Court, Eastern District of California. Local Rule 303 provides that rulings by Magistrate Judges are final if no reconsideration is sought within fourteen (14) days. Local Rule 303(b). Federated argues that Plaintiff failed to seek reconsideration within the fourteen (14) day time limit. However, Rule 303 does not apply to reconsideration of a Magistrate Judge’s ruling where, as here, the parties have consented to have the Magistrate Judge conduct all proceedings, including trial and entry of final judgment. Thus, Plaintiff’s motion for reconsideration is not untimely.

1 matter, these alleged misrepresentations are not “new or different facts or circumstances,” which
2 did not exist at the time of the motion to strike or the motion for summary judgment. Local Rule
3 230(j). Indeed, Plaintiff had the opportunity to oppose Federated’s representations either in his
4 briefing on the relevant motions or during oral argument. Plaintiff’s failure to file a reply in
5 support of the motion to strike refining his arguments and his failure to file a timely opposition to
6 the motion for summary judgment are not new or different circumstances which did not exist or
7 were not shown at the time of the motion warranting reconsideration of the Court’s decision.

8 As to the two specific representations at issue, Plaintiff first contends that Federated “has
9 perpetrated fraud” on the Court by “representing to the Court that there was a stipulation from
10 Plaintiff’s attorney regarding filing a counterclaim.” Doc. 71, p. 6. Plaintiff previously argued
11 this exact point in his motion to strike Federated’s affirmative defenses and counterclaim. See
12 Doc. 52, pp. 7-8. Thus, the alleged misrepresentation regarding the terms of the stipulation is not
13 a new or different fact or circumstance to support reconsideration. See, e.g., Backlund v.
14 Barnhart, 778 F.2d 1386, 1388 (9th Cir. 1985) (reconsideration motion is properly denied where
15 it merely presents arguments previously raised in the prior motion or opposition); Lopes v.
16 Vieria, 2011 WL 3568600, *2 (E.D. Cal. Aug. 12, 2011).

17 Plaintiff attempts to offer evidence of Federated’s alleged misrepresentations by citing the
18 declaration of Federated’s counsel in support of the opposition to the motion to strike and
19 counsel’s statements made during oral argument. The Court has reviewed the relevant
20 declaration and supporting documents and finds no evidence of any misrepresentation. Doc. 55.
21 More importantly, the Court’s ruling on the motion to strike did not rely on evidence of a
22 stipulation to file a counterclaim. Rather, the Court found that “there was no agreement
23 precluding Federated from asserting new affirmative defenses or a counterclaim.” Doc. 60, p. 4.
24 In other words, Plaintiff failed to pursue a stipulation that in any way limited Federated’s
25 response to the FAC.

26 As to the second representation at issue, Plaintiff contends that Federated misrepresented
27 a material fact in support of the motion for summary judgment; that is, Plaintiff believes
28 Federated’s representation that it determined Plaintiff had undergone chiropractic treatment

1 during the course of discovery in this action is “clearly false.” Doc. 71, p. 9; Doc. 46, pp. 4-5;
2 Doc. 47, Federated’s Undisputed Material Fact No. 19. Plaintiff’s challenge is a clear attempt to
3 re-litigate the issue of whether Federated is entitled to the rescind the disability insurance policy
4 at issue. Plaintiff has had two previous opportunities to persuade the Court that rescission is
5 unavailable: (1) Plaintiff’s motion to strike and (2) Plaintiff’s opposition to the motion for
6 summary judgment. Plaintiff also had the opportunity to dispute Federated’s separate statement
7 of undisputed material facts. Although Plaintiff was not entitled to be heard at oral argument
8 because of his untimely opposition to summary judgment, the Court allowed his counsel to
9 present opposing argument. The Court also considered Plaintiff’s untimely opposition, but found
10 that he had failed to assert any arguments to defeat summary judgment or to raise a genuine
11 dispute of fact. Doc. 62, pp. 5-6.

12 Plaintiff again attempts to create an issue of fact by contending that Federated’s counsel
13 knew of his chiropractic visits in February or March 2008 because they had all of Dr. Chang’s
14 records. Doc. 71, p. 10. Federated does not dispute that it received the documents, but explains
15 that

16 [i]t was not until attorney, Daniel P. Costa, took the Deposition of Chiropractor
17 Dr. Tru Chang on December 13, 2011, that FEDERATED confirmed and verified
18 that the 40 or so chiropractic visits WARKENTIN made to Dr. Chang’s office
19 were related to the back condition that WARKENTIN failed to fully and
20 accurately describe in his Application, and not just “routine type stuff” as he
21 testified during his deposition, on September 2, 2011.

22 Doc. 73, p. 10. Federated relied on the deposition of Dr. Tru Chang in support of its undisputed
23 facts and motion for summary judgment, which Plaintiff did not effectively or persuasively
24 challenge. As such, no new or different facts exist to warrant reconsideration.

25 2. Misapplication of the Law

26 Plaintiff does not elaborate on his argument that reconsideration is appropriate because of
27 a misapplication of the law unknown to Plaintiff’s attorney at the time of the summary judgment
28 hearing. Presumably, Plaintiff is referencing his counsel’s failure to apprise himself of the
relevant deadlines to file an opposition to Federated’s summary judgment motion.

Plaintiff’s counsel reportedly filed an untimely opposition because the dates his staff

1 researched on www.JuriSearch.com did not include the current version of [Federal Rule of Civil](#)
2 [Procedure 56](#). Plaintiff's counsel did not discover that [Federal Rule of Civil Procedure 56](#) had
3 been amended in 2010 and that the Court's Local Rules governed the due date for his opposition
4 until Federated filed its reply on March 16, 2012. Doc. 59, p. 2, ¶¶ 5-8 (Declaration of David C.
5 Hollingsworth).

6 Counsel's failure to apprise himself of the relevant deadlines established by the Federal
7 Rules of Civil Procedure and this Court's Local Rules is not an adequate basis for
8 reconsideration. First, Plaintiff's counsel does not explain the additional delay between
9 Federated's reply on March 16, 2012, and the filing of his opposition brief on March 22, 2012.
10 Second, Plaintiff did not suffer any prejudice resulting from the untimely brief. The Court
11 allowed Plaintiff's counsel to participate in oral argument on the motion for summary judgment.
12 The Court also considered the untimely opposition in ruling on the merits of Federated's
13 summary judgment motion. Third, and finally, Plaintiff provides no authority for the proposition
14 that reconsideration is warranted based on his counsel's lack of knowledge or the untimely filing.

15 3. Additional Arguments

16 Plaintiff forwards two additional arguments for reconsideration (1) that Federated's
17 rescission action is barred by the statute of limitations; and (2) that Federated cannot rescind the
18 policy on the basis of a pre-existing condition. Plaintiff's arguments do not warrant
19 reconsideration. The Court clearly addressed Plaintiff's argument that rescission was barred by
20 the statute of limitations in its March 28, 2012 order. Doc. 62, pp. 5-8. Plaintiff has provided no
21 basis for this Court to reconsider any argument regarding the statute of limitations. Furthermore,
22 Plaintiff's efforts to add a new argument, namely that Federated was precluded from rescinding
23 the policy on the basis of a pre-existing condition does not warrant reconsideration. Plaintiff
24 does not explain why he could not (and did not) raise this issue at the time of the motion for
25 summary judgment.

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1 **CONCLUSION**

2 For the reasons discussed above, IT IS HEREBY ORDERED as follows:

- 3 1. Plaintiff's motion for clarification is DENIED; and
4 2. Plaintiff's motion for reconsideration is DENIED.

5 IT IS SO ORDERED.

6 **Dated: June 8, 2012**

/s/ Dennis L. Beck
UNITED STATES MAGISTRATE JUDGE

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