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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

EFRAIN GARCIA, et al.

Plaintiffs,

vs.

ALLSTATE INSURANCE,

Defendant.

) Case No. 1:12-cv-00609-AWI-SKO

) **FINDINGS AND RECOMMENDATIONS**
) **THAT PLAINTIFFS' MOTION FOR**
) **RELIEF BE GRANTED AND THE CASE**
) **BE REOPENED**

) (Docket No. 24)

) **OBJECTIONS DUE: 21 days**

I. INTRODUCTION

This Court must determine whether to recommend that judgment in the case of *Garcia, et al. v. Allstate Insurance*, case no. 1:12-cv-00609-AWI-SKO ("*Garcia I*") be set aside and the case reopened.

On December 6, 2012, Plaintiffs Efrain Garcia and Ofelia Garcia ("Plaintiffs") filed a response to Defendant Allstate Insurance's ("Defendant") Motion to Dismiss in related case *Garcia, et al. v. Allstate Insurance*, case no. 1:12-cv-01762-AWI-SKO ("*Garcia II*"). On December 13, 2012, District Judge Anthony W. Ishii issued an order construing Plaintiffs' response as a Motion for Relief in this action, *Garcia I*, and referring the matter to Magistrate Judge Sheila K. Oberto to issue Findings and Recommendations on whether relief from judgment is warranted. (Doc. 25.)

For the reasons set forth below, the Court RECOMMENDS that Plaintiffs' Motion for Relief be granted, that judgment in *Garcia I* be set aside, and that Plaintiffs' be permitted to file a first amended complaint.

1 **II. BACKGROUND**

2 On March 14, 2012, Plaintiffs, represented by attorney Joseph Todd Armas ("Armas"), filed
3 a lawsuit in Tulare County Superior Court against Defendant alleging a single cause of action for
4 malicious prosecution. (*Garcia I*, Doc. 1, pp. 5-7.) On April 17, 2012, Defendant removed the
5 *Garcia I* action to this Court. (*Garcia I*, Doc. 1.) Plaintiffs' complaint alleged that in October 2004,
6 Defendant instituted a wrongful subrogation lawsuit against Plaintiffs, which Defendant dismissed
7 in November 2011. (*Garcia I*, Doc. 1, pp. 5-7.) Plaintiffs' complaint states in relevant part:

8 Defendant[] acted without probable cause in bringing the [prior action in] that they
9 did not honestly and reasonabl[y] believe that there were grounds for the action
10 because DMV [Department of Motor Vehicle] records clearly showed that Plaintiffs
11 were not the owners of the vehicle that Defendant was seeking subrogation for.
Defendant[,] furthermore, continued to prosecute the action even after Plaintiffs
asserted this fact.

12 (*Garcia I*, Doc. 1, p. 6, ¶ 7.) Plaintiffs allege that Defendant "acted maliciously" in bringing the prior
13 suit due to Defendant's refusal to "dismiss the [prior] lawsuit against Plaintiffs even after Plaintiffs
14 on numerous attempts communicated that they did not own the subject vehicle, and showed
15 sufficient proof of this." (*Garcia I*, Doc. 1, p. 6, ¶ 8.)

16 On June 21, 2012, Defendant filed a motion pursuant to California's anti-Strategic Lawsuits
17 Against Public Participation ("anti-SLAPP") statute, California Code of Civil Procedure Section
18 425.16. (*Garcia I*, Doc. 13.) Plaintiffs, represented by attorney Armas, did not file an opposition.

19 On August 17, 2012, Plaintiffs, representing themselves *pro se*, filed another action in Tulare
20 County Superior Court against Defendant. (*Garcia II*, Doc. 1, pp. 5-14.) The parties are identical
21 to those in *Garcia I*. The complaint in *Garcia II* is on a pre-printed state court form and, while the
22 box for "general negligence" is checked, the title of the first (and only) cause of action is for
23 "Intentional Tort"; Plaintiffs allege that "Defendant Allstate Insurance Company filed a lawsuit
24 against Plaintiffs . . . with full knowledge that Plaintiffs were not liable for the damage caused to
25 their insured . . . who was involved in an auto accident" (*Garcia II*, Doc. 1, pp. 10, 11.)

26 On September 18, 2012, Magistrate Judge Oberto issued Findings and Recommendations
27 ("F&R") in *Garcia I* that Defendant's anti-SLAPP motion be granted without prejudice to Plaintiffs'
28 ability to amend the complaint. (*Garcia I*, Doc. 16.) No objections to the F&R were filed, and on

1 October 17, 2012, District Judge Ishii issued an order adopting the F&R and allowing Plaintiffs 21
2 days to file an amended complaint. (*Garcia I*, Doc. 18.)

3 On October 29, 2012, Defendant removed *Garcia II*, Plaintiffs' *pro se* action, to this Court,
4 asserting that it was related to *Garcia I*. (*Garcia II*, Doc. 1, 2:10-20.) On November 5, 2012,
5 Defendant filed a Motion to Dismiss in *Garcia II* contending that *Garcia II* was duplicative of
6 *Garcia I*. (*Garcia II*, Doc. 10.)

7 On November 21, 2012, the Court closed *Garcia I* and entered judgment in favor of
8 Defendant due to Plaintiffs' failure to file an amended complaint. (*Garcia I*, Docs. 20, 21.) Plaintiffs
9 were still represented by attorney Armas in *Garcia I* at the time the case was closed, as Armas had
10 neither filed a request for substitution of counsel nor sought to withdraw from representation. (*See*
11 *generally Garcia I* docket.)

12 On December 3, 2012, Defendant filed a Motion for Attorney's Fees in *Garcia I*. (*Garcia I*,
13 Doc. 22.) On December 6, 2012, Plaintiffs filed their opposition to Defendant's Motion to Dismiss
14 in *Garcia II*, and on December 10, 2012, Defendant filed its reply. (*Garcia II*, Docs. 12, 13.)

15 On December 13, 2012, District Judge Ishii issued an order in *Garcia II* (Doc. 16 (also
16 docketed in *Garcia I* as Doc. 25)), finding that the complaints in *Garcia I* and *Garcia II* were
17 impermissibly duplicative with identical parties. (*Garcia II*, Doc. 16, 3:27-28.) The order noted that
18 *Garcia I* alleged a malicious prosecution claim and, while the precise cause of action in
19 *Garcia II* was not clear, "[n]evertheless, the two cases appear to infringe on the same rights of
20 Plaintiffs[;] it appears that substantially the same evidence would be used in . . . both cases, it
21 appears that the rights established in one case would impair or destroy the rights in the other, and the
22 two cases share the same nucleus of facts." (*Garcia II*, Doc. 16, 4:3-6.) Accordingly, the Court
23 dismissed *Garcia II*, noting that "[g]iven the considerable work that has already occurred in *Garcia I*,
24 and the fact there is a pending motion in that case, the Court sees no utility in maintaining
25 [*Garcia II*]." (*Garcia II*, Doc. 16, 4:11-13.)

26 The Court also ordered further proceedings in *Garcia I*, finding that "Plaintiffs' opposition
27 [to the Motion to Dismiss in *Garcia II*] suggests that they were abandoned by their attorney in
28 *Garcia I*. Plaintiffs' opposition indicates that they were never properly informed about the

1 consequences of filing a substitution of attorney, that the substitution was never filed, or that
2 *Garcia I* had been removed." (*Garcia II*, Doc. 16, 5:20-23.) Further, it appeared that Plaintiffs were
3 not aware of Defendant's anti-SLAPP motion or the 21-day deadline to file an amended complaint.
4 (*Garcia II*, Doc. 16, 5:23-24.) As such, District Judge Ishii found that further proceedings were
5 warranted and that possible relief may be justified. (*Garcia II*, Doc. 16, 5:24-28.) The Court ordered
6 that Plaintiffs' opposition to the Motion to Dismiss in *Garcia II* be filed as a Motion for Relief in
7 *Garcia I*, and referred the matter to Magistrate Judge Oberto to issue findings and recommendations
8 on whether relief from judgment is appropriate due to attorney abandonment under Rules 59 and/or
9 60 of the Federal Rules of Civil Procedure. (*Garcia II*, Doc. 16, 6:10-13.)

10 On December 14, 2012, District Judge Ishii denied without prejudice Defendant's Motion for
11 Attorney's Fees in *Garcia I* pending the resolution of Plaintiffs' Motion for Relief. (*Garcia I*, Doc.
12 26.)

13 On December 20, 2012, Plaintiffs filed a "Letter to the Court" setting forth issues they had
14 encountered with attorney Armas. The Court notes that Armas neither filed a substitution of counsel
15 form nor a motion seeking to withdraw as counsel, and is thus still attorney of record for Plaintiffs
16 in *Garcia I*.

17 III. DISCUSSION

18 District Judge Ishii directed the Magistrate Judge to consider whether Plaintiffs should be
19 granted relief pursuant to Rules 59(e) and 60(b) of the Federal Rules of Civil Procedure, which
20 permit a court to alter, amend, or grant relief from judgment. (*Garcia II*, Doc. 16, 5:6-8 (citing Fed.
21 Rs. Civ. Pro. 59(e), 60(b); *Sch. Dist. No. 1J, Multnomah County, Or. v. ACandS, Inc.*, 5 F.3d 1255,
22 1262-63 (9th Cir. 1993)). District Judge Ishii's order indicated that "Plaintiffs' opposition suggests
23 that they were abandoned by their attorney during *Garcia I*." (*Garcia II*, Doc. 16, 5:20-21.)

24 A. Legal Standard

25 Federal Rule of Civil Procedure 59(e) allows parties to file a motion to alter or amend
26 judgment within 28 days after the entry of judgment. *See* Fed. R. Civ. P. 59(e). A motion to alter
27 or amend the judgment under Rule 59(e) may be granted where "(1) the district court is presented
28 with newly discovered evidence, (2) the district court committed clear error or made an initial

1 decision that was manifestly unjust, or (3) there is an intervening change in controlling law."
2 *Zimmerman v. City of Oakland*, 255 F.3d 734, 740 (9th Cir.2001). However, a Rule 59(e) motion
3 is not an opportunity for parties to "raise arguments or present evidence for the first time when they
4 could reasonably have been raised earlier in the litigation." *Kona Enters., Inc. v. Estate of Bishop*,
5 229 F.3d 877, 890 (9th Cir. 2000). Rule 59(e) is an "extraordinary remedy, to be used sparingly in
6 the interests of finality and conservation of judicial resources." *Id.* A judgment is not properly
7 reopened "absent highly unusual circumstances." *Weeks v. Bayer*, 246 F.3d 1231, 1236 (9th Cir.
8 2001); *see also Weeks v. Fresh-Pic Produce Co., Inc.*, No. 08CV02058 BTM WVG, 2013 WL
9 990827, at *3 (S.D. Cal. Mar. 12, 2013); *United States v. Uptergrove*, No. 1:06-CV-01630-AWI-
10 GSA, 2009 WL 840607, at *5 (E.D. Cal. Mar. 26, 2009) objections overruled, 1:06-CV-01630-AWI-
11 GSA, 2009 WL 1156506 (E.D. Cal. Apr. 29, 2009).

12 Pursuant to Federal Rule of Civil Procedure 60(b), the court may relieve a party from a final
13 judgment, order, or proceeding based on: (1) mistake, inadvertence, surprise, or excusable neglect;
14 (2) newly discovered evidence; (3) fraud; (4) a void judgment; (5) a satisfied or discharged
15 judgment; or (6) "extraordinary circumstances" which would justify relief. Fed. R. Civ. Pro. 60(b);
16 *Sch. Dist. No. 1J*, 5 F.3d at 1263; *Uptergrove*, 2009 WL 840607, at *5. A motion filed under Rule
17 60(b) allows for relief from a judgment or order and "must be made within a reasonable time – and
18 for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date
19 of the proceeding." Fed. R. Civ. P. 60(c)(1).

20 District courts may raise Rule 59(e) and Rule 60(b) motions *sua sponte*. (*See Garcia II*,
21 Doc. 16, 5:8-19 (and cases cited within).)

22 **B. Analysis**

23 **1. Timing of Motion**

24 The Court entered its ruling closing *Garcia I* on November 21, 2012, and judgment was
25 entered in favor of Defendant. (*Garcia I*, Docs. 20, 21.) Plaintiffs' opposition to Defendant's Motion
26 to Dismiss in *Garcia II* was filed on December 6, 2012, which was construed by the Court as a
27 Motion for Relief. (*See Garcia II*, Docs. 12, 16; *Garcia I*, Doc. 24.) Rule 59(e) requires that a
28 motion to alter or amend judgment be filed no later than 28 days after entry of judgment, and Rule

1 60(b) requires that a motion for relief from judgment be filed within "a reasonable time frame" and,
2 for specific requests, no more than one year after the entry of judgment. *See* Rules 59(e); 60(c)(1).
3 As there were 15 days between the date judgement was entered in *Garcia I* and Plaintiffs' opposition
4 to the Motion to Dismiss was filed in *Garcia II*, Plaintiffs' Motion for Relief is timely.

5 **2. Analysis**

6 Defendant's Motion to Dismiss in *Garcia II* sought dismissal of Plaintiffs' complaint because
7 it was duplicative of *Garcia I*, which was dismissed due to Plaintiffs failure to file an amended
8 complaint after Defendant's anti-SLAPP motion was granted. (*Garcia II*, Doc. 10.) Plaintiffs'
9 Motion for Relief contends that their counsel in *Garcia I* never informed Plaintiffs that the case had
10 been removed to federal court, never filed the substitution of counsel form signed by Plaintiffs, never
11 informed them of the ruling on Defendant's anti-SLAPP motion, and never informed them of the
12 need to file an amended complaint in *Garcia I*. (*Garcia I*, Doc. 24.)

13 Rule 59(e)(2) allows the district court to alter or amend the judgment when it "made an initial
14 decision that was manifestly unjust," and Rule 60(b)(6) is a catch-all provision that allows a court
15 to grant relief from a final judgment, order, or proceeding for "any other reason that justifies relief."
16 These rules should be used sparingly as an equitable remedy to prevent manifest injustice and
17 utilized only where extraordinary circumstances prevented a party from taking timely action to
18 prevent or correct an erroneous judgment. *See Latshaw v. Trainer Wortham & Co., Inc.*, 452 F.3d
19 1097, 1103 (9th Cir.2006); *Kona Enterprises, Inc.*, 229 F.3d at 890. "[A] motion under either
20 provision [Rule 59(e) or Rule 60(b)] asks the court to set aside a judgment, and indeed, parties often
21 cite to both provisions in moving for reconsideration of a court's judgment." *Fresh-Pic Produce*,
22 2013 WL 990827, at *3. A party who moves for such relief "must demonstrate both injury and
23 circumstances beyond his control that prevented him from proceeding with . . . the action in a proper
24 fashion." *Cnty. Dental Servs. v. Tani*, 282 F.3d 1164, 1168 (9th Cir. 2002) (citation omitted).

25 **a. An Attorney's Gross Negligence Justifies Relief From Judgment**

26 Generally, "clients must be held accountable for the acts and omissions of their attorneys."
27 *Pioneer Inv. Services Co. v. Brunswick Associates Ltd. P'ship*, 507 U.S. 380, 396 (1993). As noted
28 by the United States Supreme Court:

1 There is certainly no merit to the contention that dismissal of petitioner's claim
2 because of his counsel's unexcused conduct imposes an unjust penalty on the client.
3 Petitioner voluntarily chose this attorney as his representative in the action, and he
4 cannot now avoid the consequences of the acts or omissions of this freely selected
5 agent. Any other notion would be wholly inconsistent with our system of
representative litigation, in which each party is deemed bound by the acts of his
lawyer-agent and is considered to have 'notice of all facts, notice of which can be
charged upon the attorney.'

6 *Link v. Wabash R.R. Co.*, 370 U.S. 626, 633-34 (1962).

7 As such, "[b]ecause the client is presumed to have voluntarily chosen the lawyer as his
8 representative and agent, he ordinarily cannot later avoid accountability for negligent acts or
9 omissions of his counsel." *Tani*, 282 F.3d at 1168 (citing *Link*, 370 U.S. at 633-34; *Pioneer*,
10 507 U.S. at 396-97.) However, "[t]he circuits that have distinguished negligence from gross
11 negligence in the present context have granted relief to the client where the . . . judgment was a result
12 of his counsel's displaying 'neglect so gross that it is inexcusable.'" *Tani*, 282 F.3d at 1168 (citations
13 omitted). The Ninth Circuit "join[ed] the Third, Sixth and Federal Circuits in holding that where the
14 client has demonstrated gross negligence on the part of his counsel, a default judgment may be set
15 aside pursuant to Rule 60(b)(6)." *Id.* at 1169.

16 In *Tani*, the Ninth Circuit set aside a default judgment after finding that a defense attorney
17 committed gross negligence by failing to participate in preliminary settlement discussions despite
18 a court order to do so, failing to file papers, failing to oppose a motion to strike the answer, and
19 failing to attend hearings, while "explicitly represent[ing]" to his client that "the case was proceeding
20 properly." *Id.* at 1171. As the court noted:

21 Such failures and actions cannot be characterized as simple attorney error or "mere
22 'neglect.'" Rather, conduct on the part of a client's alleged representative that results
23 in the client's receiving practically no representation at all clearly constitutes gross
negligence, and vitiating the agency relationship that underlies our general policy of
attributing to the client the acts of his attorney.

24 *Id.* (citations omitted).

25 Initially, it appeared that the ruling in *Tani* was limited in application to relief from default
26 judgments. In *Latshaw*, the Ninth Circuit declined to extend the holding of *Tani* to the context of
27 a Federal Rule of Civil Procedure 68 judgment, stating, "[o]ur decision in *Tani* was explicitly
28 premised upon the default judgment context of the case." *Latshaw*, 452 F.3d at 1103. The court

1 distinguished a Rule 68 judgment and a default judgment and found that "[d]efault judgments are
2 disfavored and appropriate only in unique circumstances. Rule 68 offers and acceptances, however,
3 are actively supported by courts. Indeed, the very purpose of Rule 68 is to encourage termination
4 of litigation." *Id.* As a result of this difference, the Ninth Circuit "decline[d] to extend the holding
5 of *Tani* to the context of Rule 68 judgments and therefore conclude[d] that [the attorney's] alleged
6 gross negligence does not provide grounds to vacate the judgment under Rule 60(b)(6)." *Id.* at
7 1103-04.

8 However, in *Lal v. California*, 610 F.3d 518, 524-27 (9th Cir. 2010), the Ninth Circuit
9 extended the holding in *Tani* and granted relief under Rule 60(b)(6) from a Federal Rule of Civil
10 Procedure 41(b) dismissal for failure to prosecute. In *Lal*, the court found that the attorney's conduct
11 "constituted gross negligence" by failing to obey court orders to contact the client regarding
12 preliminary settlement discussions, failing to participate in the case management conference, failing
13 to meet and confer, failing to attend hearings, and lying to the client. *Id.* at 525.

14 In ordering that the dismissal be set aside, the Ninth Circuit determined the following:

15 A dismissal for failure to prosecute under Rule 41(b) is much more like a default
16 judgment than a Rule 68 judgment. We based our decision in *Tani* on "the
17 well-established policy considerations we have recognized as underlying default
18 judgments and Rule 60(b)." The same policy considerations underlie dismissal for
19 failure to prosecute. We have stated that dismissal under Rule 41(b) "is so harsh a
penalty it should be imposed as a sanction only in extreme circumstances." This is
almost identical to our stance on default judgments, which are "appropriate only in
extreme circumstances."

20 *Id.* (citations omitted).

21 As such, the court considered the harsh policy implications of both default judgments and
22 Rule 41(b) dismissals for failure to prosecute, finding that judgments arising under these
23 circumstances could be properly set aside pursuant to Rule 60(b)(6) due to an attorney's gross
24 negligence.

25 While published Ninth Circuit cases have held that setting aside judgment for an attorney's
26 gross negligence is warranted in cases of default judgment and dismissal due to failure to prosecute,
27 unpublished Ninth Circuit cases have extended the rulings in *Tani* and *Lal* to cases where the
28 attorney's gross negligence resulted in a ruling of summary judgment against the attorney's clients.

1 In *Spates-Moore v. Henderson*, 305 F. App'x. 449 (9th Cir. 2008), the Ninth Circuit remanded a case
2 in which the district court failed to consider the gross negligence standard and application of Rule
3 60(b)(6) for relief from an order granting summary judgment based on the opposing party's counsel's
4 failure to file an opposition to the motion. *Id.* at 450-51. The court determined that the attorney had
5 "effectively abandoned his client," noting that counsel had done the following:

6 twice failed to file timely oppositions to motions to dismiss; did not return phone
7 calls; did not attend a pre-trial meeting; did not file an opposition to summary
8 judgment; did not move for relief from summary judgment until more than seventy
9 days after judgment was entered; and told opposing counsel there was 'no point' in
10 doing so.

11 *Id.* at 451. The Ninth Circuit concluded that "[i]t is unreasonable to hold the client responsible for
12 [the attorney's] acts in these circumstances. These failures went far beyond simple attorney error and
13 perhaps constituted gross negligence and extraordinary circumstances sufficient to justify relief
14 under 60(b)(6)." *Id.*

15 Further, in *Moore v. United States*, 262 F. App'x. 828 (9th Cir. 2008), the Ninth Circuit held
16 that a district court "erred in denying relief under Rule 60(b)(6)" where an attorney "virtually
17 abandoned" his client by "failing to respond to the motion for summary judgment, even after being
18 warned that such an omission would result in the summary grant of the motion." *Id.* at 829. The
19 court found that "the attorney abandoned his advocacy" and had "crossed the line into the 'gross
20 negligence' we described in *Tani*." *Id.*

21 District courts considering whether to overturn a judgment must therefore consider the
22 attorney's actions in determining whether the conduct meets the gross negligence standard set forth
23 in *Tani*. In *Contasti v. City of Solana Beach*, No. 09CV1371 WQH BLM, 2012 WL 2722551, at
24 *2-*4 (S.D. Cal. July 9, 2012), the district court granted the plaintiff's motion for relief from
25 summary judgment pursuant to Rule 60(b) due to "the failure of counsel to inform his client of the
26 status of the case." *Id.* at *4. The court found that the plaintiff was "not informed" of the pending
27 motion for summary judgment "or of counsel's failure to file an opposition," despite the plaintiff
28 speaking with counsel the day after the opposition was due. *Id.* The court concluded that, based on
counsel's conduct, there were "extraordinary circumstances sufficient to warrant relief from
judgment." *Id.*

1 In *Madison v. First Mangus Financial Corp.*, No. CV-08-1562-PHX-GMS, 2009 WL
2 1148453, at *2-*4 (D. Ariz. Apr. 28, 2009), the district court granted the plaintiff's motion for relief
3 from dismissal of her case for failing to file a second amended complaint. *Id.* After considering the
4 Ninth Circuit's holdings in *Tani*, *Spates-Moore*, and *Moore*, the court found that the plaintiff's
5 counsel had met the gross negligence standard and had "made numerous errors while handling [the]
6 case," including failing to inform the client of developments in the action, failing to notify the client
7 of deadlines, failing to file a second amended complaint despite assurances that he would do so,
8 avoiding correspondence from the client, and failing to file a motion for relief. *Id.* at *3-*4.
9 Accordingly, the court found that the plaintiff was entitled to relief pursuant to Rule 60(b)(6). *Id.*
10 at *4.

11 Further, in *Slama v. City of Madera*, No. 1:08-CV-00810-AWI-SKO, 2011 WL 3667334, at
12 *9-*11 (E.D. Cal. Aug. 22, 2011) report and recommendation adopted, No. 1:08-CV-00810 AWI-
13 SKO, 2011 WL 4055299 (E.D. Cal. Sept. 12, 2011), this Court determined that the conduct of
14 plaintiff's counsel had risen to the level of gross negligence and he had virtually abandoned his client
15 when counsel failed to file oppositions to motions for summary judgment, failed to apprise plaintiff
16 of pending motions, and misled the client as to the status of the case and the reasons why summary
17 judgment was granted. *Id.* at *11.

18 Recent district court cases that have denied Rule 60(b)(6) relief from judgment have done
19 so after finding that the attorneys in question had not committed gross negligence. In *Fruehauf*
20 *Trailer Corp. v. Harrow*, No. CV 11-09218 DDP, 2013 WL 816446, at *12-*13 (C.D. Cal. Mar. 5,
21 2013), the court determined that, although the defense counsel failed to appear at the parties' pretrial
22 conference, counsel was permitted to correct that error and was present at trial, "where he offered
23 argument, presented testimony, and asserted objections to the plaintiff's evidence." *Id.* The court
24 thus determined that, although the defendant "may now have concerns with how the case was
25 handled and the efficacy of [counsel's] representation, the court discerns no basis for concluding that
26 his performance was so ineffective or absent that it amounts to the entry of default judgment against
27 defendant." *Id.*

1 In *Markray v. AT&T-SBC-Pacific Bell Directory*, No. CV 07-08001 DDP (CTx), 2010 WL
2 3220096, at *3 (C.D. Cal. Aug. 13, 2010), the court denied relief from summary judgment, finding
3 that the plaintiff's "attorney was not grossly negligent." *Id.* In *Markray*, the attorney had filed an
4 opposition to the motion for summary judgment (albeit one that was "substantively weak"), had not
5 deliberately misled her client about the case, and had informed her client of the judgment and the
6 need to file a Rule 60(b) motion; further, the plaintiff had "made no attempt to inquire about her case
7 until nearly a year after the Court granted Defendants' MSJ." *Id.* As such, the court held that the
8 plaintiff's attorney "did not 'virtually abandon' her" client and denied relief under Rule 60(b)(6). *Id.*

9 Likewise, in *Brown v. Cowlitz County*, No. C09-5090 RBL, 2010 WL 1608876, at *1-*2
10 (W.D. Wash. Apr. 19, 2010), the district court denied relief from summary judgment under
11 Rule 60(b)(6), finding that "counsel cannot be considered to have abandoned his client." *Id.* at *2.
12 Counsel filed pleadings opposing one of the motions for summary judgment, although not the other,
13 and further filed a motion for reconsideration. *Id.* As such, the plaintiff was "not entitled to relief
14 due to attorney abandonment or gross negligence under Rule 60(b)(6)." *Id.*

15 **b. Attorney Armas' Conduct Rises to Gross Negligence**

16 Here, the Court must determine whether Armas' actions (or lack thereof) constituted gross
17 negligence and "virtual abandonment" of Plaintiffs so as to justify relief from judgment. *See Tani*,
18 282 F.3d at 1171-72; *Lal*, 610 F3d at 525.

19 Plaintiffs indicate that the initial complaint in *Garcia I* was prepared by attorney Armas and
20 filed in Tulare County Superior Court on March 14, 2012. (*Garcia I*, Doc. 24, 1:23-24.) On April
21 17, 2012, Defendant removed the action to this Court. (*Garcia I*, Doc. 1.) Armas was aware of this
22 removal, as he signed stipulations with Defendant allowing Defendant additional time to file an
23 anti-SLAPP motion; the stipulations were filed with this Court on May 17, and June 1, 2012.
24 (*Garcia I*, Docs. 6, 9.)

25 In a letter dated June 6, 2012, Armas communicated to Plaintiffs that Defendant had made
26 a settlement offer and that Armas had been unable to reach Plaintiffs by phone to discuss the offer.
27 (*Garcia I*, Doc. 24, 1:25-27, Exh. A.) The letter did not indicate that the case had been removed to
28

1 federal court. On June 21, 2012, Defendant filed its anti-SLAPP motion; Armas was served with
2 a copy of the motion via U.S. mail. (*Garcia I*, Doc. 13.)

3 Plaintiffs indicate that they rejected Defendant's settlement offer, and on June 28, 2012,
4 Armas sent a letter to Plaintiffs stating that he had been unable to reach them but noted their desire
5 to retain another attorney and enclosed a substitution of attorney form for Plaintiffs to sign. (*Garcia*
6 *I*, Doc. 24, 2:3-5, Exhs. B, C.) The substitution form apparently provided with Armas' June 28,
7 2012, letter reflected the case number for the Tulare County Superior Court case, despite the fact that
8 the case had been removed to this Court more than two months prior on April 17, 2012. (*See Garcia*
9 *I*, Doc. 1; Doc. 24, Exh. C.) Further, Armas' June 28, 2012, letter did not notify Plaintiffs that
10 Defendant had filed an anti-SLAPP motion, or that Plaintiffs were required to file an opposition by
11 no later than July 18, 2012, based on the scheduled August 1, 2012, hearing date. (*See Garcia I*,
12 Doc. 13; Doc. 24, and Rule 230(c) of the Local Rules for the United States District Court, Eastern
13 District of California (requiring that any opposition to a motion be filed and served not less than
14 14 days preceding the noticed hearing date).)

15 Armas filed neither the substitution of attorney form in *Garcia I*, nor an opposition to
16 Defendant's anti-SLAPP motion. (*See generally Garcia I* docket.) On September 18, 2012,
17 Magistrate Judge Oberto issued an F&R recommending that Defendant's anti-SLAPP motion be
18 granted in part, Plaintiffs' complaint be dismissed without prejudice and with 21 days to amend, and
19 that Defendant's request for an award of attorney's fees be denied. (*Garcia I*, Doc. 16.) Armas, who
20 was Plaintiffs' attorney of record and thus represented Plaintiffs at the time, was served a copy of the
21 F&R by mail.¹ (*See generally Garcia I* docket.) Objections were due within 21 days of the issuance
22 of the F&R; no objections were filed. (*See generally Garcia I* docket.) On October 17, 2012,
23 District Judge Ishii issued an order adopting the F&R; Plaintiffs' complaint was dismissed without
24 prejudice and with 21 days leave to amend. (*Garcia I*, Doc. 18.) Armas, still Plaintiffs' attorney of
25 record, was served with a copy of the order by mail. (*See generally Garcia I* docket.) Plaintiffs did
26

27
28 ¹ While the Eastern District of California is an electronic case management/filing district (*see* Local Rule 133),
attorney Armas did not provide an email address to the Court, and thus all correspondence was served via U.S. mail.

1 not file an amended complaint, and the case was closed. (*Garcia I*, Doc. 20.) Armas was served
2 by mail with that order as well. (*See generally Garcia I* docket.)

3 Plaintiffs contend that, when they contacted Armas regarding *Garcia I*, "he stated that he
4 never received any notices from this Court." (*Garcia I*, Doc. 24, 18-19.) As noted, Armas was
5 served by mail with the above orders on the date the orders were issued to the address he provided
6 to the Court – Law Office of Todd Armas, 1186 West Shaw Avenue, Suite 104, Fresno, CA 93711.
7 (*See generally Garcia I* docket.) This is the same address that Armas has provided to the State Bar
8 of California, and thus is his address of record. (*See* The State Bar of California, Attorney Search,
9 Joseph Todd Armas, <http://members.calbar.ca.gov/fal/Member/Detail/172532> (last visited April 5,
10 2013) and Rules of the California State Bar, Rules 2.1-2.4 (requiring that California State Bar
11 members maintain their current address with the State Bar).) Further, the orders mailed by the Court
12 were not returned as undeliverable, and thus appear to have been delivered to Armas. (*See generally*
13 *Garcia I* docket.) It is unclear why Armas purportedly claims not to have received the Court's
14 orders.

15 Additionally, Plaintiffs contend that they asked Armas why the substitution of attorney form
16 was not filed in *Garcia I*, and Armas "stated he couldn't file the signed substitution as federal court
17 required a different form." (*Garcia I*, Doc. 24, 2:19-21.) The Court notes that the substitution form
18 submitted with Plaintiffs' Motion for Relief provided by Armas was created by the Judicial Council
19 of California for use in California state courts and is not the form used in federal courts. (*Garcia I*,
20 Doc. 24, Exh. C.) It appears that Armas did not contact Plaintiffs to request that they sign the correct
21 form, nor did Armas file the incorrect form with this Court or seek the Court's permission to
22 withdraw as attorney of record. Thus, Armas remained Plaintiffs' attorney of record in *Garcia I*, and
23 was representing Plaintiffs during the period where Plaintiffs failed to file an opposition to
24 Defendant's anti-SLAPP motion and failed to file an amended complaint as required by the Court's
25 October 17, 2012, order.

26 On balance, Armas' conduct rises to the level of gross negligence as he "virtually abandoned"
27 Plaintiffs. He provided "practically no representation at all" (*Tani*, 282 F.3d at 1171), and
28 "abandoned his advocacy" (*Moore*, 262 F. App'x at 829). Armas did not keep Plaintiffs apprised of

1 the status of their case in *Garcia I* and appears to have provided them with no information regarding
2 the legal proceedings. Armas was in contact with Plaintiffs after the anti-SLAPP motion was filed,
3 but failed to inform Plaintiff of the motion. (*See Garcia I*, Doc. 13 (anti-SLAPP motion filed June
4 21, 2012); Doc. 24, Exh. B (letter from Armas to Plaintiff regarding substitution of counsel dated
5 June 28, 2012 (failing to mention the anti-SLAPP motion).) Plaintiffs were unaware that *Garcia I*
6 was removed, unaware that Defendant filed an anti-SLAPP motion, unaware that Defendant's motion
7 had been granted, unaware that Armas had failed to file the substitution of attorney form, and
8 unaware that Plaintiffs were required to file an amended complaint. (*See Garcia I*, Doc. 24.)

9 Armas, as Plaintiffs' attorney of record, received notice of Defendant's motion and the Court's
10 orders; Plaintiffs would not have received separate notice regarding the proceedings from either
11 Defendant or the Court as Plaintiffs were represented by counsel. *See* Fed. R. Civ. P. 5(b)(1) ("[i]f
12 a party is represented by an attorney, service under this rule must be made on the attorney unless the
13 court orders service on the party.") As such, Plaintiffs were reliant upon Armas to inform them of
14 any proceedings in the action, and it appears that Armas failed to do so.

15 Defendant's anti-SLAPP motion was granted, in part, due to Plaintiffs' failure to file an
16 opposition. (*See Garcia I*, Doc. 16, 7:22-24 ("Plaintiffs failed to file an opposition to Defendant's
17 motion. To survive an anti-SLAPP motion, Plaintiffs are required to show that their complaint is
18 'supported by a sufficient prima facie showing of facts to sustain a favorable judgment' on the issues
19 of probable cause and malice." (citation omitted).) *Garcia I* was dismissed due to Plaintiffs' failure
20 to file an amended complaint. (*See Garcia I*, Doc. 20.) Armas thus failed to provide adequate
21 representation for his clients and failed to inform them of the actions necessary in their case.

22 As such, due to Armas' "virtual abandonment" and gross negligence in handling his clients'
23 action, it is recommended that Plaintiffs' Motion for Relief be GRANTED, *Garcia I* be reopened,
24 and Plaintiffs be afforded a renewed opportunity to file an amended complaint.²

25
26 ² Plaintiffs are advised that, if the Court adopts these Findings and Recommendations and allows Plaintiffs to
27 file an amended complaint, the amended complaint supercedes the original complaint. *See Lacey v. Maricopa Cnty*,
28 693 F.3d 896, 907 n.1 (9th Cir. 2012) (en banc). The amended complaint must be "complete in itself without reference
to the prior or superceded pleading." Local Rule 220. Therefore, in an amended complaint, each claim and the
involvement of each defendant must be sufficiently alleged.

1 **C. Current Status of Counsel**

2 Although Plaintiffs were representing themselves *pro se* in *Garcia II*, Armas remains
3 Plaintiffs' attorney of record in *Garcia I* since a substitution of attorney form has not been filed, nor
4 has Armas sought to withdraw as counsel. (*See generally Garcia I* docket). It is thus recommended
5 that Armas be ORDERED to either file a substitution of attorney form (which can be found under
6 the "Forms & Fees" section of the United States Courts website (www.uscourts.gov)), or inform the
7 Court that Plaintiffs wish to continue proceeding with Armas as their counsel. Armas continues to
8 remain as Plaintiffs' attorney of record until a substitution of counsel is approved by the Court.

9 **IV. CONCLUSION AND RECOMMENDATION**

10 Based on consideration of the declarations, pleadings, and exhibits to the present motion, the
11 Court RECOMMENDS that:

- 12 1. Plaintiffs' Motion for Relief be GRANTED in *Garcia et al. v. Allstate Insurance*,
13 case no. 1:12:-cv-00609-AWI-SKO;
- 14 2. The order closing the case and the judgment against Plaintiffs be set aside and the
15 case be reopened;
- 16 3. Plaintiffs be ORDERED to file an amended complaint within twenty-one (21) days
17 of the date of service of the district court's order adopting these findings and
18 recommendations; and
- 19 4. Attorney Joseph Todd Armas be ORDERED, within twenty-one (21) days of the date
20 of service of the district court's order adopting these findings and recommendations,
21 to file either a substitution of attorney form or inform the Court if Plaintiffs wish to
22 continue proceeding with attorney Armas as their counsel.

23 The Clerk's Office is DIRECTED to serve Plaintiffs with a copy of these findings and
24 recommendations via U.S. mail at the following address:

25 Efrain Garcia and Ofelia Garcia
26 1095 Adams Avenue
Orange Cove, CA 93646

27 These findings and recommendations are submitted to the district judge assigned to this
28 action, pursuant to 28 U.S.C. § 636(b)(1)(B) and this Court's Local Rule 304. Within twenty-one

1 (21) days of service of this recommendation, any party may file written objections to these findings
2 and recommendations with the Court and serve a copy on all parties. Such a document should be
3 captioned "Objections to Magistrate Judge's Findings and Recommendations." If objections are
4 filed, any responses to the objections shall be filed within fourteen (14) days of the service of the
5 objections. Local Rule 304(d). The district judge will review the magistrate judge's findings and
6 recommendations pursuant to 28 U.S.C. § 636(b)(1)(C). The parties are advised that failure to file
7 objections within the specified time may waive the right to appeal the district judge's order.
8 *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

9
10
11 IT IS SO ORDERED.

12 **Dated:** April 22, 2013

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE