



1 No. 19; Order Granting Ext. of Time for Obj., ECF No. 27.) The District Judge assigned  
2 to this case issued an order adopting the findings and recommendations and dismissing  
3 the action with prejudice on November 29, 2012 (Order Adopt F&R, ECF No. 31), and  
4 judgment was entered thereon. (J. Dismiss., ECF No. 32.)

5 Plaintiff filed, on December 6, 2012 a purported second motion opposing the  
6 Magistrate's recommendation to dismiss. (Sec. Obj. to F&R, ECF No. 33.) The Court  
7 construes this as a request for reconsideration of the November 29, 2012.<sup>1</sup>

## 8 **II. LEGAL STANDARD**

9 Rule 60(b)(6) allows the Court to relieve a party from an order and judgment for  
10 any reason that justifies relief. Rule 60(b)(6) "is to be used sparingly as an equitable  
11 remedy to prevent manifest injustice and is to be utilized only where extraordinary  
12 circumstances . . ." exist. Harvest v. Castro, 531 F.3d 737, 749 (9th Cir. 2008). The  
13 moving party "must demonstrate both injury and circumstances beyond his control . . ."  
14 Id. In seeking reconsideration of an order, Local Rule 230(j) requires a party to identify  
15 the motion or order in issue and when it was made, and show "what new or different  
16 facts or circumstances are claimed to exist which did not exist or were not shown upon  
17 such prior motion, or what other grounds exist for the motion."

18 "A motion for reconsideration should not be granted, absent highly unusual  
19 circumstances, unless the . . . court is presented with newly discovered evidence,  
20 committed clear error, or if there is an intervening change in the controlling law," Marlyn  
21 Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co., 571 F.3d 873, 880 (9th Cir. 2009),  
22 and "[a] party seeking reconsideration must show more than a disagreement with the  
23 [c]ourt's decision, and recapitulation . . ." of that which was already considered by the  
24 court in rendering its decision. U.S. v. Westlands Water Dist., 134 F.Supp.2d 1111,  
25 1131 (E.D. Cal. 2001).

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27 <sup>1</sup> Plaintiff has appealed the Court's November 29, 2013 Order Dismissing Action and Judgment thereon.  
28 (Notice of Appeal, ECF No. 34.) The appeal is held in abeyance of resolution of the instant request for relief. (Order  
of U.S.C.A., ECF No. 38.)

1 **III. ARGUMENT**

2 Plaintiff argues he has made the same allegations of inadequate pain  
3 management as were made in Herrera v. Wheeler, a civil rights action pending in the  
4 Eastern District in which the Court found a cognizable Eighth Amendment medical  
5 indifference claim.<sup>2</sup> He argues that a California Department of Corrections and  
6 Rehabilitation pain management policy prevents him from receiving adequate pain  
7 medication. He argues that he is entitled to enjoin the pain management committee from  
8 implementing that policy. (Sec. Obj. to F&R at 1:21-2:9.)

9 **IV. ANALYSIS**

10 Plaintiff's purported second motion opposing the Magistrate's recommendation to  
11 dismiss the action, construed as a request for reconsideration of the November 29, 2012  
12 order, is without merit and shall be denied.

13 This action, originally filed on June 19, 2012, was dismissed following a second  
14 screening because Plaintiff failed to allege facts sufficient to claim that Defendants  
15 intentionally denied, delayed or interfered with treatment, or intentionally offered  
16 medically unacceptable treatment. (Order Adopt F&R at 2:18-20.) The Court previously  
17 determined that Plaintiff had ongoing access to Defendant medical staff, each of whom  
18 concurred in, and provided, a course of treatment; there was an absence of facts  
19 suggesting disagreement among medical professionals as to the proper course of  
20 treatment for Plaintiff; there were insufficient facts to suggest Plaintiff's treatment was  
21 otherwise medically unacceptable; and that any alleged mis-diagnosis suggested by  
22 Plaintiff was at most negligence and, as such, insufficient to support an Eighth  
23 Amendment violation. (Id. at 6:11-7:1.) The Court determined Plaintiff's requested  
24 injunctive relief to be similarly deficient. (Id. at 8:1-9:5.)

25 Plaintiff provides no basis for granting a motion for reconsideration. He cites to a  
26 screening order in Wheeler, an unrelated, still pending district court action against non-

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28 <sup>2</sup> Plaintiff cites to Herrera v. Wheeler, E.D. Cal. Case No. 2:10- cv-01280-GEB-DAD.

1 party defendants, but provides no factual or legal basis for arguing error or newly  
2 discovered evidence in this action, and the Court is aware of none. There is nothing to  
3 suggest an identity of claims, a final judgment on the merits, and identity or privity  
4 between parties necessary for application of res judicata and collateral estoppel. Rest.2d  
5 Judgments § 17; see also Adams v. California Dep't of Health Servs., 487 F.3d 684,  
6 688–89 (9th Cir.2007); Headwaters, Inc., v. U.S. Forest Serv., 399 F.3d 1047, 1052,  
7 quoting Tahoe–Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 322 F.3d  
8 1064, 1077 (9th Cir. 2003).

9 He argues for relief from a pain management policy imposed by a pain  
10 management committee. However, such policy and committee are neither mentioned in  
11 his First Amended Complaint nor before the Court in this action. He provides no other  
12 grounds for reconsideration.

#### 13 **V. CONCLUSIONS AND RECOMMENDATION**

14 Plaintiff has not met the burden imposed upon a party moving for reconsideration.  
15 Marlyn Nutraceuticals, Inc., 571 F.3d at 880. He has not shown clear error or other  
16 meritorious grounds for relief from the November 29, 2012 order adopting findings and  
17 recommendations and dismissing this action with prejudice and judgment thereon.

18 Accordingly, it is RECOMMENDED that Plaintiff's purported second motion  
19 opposing the Magistrate's recommendation to dismiss the action (Sec. Obj. to F&R, ECF  
20 No. 33), construed as a request for reconsideration of the November 29, 2012 order  
21 adopting findings and recommendations and dismissing the action with prejudice and  
22 judgment thereon, be DENIED by the District Judge.

23 These findings and recommendations are submitted to the United States District  
24 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1).  
25 Within fourteen (14) days after being served with these findings and recommendations,  
26 any party may file written objections with the Court and serve a copy on all parties.  
27 Such a document should be captioned "Objections to Magistrate Judge's Findings and  
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1 Recommendations.” Any reply to the objections shall be served and filed within ten (10)  
2 days after service of the objections. The parties are advised that failure to file objections  
3 within the specified time may waive the right to appeal the District Court's order.

4 Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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6 IT IS SO ORDERED.

7 Dated: December 21, 2012

*/s/ Michael J. Seng*  
UNITED STATES MAGISTRATE JUDGE