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7	UNITED STATES DISTRICT COURT		
8	EASTERN DISTRICT OF CALIFORNIA		
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10	ROBERTO HERRERA,	Case No. 1:12-cv-01565-SKO (PC) Appeal No. 14-16371	
11	Plaintiff,	ORDER DENYING MOTION FOR	
12	V.	RECONSIDERATION, WITH PREJUDICE, AND DIRECTING CLERK'S OFFICE TO	
13	HUU NGUYEN, et al.,	SERVE COPY OF ORDER ON NINTH CIRCUIT	
14	Defendants.	(Doc. 30)	
15	/		
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17	I. <u>Procedural History</u>		
18	Plaintiff Roberto Herrera, a state prisoner proceeding pro se and in forma pauperis, filed		
19	this civil rights action pursuant to 42 U.S.C. § 1983 on September 24, 2012. ¹ On June 23, 2014,		
20	the Court dismissed the case, without prejudice, based on Plaintiff's failure to file a legible second		
21	amended complaint in compliance with the Court's orders. On July 10, 2014, Plaintiff filed a		
22	motion for reconsideration and on July 18, 2014, Plaintiff filed a notice of appeal. The United		
23	States Court of Appeals for the Ninth Circuit issued an order holding the appeal in abeyance		
24	pending resolution of the motion for reconsideration on July 21, 2014. For the reasons which		
25	follow, the motion is denied.		
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28	¹ Plaintiff became subject to 28 U.S.C. § 1915(g) in 2013.		

1 II. Discussion and Order

Pursuant to Federal Rule of Civil Procedure 60(b), the Court may relieve a party from a
final judgment, order, or proceeding based on: (1) mistake, inadvertence, surprise, or excusable
neglect; (2) newly discovered evidence; (3) fraud; (4) a void judgment; (5) a satisfied or
discharged judgment; or (6) "extraordinary circumstances" which would justify relief. Fed. R.
Civ. Pro. 60(b); *Sch. Dist. No. 1J, Multnomah County, Or. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th
Cir. 1993).

In his motion for reconsideration, Plaintiff attests under penalty of perjury that after the
Court dismissed his amended complaint with leave to amend on April 4, 2014, he mailed a second
amended complaint on April 23, 2014, but he did not keep a copy due to institutional procedures.
(Doc. 30.) Plaintiff also attests that the Court granted him an extension of time on April 30, 2014.
(*Id.*)

A review of the docket, however, reveals that Plaintiff filed a motion for an extension of time to file a second amended complaint on April, 30, 2014. (Doc. 26.) The motion was granted on May 2, 2014, and Plaintiff's failure to file a second amended complaint following that extension of time led to the dismissal of this action. (Docs. 27, 28.)

17 Plaintiff's present representation that he mailed his second amended complaint on April 18 23, 2014, is directly contradicted by the record, which reflects that Plaintiff mailed a motion 19 seeking an extension of time to file a second amended complaint on April 23, 2014. Given that 20 Plaintiff's present representation is belied by the record, he is not entitled to relief from dismissal, 21 whether his motion is treated as brought pursuant to Rule 60(b)(1) or Rule 60(b)(6). See Harvest 22 v. Castro, 531 F.3d 737, 749 (9th Cir. 2008) (Rule 60(b)(6) is to be used sparingly to prevent 23 manifest injustice); Lemoge v. U.S., 587 F.3d 1188, 1192 (9th Cir. 2007) (excusable neglect 24 determination is equitable in nature and movant must demonstrate he acted in good faith); TCI 25 Group Life Ins. Plan v. Knoebber, 244 F.3d 691, 696-97 (9th Cir. 2001) (excusable neglect 26 ordinarily shown by lack of culpability).

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1	Accordingly, Plaintiff's motion for reconsideration is HEREBY DENIED, with prejudice;		
2	and the Clerk's Office is DIRECTED to serve a copy of this order on the Ninth Circuit.		
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5	IT IS SO O	RDERED.	
6	Dated:	September 10, 2014	/s/ Sheila K. Oberto
7			UNITED STATES MAGISTRATE JUDGE
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