

1 counsel shall present to the Judge or Magistrate Judge to whom such subsequent
2 motion is made an affidavit or brief, as appropriate, setting forth the material facts and
circumstances surrounding each motion for which reconsideration is sought, including:

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

8 Despite this, Plaintiff relies upon the catchall provision of Fed. R. Civ. P. 60(b) as the legal authority
9 for his motion for reconsideration. In doing so, without explanation or analysis, he seeks to sidestep
10 the requirements of Local Rules 230. (Doc. 46-1 at 2) Except for announcing that he is not required
11 to make this demonstration in his moving papers, he fails to address this topic at all and does not
12 mention Local Rule 230(j).

13 Then, *in his reply*, he argues that the legal authority *upon which he relied in the underlying*
14 *motion—Villacorta v. Cemex Cement Inc.*, 221 Cal.App.4th 1425, 1428-1429 (2013)—caused him to
15 need to present additional facts but that his counsel failed to do so at that time because, “Plaintiff did
16 not have the opportunity to conduct a full investigation and analysis of the appropriate facts to include
17 on such short notice.” (Doc. 46 at 12) What further investigation occurred, why it could not have
18 been done at the time of the supplemental briefing or what further facts needed to be developed
19 because of the reliance upon *Villacorta*, is not explained.

20 The Court finds this explanation to be lacking in credibility. First, *Villacorta* was published six
21 days before the supplemental brief was filed which is sufficient time to address the little it added to the
22 existing body of jurisprudence. Second, in the supplemental brief, Plaintiff provided a section entitled,
23 “Facts Pertinent to Supplemental Briefing” without any indication that these facts were somehow
24 deficient. (Doc. 38 at 2) Third, there is no explanation for why counsel failed to seek additional time,
25 if it was needed before filing the supplemental brief.¹ Fourth, Plaintiff fails to set forth which of the
26 new evidence provided with his motion for reconsideration he relies upon to address the holding of

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28 ¹ Indeed, given the supplemental brief was filed without leave of the Court and was filed in addition to his opposition—
and filed ten days later—it is unknown exactly what deadline he felt he had to meet.

1 *Villacorta*. Indeed, review of Plaintiff’s newly filed declaration makes clear that he does not add any
2 fact that is pertinent to the *Villacorta* analysis that was not already set forth in his earlier declaration.²
3 At most he clarifies that at the time he was fired by Sturgeon, he worked locally only. (Doc. 43-1 at 4)
4 However, the fact that he was forced to work out of the area for Pivox was established in his earlier
5 declaration (Doc. 37-2 at 7, 9) and was argued in his supplemental brief. (Doc. 38 at 4)

6 Likewise, despite Plaintiff’s implied characterization of *Villacorta*—as changing the legal
7 landscape for those wrongfully fired—courts have long-held that wages earned from an inferior
8 position may not be used in mitigation. *Rabago–Alvarez v. Dart Industries, Inc.*, 55 Cal.App.3d 91,
9 99 (1976); *California Sch. Employees Assn. v. Pers. Comm’n*, 30 Cal.App.3d 241, 253 (1973)
10 (replacement job in the same locale not inferior). Notably, CACI 2407 (version 2007) sets forth the
11 factors upon which a jury may rely in determining whether the replacement job is inferior. In fact, the
12 trial court in *Villacorta* used CACI 2407 to instruct the jury. Likewise, CACI 2603 defines
13 “comparable job” as it relates to CFRA violations as “a job that is the same or close to the employee’s
14 former job in responsibilities, duties, pay, benefits, working conditions, and schedule. **It must be at**
15 **the same or a nearby worksite.**” Emphasis added. This instruction was added by the Judicial
16 Council in September 2003.

17 Thus, the new declaration fails to address the *Villacorta* case in any substantive manner and
18 clearly is an attempt to introduce evidence that was known to Plaintiff at the time he filed his
19 opposition and supplemental briefs without compliance with Local Rule 230. Therefore, the motion
20 for reconsideration is **DENIED**.

22 ² Indeed, much of the new declaration contradicts that which Plaintiff swore was true in his earlier declaration and is
23 inconsistent with statements made by counsel at the hearing. For example, at the hearing, the Court inquired, “On this day,
24 what were his job duties?” Counsel responded, “Generally getting supplies, sweeping the job site, keeping it clean, maybe
25 putting up fencing, digging ditches, manual labor.” (Doc. 42 at 26) Plaintiff’s earlier declaration was consistent; “my job
26 duties were pretty straight up manual labor, even though I was hired as an operator.” (Doc. 37-2 at 7) Despite this, in his
27 current declaration Plaintiff attests that he slipped on the wet plastic *only* because he was forced to walk on it because he
28 was acting as an equipment operator. (Doc. 43-1 at 2, 3) Likewise, though Plaintiff attested earlier that he questioned his
foreman by saying, “Are you really going to expect *everyone* to walk around on this wet plastic and not get hurt?” (Doc.
37-2 at 8), now he attests that *only those* who were operating equipment on the day had to walk on the plastic. (Doc. 43-1
at 7) Clearly, his new declaration is an attempt to re-design the “facts” such to demonstrate that his injury was directly
related to his work duties. It has not escaped the Court’s notice that this is the *exact* type of fall the Court described in an
example at the hearing that could give rise to damages. Plaintiff fails to explain these inconsistencies or why this evidence
was not presented in opposition to the motion for summary judgment. Thus, the Court concludes that this new declaration
is a sham and refuses to consider it. *Messick v. Horizon Indus. Inc.*, 62 F.3d 1227, 1231 (9th Cir.1995); L.R. 230(j).

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ORDER

Based upon the foregoing, the Court **ORDERS**:

1. Plaintiff's motion for reconsideration (Doc. 43) is **DENIED**.

IT IS SO ORDERED.

Dated: March 27, 2014

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE