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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF CALIFORNIA
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8 JANICE SUGITA,

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10 Plaintiff,

11 v.

12 B. PARKER, et al.,

13 Defendants.
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CASE NO. 1:13-cv-00118-AWI-MJS (PC)

ORDER DENYING MOTION FOR
RECONSIDERATION

(ECF No. 43)

ORDER GRANTING, IN PART, MOTION
TO MODIFY DEADLINE TO FILE
PRETRIAL STATEMENT

(ECF No. 44)

17 **I. PROCEDURAL HISTORY**

18 Plaintiff is a state prisoner proceeding *pro se* and *in forma pauperis* in this civil
19 rights action brought pursuant to 28 U.S.C. § 1983. (ECF Nos. 4 & 10.) The action
20 proceeds on a First Amendment retaliation claim against Defendant Longia.¹ (ECF No.
21 10.)

22 Defendant filed a motion seeking to modify the Court's Second Scheduling Order
23 (ECF No. 37.) to enable him to file a motion for judgment on the pleadings. (ECF No.
24 40.) The Court denied the motion based on Defendant's failure to demonstrate good
25 cause. Defendant attributed the failure to raise the retaliation claim sooner to counsel's
26 inadvertence. Defendant did not explain the delay in bringing the motion to modify the

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28 ¹ The Court granted Defendants Salinas and Longia's motions for summary judgment on the
Eighth Amendment medical indifference claims. (ECF No. 36.)

1 scheduling order. (ECF No. 41.)

2 Before the Court is Defendant's application for reconsideration of the Court's
3 ruling. (ECF No. 43.). Defendant also filed a motion to modify the deadline for filing his
4 pretrial statement. (ECF No. 44.)

5 **II. MOTION FOR RECONSIDERATION**

6 **A. Legal Standard**

7 Federal Rule of Civil Procedure 60(b)(1) allows the Court to relieve a party from
8 an order due to "mistake, inadvertence, surprise, or excusable neglect." In seeking
9 reconsideration of an order, Local Rule 230(j) requires a party to show "what new or
10 different facts or circumstances are claimed to exist which did not exist or were not
11 shown upon such prior motion, or what other grounds exist for the motion."

12 "A motion for reconsideration should not be granted, absent highly unusual
13 circumstances, unless the . . . court is presented with newly discovered evidence,
14 committed clear error, or if there is an intervening change in the controlling law," *Marlyn*
15 *Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 880 (9th Cir. 2009),
16 and "[a] party seeking reconsideration must show more than a disagreement with the
17 Court's decision, and 'recapitulation . . .'" of that which was already considered by the
18 court in rendering its decision. *U.S. v. Westlands Water Dist.*, 134 F.Supp.2d 1111,
19 1131 (E.D. Cal. 2001) (*quoting Bermingham v. Sony Corp. of Am., Inc.*, 820 F. Supp.
20 834, 856 (D. N.J. 1992)).

21 **B. Analysis**

22 Defendant argues that: 1) the Court improperly denied relief on the mistaken
23 belief that Defendant had failed to submit his consent or decline to Magistrate Judge
24 jurisdiction, and, 2) there is good cause for late filing of the motion due to counsel's trial
25 and vacation schedule. Defendant withdraws his argument that Plaintiff's retaliation
26 claim was not readily identifiable. Defendant no longer seeks to delay the pretrial
27 confirmation hearing.

1 Defendant is correct that both he and Plaintiff filed consent and decline forms
2 prior to the Court issuing its Second Scheduling Order. (ECF Nos. 5 & 18.) However, in
3 the Second Scheduling Order, the Court, thinking the parties might be willing to consent
4 for purposes of trial, again requested the forms. (ECF No. 37.) Defendant's notification
5 that he relies on his previously submitted declination of Magistrate Judge jurisdiction is
6 sufficient; he need not resubmit the form.

7 The Court noted in its ruling that Defendant's failure to respond regarding
8 consent did not reflect well on counsel's request for more time. As noted, however, the
9 Court did not deny Defendant's motion because of that failure.

10 Defendant also explains that his delay in requesting a modification of the Second
11 Scheduling Order was due to defense counsel's trial and vacation schedule. Defendant
12 argues that, if granted, his request for leave to file a judgment on the pleadings would
13 not delay trial currently set for December 1, 2015, and it would promote judicial
14 economy. Defendant claims he will be prejudiced if denied leave to file a motion for
15 judgment on the pleadings for failure to state a claim.

16 The only new facts presented on this request for reconsideration are those
17 attributing delay in filing a motion for modification to counsel's trial and vacation
18 schedule. While that may excuse Defendant's approximately two-month delay in
19 bringing the motion, it does not demonstrate good cause for granting Defendant leave to
20 file a dispositive motion at this stage in the proceedings, thereby effectively modifying the
21 Court's original discovery and scheduling order a second time. (ECF No. 16.) "Good
22 cause means scheduling deadlines cannot be met despite a party's diligence." *Johnson*
23 *v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir.1992). Because Defendant
24 no longer seeks to move the pretrial conference but only requests leave to file a motion
25 for judgment on the pleadings, he must demonstrate good cause for not complying with
26 the Court's original scheduling order. Defendant has not done so.

1 The Court finds no basis for reconsidering its denial of Defendant's motion for
2 modification of the Second Scheduling Order. The defense of failure to state a claim
3 remains available to Defendant.

4 **III. MOTION TO MODIFY DEADLINE TO FILE PRETRIAL STATEMENT**

5 Defendant seeks to modify the Second Scheduling Order to re-set the deadline
6 for him to file his pretrial statement from September 21, 2015 to fourteen days after
7 Plaintiff files her pretrial statement.

8 Plaintiff has not filed her pretrial statement, which was due on September 7, 2015.
9 The Court has accordingly ordered Plaintiff to show cause why his case should not be
10 dismissed for failure to comply with a Court order. (ECF No. 42.)

11 Because Defendant cannot file a responsive pretrial statement without Plaintiff
12 first filing a pretrial statement and thus his delay in filing a pretrial statement is through
13 no fault of his own, the Court finds good cause to grant Defendant's motion. Once the
14 order to show cause has been resolved, the Court will set a deadline for Defendant to
15 file a pretrial statement.

16 **IV. CONCLUSION AND ORDER**

17 Based on the foregoing, it is HEREBY ORDERED that:

- 18 1. Defendant's motion for reconsideration is DENIED (ECF No. 43.); and
19 2. Defendant's motion to modify the deadline to file his pretrial statement is
20 GRANTED, in part. A deadline for Defendant's pretrial statement will be
21 set once the Court resolves the pending order to show cause against
22 Plaintiff. (ECF No. 44.)

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24 IT IS SO ORDERED.

25 Dated: September 30, 2015

26 /s/ Michael J. Seng
27 UNITED STATES MAGISTRATE JUDGE
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