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8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA
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11 LUIS RODRIGUEZ,

12 Plaintiff,

13 vs.

14 HEFFLEFINGER, et al.,

15 Defendants.
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1:13-cv-00231-DAD-GSA-PC

ORDER GRANTING MOTION FOR
RECONSIDERATION
(ECF No. 76.)

17 Luis Rodriguez (“Plaintiff”), a state prisoner proceeding pro se, filed the complaint
18 commencing this action on February 14, 2013, as a civil rights action pursuant to 42 U.S.C. §
19 1983. (ECF No. 1.) The case now proceeds with Plaintiff’s Second Amended Complaint filed
20 on July 14, 2014, on the following cognizable claims: (1) retaliation in violation of the First
21 Amendment against defendants Anderson, Hefflefinger, Badger, McAllister, Tredwell,
22 Sheldon, Speidell, Duncan, Lovofoy, and Huerta; (2) violation of the Eighth Amendment
23 against defendant Lovofoy for inadequate medical care; and (3) violation of the Eighth
24 Amendment against defendants Hefflefinger and Lovofoy based on conditions of confinement.
25 (ECF No. 25.)

26 **I. BACKGROUND**

27 A notice of Plaintiff’s death was placed on the court’s record by his wife, Caroline
28 Grenot, on April 25, 2016, in which Ms. Grenot requested information regarding continuation

1 of the suit on behalf of Plaintiff's estate. (ECF No. 67.) On May 4, 2016, Defendants filed a
2 formal notice of Plaintiff's death with the court. (ECF No. 66.) Defendants produced evidence
3 that Plaintiff's daughter, Amelia Garcia, was served by personal delivery on May 7, 2016.
4 (ECF No. 69.) However, Defendants' evidence established that while personal delivery of the
5 notice was attempted upon Plaintiff's wife, Caroline Grenot, and Plaintiff's brother, David
6 Rodriguez, neither of them were located at their respective addresses, and therefore, neither of
7 them were served with notice. (ECF No. 69.) Moreover, the documents submitted by
8 Defendants did not indicate that any other attempts were made to serve either Ms. Grenot or
9 Mr. Rodriguez, both of whom Defendants represented to be non-party successors or
10 representatives, by means other than personal delivery.

11 On November 3, 2016, the Court ordered Defendants to supplement their previously
12 filed notice with evidence of proper service upon both Caroline Grenot and David Rodriguez
13 within twenty-one days. (ECF No. 72.) On November 7, 2016, Defendants filed a proof of
14 service on Plaintiff's widow, C. Grenot, showing that she was personally served with the
15 Notice of Death on September 14, 2016. (ECF No. 73.)

16 On November 22, 2016, Defendants filed a motion for an order permitting service of the
17 Notice of Death of Plaintiff upon David Rodriguez by publication. (ECF No. 74.) On January
18 18, 2017, the court issued an order granting Defendants' motion, authorizing Defendants to
19 serve D. Rodriguez with the Notice of Death of Plaintiff by publication in the Los Angeles
20 Times, with publication to be made once a week for four weeks. (ECF No. 75.)

21 On January 31, 2017, Defendants filed a motion for reconsideration of the court's
22 January 18, 2017, order.¹ (ECF No. 76, 77.) No opposition has been filed. The motion for
23 reconsideration is now before the court. (Local Rule 230(l).

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28 ¹ Defendants also filed a request for judicial notice on January 31, 2017. (ECF No. 77.) The
Court does not require evidence of the documents submitted for judicial notice to resolve the motion for
reconsideration. Therefore, Defendants' request for judicial notice is denied as moot.

1 **II. MOTION FOR RECONSIDERATION**

2 Rule 60(b) allows the Court to relieve a party from an order for “(1) mistake,
3 inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with
4 reasonable diligence, could not have been discovered in time to move for a new trial under
5 Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or
6 misconduct by an opposing party; (4) the judgment is void; or (6) any other reason that justifies
7 relief.” Fed. R. Civ. P. 60(b). Rule 60(b)(6) “is to be used sparingly as an equitable remedy to
8 prevent manifest injustice and is to be utilized only where extraordinary circumstances . . .”
9 exist. Harvest v. Castro, 531 F.3d 737, 749 (9th Cir. 2008) (internal quotations marks and
10 citation omitted). The moving party “must demonstrate both injury and circumstances beyond
11 his control” Id. (internal quotation marks and citation omitted). In seeking
12 reconsideration of an order, Local Rule 230(k) requires Plaintiff to show “what new or different
13 facts or circumstances are claimed to exist which did not exist or were not shown upon such
14 prior motion, or what other grounds exist for the motion.”

15 “A motion for reconsideration should not be granted, absent highly unusual
16 circumstances, unless the district court is presented with newly discovered evidence, committed
17 clear error, or if there is an intervening change in the controlling law,” Marlyn Nutraceuticals,
18 Inc. v. Mucos Pharma GmbH & Co., 571 F.3d 873, 880 (9th Cir. 2009) (internal quotations
19 marks and citations omitted, and “[a] party seeking reconsideration must show more than a
20 disagreement with the Court’s decision, and recapitulation” of that which was already
21 considered by the Court in rendering its decision,” U.S. v. Westlands Water Dist., 134
22 F.Supp.2d 1111, 1131 (E.D. Cal. 2001). To succeed, a party must set forth facts or law of a
23 strongly convincing nature to induce the court to reverse its prior decision. See Kern-Tulare
24 Water Dist. v. City of Bakersfield, 634 F.Supp. 656, 665 (E.D. Cal. 1986), affirmed in part and
25 reversed in part on other grounds, 828 F.2d 514 (9th Cir. 1987).

26 **A. Defendants’ Motion**

27 Defendants move for reconsideration of the court’s order issued on January 18, 2017, in
28 which the court authorized Defendants to serve notice of Plaintiff’s death upon Plaintiff’s

1 brother, D. Rodriguez, by publication, on the grounds that all necessary parties have already
2 been personally served and the costs of publication would be wasteful and unnecessary under
3 the circumstances. In the alternative, Defendants request an order approving publication of a
4 shortened version of the notice of death, to decrease Defendants' cost of compliance with the
5 order.

6 Defendants submit the following background facts:

7 On or about April 14, 2016, Defendants received notice that Plaintiff
8 died during the pendency of this litigation. (ECF No. 67.) After learning the
9 names and possible locations of Plaintiff's possible successors or
10 representatives, Defendants filed a Notice of Death of Plaintiff with the Court on
11 May 4, 2016. (ECF No. 66.) That same day, Defendants sent out the Notice of
12 Death to be served. However, due to an oversight, counsel for Defendants did
13 not immediately file the proof of service for A. Garcia, and the declarations of
14 non-service for C. Grenot and D. Rodriguez, with the Court after serving the
15 notice. (ECF No. 69.)

16 On August 11, 2016, the Magistrate Judge issued an Order requiring
17 Defendants to supplement their Notice of Death of Plaintiff with proofs of
18 service. (ECF No. 68.) On August 16, 2016, in response to that Order,
19 Defendants filed with the Court a proof of service for Plaintiff's daughter, A.
20 Garcia, showing that she was served personally on May 7, 2016. (ECF No. 69
21 at 6.) Defendants also filed with the Court Declarations of Non-Service for
22 Plaintiff's wife, C. Grenot, and his brother, D. Rodriguez. (ECF No. 69 at 4-5.)
23 To date, A. Garcia has not filed a motion for substitution, or any other document
24 with the Court, evidencing her intention to substitute into this case.

25 The day after Defendants filed the proof of service for A. Garcia, and
26 declarations of non-service for C. Grenot, and D. Rodriguez, the Magistrate
27 Judge issued Findings and Recommendations dismissing Plaintiff's claims.
28 (ECF No. 70.) On November 3, 2016, the District Judge declined to adopt the

1 Findings and Recommendations and ordered Defendants to provide proofs of
2 service for C. Grenot and D. Rodriguez. (ECF No. 72.) The Court also ordered
3 substituted service, one method which was service by publication. (Id.)

4 On November 7, 2016, counsel for Defendants filed a Declaration along
5 with the proof of service for Plaintiff's wife, C. Grenot, showing that she was
6 personally served with the Notice of Death on September 14, 2016. (ECF No.
7 73.) Counsel for Defendants also notified the Court that D. Rodriguez,
8 Plaintiff's brother, is not a necessary or proper party to this section 1983 action
9 because he is not a successor to Plaintiff's claims whom Defendants were
10 required to serve. Fed. R. Civ. P. 25(a)(1); See Cal Code Civ. Proc. § 377.3;
11 Cal. Prob. Code §§ 6401, 6402.

12 Defendants notified the Court that they had been unable to locate D.
13 Rodriguez after a diligent search and sending a process server to his last known
14 addresses. (Id.) Defendants were informed through the process server that the
15 address for D. Rodriguez's last known personal residence was no longer valid
16 because he sold the home more than fifteen years ago. (Id.) Defendants also
17 learned that D. Rodriguez's last known business address was no longer valid
18 because the business no longer exists. (Id.)

19 However, to comply with the Court's Order to serve D. Rodriguez,
20 Defendants also moved for an Order authorizing them to serve the Notice of
21 Death of Plaintiff by publication in the Los Angeles Times if the Court so
22 required. (ECF No. 74.)

23 The Magistrate Judge granted Defendants' motion for service by
24 publication and ordered publication for four weeks, one day per week. (ECF
25 No. 75.) On January 19, 2017, counsel for Defendants contacted a Legal
26 Advertising Representative with the Los Angeles Times for a cost estimate for
27 serving the Notice of Death via publication. (Walker, Decl. ¶¶ 2-3.) That same
28 day, the Legal Advertising Representative at the Los Angeles Times provided

1 counsel for Defendants with a sample and an invoice for \$8,357.68 including the
2 costs to publish the Notice of Death once a week for four weeks. (Walker, Decl.
3 ¶ 3, Ex. 1.) On January 20, 2017, counsel for Defendants contacted the Legal
4 Advertising Representative and requested a price quote on a shortened version
5 of the Notice of Death. (Walker, Decl. ¶ 4, Ex. 2.) The price quote for the
6 shortened version of the Notice of Death was \$1,836.24 to publish once a week
7 for four weeks. (Id.)

8 Defendants argue that they were not required under Rule 25(a)(1) to serve Plaintiff's
9 brother, D. Rodriguez, with the Notice of Death, because he is not a successor to Plaintiff's
10 claims whom Defendants were required to serve. Defendants also argue that under California
11 law, Plaintiff's wife, not her brother, would be the successor to Plaintiff's § 1983 claims.

12 Defendants also argue that serving an unnecessary party, D. Rodriguez, by publication
13 would require them to incur significant costs with no benefit to Plaintiff's potential successors
14 to his claims.

15 **B. Discussion**

16 Defendants have set forth facts of a strongly convincing nature to induce the court to
17 reverse its prior decision. Therefore, Defendants' motion for reconsideration shall be granted.

18 Defendants have provided evidence that they complied with the requirements of Rule
19 21(a)(1) to (1) formally suggest the death of the party on the record, and (2) serve the
20 suggestion of death on the other parties and nonparty successors or representatives. Fed R. Civ.
21 P. 21(a)(1). Defendants have submitted proof that on September 14, 2016, they personally
22 served Plaintiff's wife, C. Grenot, with the notice of Plaintiff's death. (ECF No. 73.)

23 The court concurs that under California law, Plaintiff's wife is the successor in interest
24 to Plaintiff's claims in this § 1983 action. See Cal. Code Civ. Proc. § 377.30 (Under California
25 law, Plaintiff's 1983 claim survives his death and "passes to [his] successor in interest."); Cal.
26 Prob. Code § 6401 (Under the rule of California's intestate succession, a surviving spouse
27 receives all community property and one-half of separate property); Cal. Prob. Code § 6402
28 (The remaining part of the estate passes first to decedent's children. Only if the decedent has

1 no surviving children or parents does the estate pass to decedent's siblings.) Therefore,
2 Defendants have complied with the requirements of Rule 25(a)(1) to serve the Notice of Death.

3 Accordingly, Defendants' motion for reconsideration shall be granted.

4 **III. CONCLUSION**

5 Accordingly, based on the foregoing, IT IS HEREBY ORDERED that Defendants'
6 motion for reconsideration, filed on January 31, 2017, is GRANTED, therefore, Defendants
7 are relieved of the Court's prior order directing Defendants to serve notice by substituted
8 service upon D. Rodriguez.

9
10 IT IS SO ORDERED.

11 Dated: February 28, 2017

/s/ Gary S. Austin
12 UNITED STATES MAGISTRATE JUDGE