

1  
2  
3  
4  
5  
6  
7  
8 **UNITED STATES DISTRICT COURT**  
9 **EASTERN DISTRICT OF CALIFORNIA**  
10

11 JAMES W. MILLNER, ) Case No.: 1:13-cv-02029-SAB (PC)  
12 Plaintiff, )  
13 v. ) ORDER GRANTING PLAINTIFF’S MOTION  
14 MARTIN BITER, et al., ) FOR RECONSIDERATION, AMENDING  
15 Defendants. ) SCREENING ORDER ISSUED OCTOBER 7, 2014,  
16 ) AND DIRECTING CLERK OF COURT TO ISSUE  
SUMMONSES FOR DEFENDANT DR. DILEO  
[ECF Nos. 30, 33, 78]

17 Plaintiff James W. Millner is appearing pro se in this civil rights action pursuant to 42 U.S.C. §  
18 1983.

19 This action is proceeding on Plaintiff’s third amended complaint, filed September 10, 2014,  
20 against Defendants J. Anderson, D. Rodriguez, and O. Marroquin for excessive force, against  
21 Defendants W. Sweetser, R. Sulier, Pair, and Pelayo for failure to protect, and against Defendants J.  
22 Anderson, O. Marroquin, D. Rodriguez, W. Sweetser, R. Sulier, and Pair for deliberate indifference to  
23 a serious medical need. (ECF Nos. 30, 33, 41.)

24 Now pending before the Court is Plaintiff’s motion for reconsideration, filed July 20, 2015.  
25 (ECF No. 78.) Plaintiff contends this Court did not issue a ruling with regard to his allegations against  
26 Defendant Dr. Dileo found at page nineteen,<sup>1</sup> paragraphs three through five of his third amended  
27

28 <sup>1</sup> The page numbers identified herein refer to those assigned by the Court’s electronic case management filing system.

1 complaint. Plaintiff points out that he does not dispute this Court's ruling with regards to paragraphs  
2 one and two of the third amended complaint. Plaintiff contends the Court erred in not addressing  
3 paragraphs three and five of his third amended complaint.

4 Rule 60(b)(6) allows the Court to relieve a party from an order for any reason that justifies  
5 relief. Rule 60(b)(6) "is to be used sparingly as an equitable remedy to prevent manifest injustice and  
6 is to be utilized only where extraordinary circumstances ..." exist. Harvest v. Castro, 531 F.3d 737,  
7 749 (9th Cir. 2008) (internal quotation marks and citation omitted). The moving party "must  
8 demonstrate both injury and circumstances beyond his control ..." Id. In seeking reconsideration of  
9 an order, Local Rule 230(j) requires Plaintiff to show "what new or different facts or circumstances  
10 are claimed to exist which did not exist or were not shown upon such prior motion, or what other  
11 grounds exist for the motion." Local Rule 230(j).

12 As to the allegations against Defendant Dr. Dileo, the Court's October 7, 2014, screening order  
13 specifically stated:

14 Plaintiff contends that in July 2012, he contracted Valley Fever and Defendants  
15 Doctor Mui, Lozovoy, and Delieo did nothing to treat the side effects of such illness  
16 which lead to the use of force on July 14, 2013.

17 Plaintiff fails to state a cognizable claim for relief against these Defendants. There  
18 are no factual allegations that any of Defendants acted with the requisite  
19 knowledge, and Plaintiff therefore fails to state a claim against them for deliberate  
20 indifference. Plaintiff fails to allege that these Defendants knew that Plaintiff had  
21 Valley Fever, that they had the authority to arrange for treatment and failed to  
22 provide such to Plaintiff and that, knowing that no treatment to Plaintiff would  
23 result in further injury or infliction of pain at the hands of other prison officials.

24 Furthermore, Plaintiff's claim relating to the contraction and/or treatment for Valley  
25 Fever is unrelated to the claims of excessive force and subsequent denial of medical  
26 treatment that is gravamen of Plaintiff's complaint in the instant action.

27 Accordingly, even if Plaintiff stated a cognizable claim relating to the contraction  
28 and treatment for Valley Fever, such claim would be subject to dismissal under  
Rules 18 and 20 of the Federal Rules of Civil Procedure as unrelated. Fed. R. Civ.  
P. 18(a), 20(a)(2).

(ECF No. 33, Order at 7:11-25.)

///

1 To the extent Plaintiff seeks reconsideration based on his disagreement with the Court's  
2 screening decision and application of the law to his factual allegations, such argument is not grounds  
3 to grant reconsideration. However, upon review of paragraphs three through five of Plaintiff's third  
4 amended complaint and the explanation provided in Plaintiff's present motion for reconsideration,  
5 Plaintiff states a cognizable claim against Defendant Dileo for deliberate indifference to a serious  
6 medical need, following the alleged use of excessive force and resulting delay in treatment. That said,  
7 the Court notes that paragraphs three through five of Plaintiff's third amended complaint are obscured  
8 by Plaintiff's pleading format in which the preceding paragraphs allege that Dr. Dileo was primarily  
9 responsible for treating Plaintiff's side effects of Valley Fever which the Court found did not state a  
10 cognizable claim for relief. (See Third Amd. Compl. at p. 19 ¶¶ 1-5.) Nonetheless, because Plaintiff  
11 has clarified that he is seeking liability against Defendant Dr. Dileo based on the delay in treatment of  
12 Plaintiff's injuries following the alleged use of excessive force, the Court will amend the October 7,  
13 2014, screening order to find a cognizable claim for deliberate indifference against Defendant Dr.  
14 Dileo as well as the other named Defendants, and provide Plaintiff with a summonses for service.

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

- 16 1. Plaintiff's motion for reconsideration is granted;
- 17 2. The Court's October 7, 2014, screening order is amended to find a cognizable claim for  
18 deliberate indifference against Defendant Dr. Dileo;
- 19 3. The Clerk of Court is directed to issue Plaintiff a summonses for service on Defendant  
20 Dr. Dileo;
- 21 4. Plaintiff shall initiate service of process on Defendant Dr. Dileo in accordance with the  
22 Court's October 7, 2014, order; and

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

5. All other provisions of the Court's October 7, 2014, order remain in full force and effect.

IT IS SO ORDERED.

Dated: August 6, 2015



UNITED STATES MAGISTRATE JUDGE