

1 Rule 60(b)¹ of the Federal Rules of Civil Procedure provides that “[o]n motion and upon
2 such terms as are just, the court may relieve a party . . . from a final judgment, order, or
3 proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect;
4 (2) newly discovered evidence that, with reasonable diligence could not have been discovered in
5 time to move for a new trial under Rule 59(b); (3) fraud . . . , misrepresentation, or misconduct by
6 an opposing party; . . . or (6) any other reason justifying relief from the operation of judgment.”
7 Motions under Rule 60(b) “must be made within a reasonable time -- and for reasons (1), (2), and
8 (3) no more than a year after the entry of the judgment or order or the date of the proceeding.”

9 Relief under Rule 60 “is to be used sparingly as an equitable remedy to prevent manifest
10 injustice and is to be utilized only where extraordinary circumstances . . .” exist. *Harvest v.*
11 *Castro*, 531 F.3d 737, 749 (9th Cir. 2008) (internal quotations marks and citation omitted)
12 (addressing reconsideration under Rules 60(b)(1)-(5)). The moving party “must demonstrate both
13 injury and circumstances beyond his control . . .” *Id.* (internal quotation marks and citation
14 omitted). Further, Local Rule 230(j) requires, in relevant part, that Plaintiff show “what new or
15 different facts or circumstances are claimed to exist which did not exist or were not shown”
16 previously, “what other grounds exist for the motion,” and “why the facts or circumstances were
17 not shown” at the time the substance of the order which is objected to was considered.

18 “A motion for reconsideration should not be granted, absent highly unusual
19 circumstances, unless the district court is presented with newly discovered evidence, committed
20 clear error, or if there is an intervening change in the controlling law,” and it “may *not* be used to
21 raise arguments or present evidence for the first time when they could reasonably have been
22 raised earlier in the litigation.” *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571
23 F.3d 873, 880 (9th Cir. 2009) (internal quotations marks and citations omitted) (emphasis in
24 original).

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26 ¹ Plaintiff asserts that he brings this motion under Rule 59(e), but that Rule applies to requests to
27 alter or amend judgment after trial -- i.e. seeking a new trial. Since judgment was entered in this
28 case based on Defendants’ motion for summary judgment, and not as a result of trial, Plaintiff’s
motion is properly considered under Rule 60.

1 In his motion, Plaintiff asserts that this Court abused its discretion by refusing to consider
2 evidence he offered in opposition to Defendants' motion for summary judgment and that new
3 evidence exists which precludes summary judgment. (Doc. 67, p. 1.) To this end, Plaintiff points
4 to a January 15, 2015 letter from the Third Level of Review to the Second Level of Review on his
5 Appeal PVSP 14-00683 which states that a number of "questions need to be addressed in a new
6 inquiry to avert a lawsuit." (See Doc. 67, pp. 3, 4, 5, 14, 17-18.) Plaintiff asserts that this letter
7 was not considered on the ruling and that it shows nefarious intent to delay which rendered the
8 appeals process unavailable to Plaintiff. (*Id.*) However, the delay at various levels of Plaintiff's
9 inmate appeals and evidence thereon was expressly addressed in the Magistrate Judge's Findings
10 and Recommendations. (See Doc. 57, pp. 8-9.) The Magistrate Judge explicitly found that
11 Plaintiff's evidence showed neither a genuine dispute of fact as to whether the screening was
12 inconsistent with applicable regulations; nor created an issue of fact whether prison officials
13 thwarted his attempts at exhaustion by excessively delaying Plaintiff's appeals. Conversely, the
14 Magistrate Judge found that the evidence established that any delay in Plaintiff's appeals was due
15 to the detailed consideration by appeals staff and the complicated process the appeals were
16 subjected to and cited a precise scenario that duplicated the processes reflected in the letter
17 Plaintiff now submits on appeal 683 -- albeit without the comment to "avert litigation." (*Id.*, p.
18 9.) Lack of precise reference to a page or two of evidence under these circumstances, does not
19 imply it was not considered. There was no commission of clear error and the evidence Plaintiff
20 bases the current motion on is not "newly discovered." *Marlyn Nutraceuticals, Inc.*, 571 F.3d at
21 880. As Defendants correctly point out, that letter was included in their motion for summary
22 judgment as part of Exhibit C to the Declaration of M. Voong (Doc. 30-11, p. 75) and was
23 directly addressed in their motion (Doc. 30-2, pp. 10-11). Plaintiff likewise specifically
24 addressed the letter in both his opposition and objections to the findings and recommendations.
25 (See Doc. 37, p. 6; Doc.61, pp. 2-3.)

26 In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 303, this
27 Court has conducted a *de novo* review of this case. Having carefully reviewed the entire file, the
28 Court finds the March 1, 2017 order which dismissed this action as well as the findings and

1 recommendation that issued on January 4, 2017, which the March 1, 2017 order adopted, are
2 supported by the record and proper analysis.

3 Accordingly, the motion Plaintiff filed on March 27, 2017 (Doc. 67), to alter or amend the
4 judgment entered in this case, is **HEREBY DENIED**.

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6 IT IS SO ORDERED.

7 Dated: August 4, 2017

/s/ Lawrence J. O'Neill
UNITED STATES CHIEF DISTRICT JUDGE

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