

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

11 JOSH THOMAS,

12 Plaintiff,

13 vs.

14 WILKINSON, et al.,

15 Defendants.  
16  
17  
18

1:15-cv-00527-LJO-GSA-PC

**ORDER DENYING MOTION FOR  
RECONSIDERATION**

**ORDER DENYING MOTION FOR  
DISQUALIFICATION OF  
MAGISTRATE JUDGE GARY S.  
AUSTIN**

**(ECF No. 68.)**

19 **I. BACKGROUND**

20 Josh Thomas (“Plaintiff”) is a state prisoner proceeding *pro se* in this civil rights action  
21 pursuant to 42 U.S.C. § 1983.

22 On July 24, 2017, Plaintiff filed objections to the court’s orders denying his motion to  
23 amend and striking his surreply. (ECF No. 68.) The court construes Plaintiff’s objections as a  
24 motion for reconsideration of the orders. Plaintiff also requests disqualification of Magistrate  
25 Judge Gary S. Austin from further participation in this case. (Id.)

26 **II. MOTION FOR RECONSIDERATION**

27 Rule 60(b) allows the Court to relieve a party from an order for “(1) mistake,  
28 inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with

1 reasonable diligence, could not have been discovered in time to move for a new trial under  
2 Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or  
3 misconduct by an opposing party; (4) the judgment is void; or (6) any other reason that justifies  
4 relief.” Fed. R. Civ. P. 60(b). Rule 60(b)(6) “is to be used sparingly as an equitable remedy to  
5 prevent manifest injustice and is to be utilized only where extraordinary circumstances . . .”  
6 exist. Harvest v. Castro, 531 F.3d 737, 749 (9th Cir. 2008) (internal quotations marks and  
7 citation omitted). The moving party “must demonstrate both injury and circumstances beyond  
8 his control . . .” Id. (internal quotation marks and citation omitted). In seeking reconsideration  
9 of an order, Local Rule 230(k) requires Plaintiff to show “what new or different facts or  
10 circumstances are claimed to exist which did not exist or were not shown upon such prior  
11 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 district court is presented with newly discovered evidence, committed  
14 clear error, or if there is an intervening change in the controlling law,” Marlyn Nutraceuticals,  
15 Inc. v. Mucos Pharma GmbH & Co., 571 F.3d 873, 880 (9th Cir. 2009) (internal quotations  
16 marks and citations omitted, and “[a] party seeking reconsideration must show more than a  
17 disagreement with the Court’s decision, and recapitulation . . .” of that which was already  
18 considered by the Court in rendering its decision,” U.S. v. Westlands Water Dist., 134  
19 F.Supp.2d 1111, 1131 (E.D. Cal. 2001). To succeed, a party must set forth facts or law of a  
20 strongly convincing nature to induce the court to reverse its prior decision. See Kern-Tulare  
21 Water Dist. v. City of Bakersfield, 634 F.Supp. 656, 665 (E.D. Cal. 1986), affirmed in part and  
22 reversed in part on other grounds, 828 F.2d 514 (9th Cir. 1987).

23 **A. Order Denying Plaintiff’s Motion for Leave to Amend (ECF No. 65.)**

24 On June 29, 2017, the court issued an order denying Plaintiff’s motion for leave to add  
25 new defendants to her complaint as futile, on the ground that the continuing violation doctrine  
26 is not applicable to this case. (ECF No. 65.) Plaintiff now requests reconsideration of the  
27 court’s decision, arguing that the continuing violation doctrine is applicable to this case because  
28 “Plaintiff[’s] motion contends a serious of related acts against him.” (ECF No. 68 at 2.)

1 Plaintiff's argument is unpersuasive. In 2002, the United States Supreme Court rejected  
2 the "related acts" aspect of the continuing violations doctrine. National Railroad Passenger  
3 Corp. v. Morgan, 536 U.S. 101 (2002); see Carpinteria Valley Farms, Ltd. v. County of Santa  
4 Barbara, 344 F.3d 822, 828 (9th Cir. 2003); also see Committee Concerning Cmty.  
5 Improvement v. City of Modesto, 583 F.3d 690, 702 (9th Cir. 2009) (continuing violation  
6 doctrine held inapplicable because plaintiffs did not show "a pattern or practice of  
7 discrimination but rather ongoing harm resulting from earlier discrete decisions.") Plaintiff has  
8 not set forth facts or law of a strongly convincing nature in his motion for reconsideration to  
9 induce the court to reverse its prior decision. Therefore, the motion shall be denied.

10 **B. Order Striking Surreply (ECF No. 66.)**

11 On May 4, 2017, Plaintiff filed a motion for extension of time to file a surreply.<sup>1</sup> (ECF  
12 No. 61.) The court denied the extension of time, because Plaintiff did not have leave of court  
13 to file a surreply and had not shown good cause to file one. (ECF No. 62.) On May 22, 2017,  
14 without requesting further leave of court, Plaintiff filed the surreply. (ECF No. 64.) On June  
15 29, 2017, the court issued an order striking Plaintiff's improperly filed surreply. (ECF No. 66.)

16 Now Plaintiff seeks reconsideration of the court's order striking the surreply. (ECF No.  
17 68.) Plaintiff argues that his surreply should not have been stricken because defendant  
18 Wilkinson's response to Plaintiff's opposition presented new evidence, and defendant  
19 Wilkinson did not object to the filing of a surreply. (ECF No. 68.) These arguments are  
20 unavailing. Plaintiff has not shown any new or different facts or circumstances to cause the  
21 court to reverse its decision to strike a document that Plaintiff filed in violation of a court order.  
22 Therefore, the motion for reconsideration on this issue shall be denied.

23 **III. DISQUALIFICATION OF JUDGE - 28 U.S.C. § 455**

24 Plaintiff requests the disqualification of the undersigned Magistrate Judge Gary S.  
25 Austin from further participation in this case, under 28 U.S.C. § 455. Plaintiff claims that  
26

27  
28 <sup>1</sup> Plaintiff sought to file a response to defendant Wilkinson's reply to Plaintiff's opposition to  
defendant Wilkinson's motion to dismiss. (Id.)

1 Judge Austin’s court rulings in this action clearly show favoritism to Defendants and bias  
2 against Plaintiff. Plaintiff claims that Judge Austin deliberately misrepresents facts, ignores  
3 Plaintiff’s cases on point, intentionally denies all of Plaintiff’s pleadings, and issues decisions  
4 contrary to law.

5 Federal law provides that “[a]ny justice, judge, or magistrate judge of the United States  
6 shall disqualify himself in any proceeding in which his impartiality might reasonably be  
7 questioned.” 28 U.S.C. § 455(a). Section (b) of that statute sets forth a number of additional  
8 grounds for disqualification, including where the judge “has a personal bias or prejudice  
9 concerning a party,” “personal knowledge of disputed evidentiary facts concerning the  
10 proceeding,” where “in private practice he served as lawyer in the matter in controversy,” or  
11 “has been a material witness concerning it.” *Id.* § 455(b).

12 “The standard for judicial disqualification under 28 U.S.C. § 455 is whether a  
13 reasonable person, with full knowledge of all the circumstances, would harbor doubts about the  
14 judge’s impartiality.” *Matassarini v. Lynch*, 174 F.3d 549, 571 (5th Cir. 1999) (citation  
15 omitted). The standard for bias is an objective one: “it is with reference to the well-informed,  
16 thoughtful and objective observer, rather than the hypersensitive, cynical, and suspicious  
17 person.” *Andrade v. Chojnacki*, 338 F.3d 448, 455 (5th Cir. 2003) (quotation marks and  
18 citation omitted).

19 **C. Discussion**

20 Plaintiff’s motion must be denied. Plaintiff’s motion identifies no extra-judicial bias,  
21 prejudice, or favoritism by Judge Austin toward any party. As discussed above, a judge’s  
22 rulings while presiding over a case do not constitute extra-judicial conduct. *In re Focus Media,*  
23 *Inc.*, 378 F.3d at 930. Plaintiff’s disagreement with the court’s rulings is not a legitimate  
24 ground for seeking disqualification.

25 **IV. CONCLUSION**

26 Based on the foregoing, IT IS HEREBY ORDERED that:

- 27 1. Plaintiff’s motion for reconsideration, filed on July 24, 2017, is DENIED; and

28 ///

