

1 60(b) motion. (ECF No. 84.)

2 Currently before the Court is Plaintiff’s “Question for Review,” filed on July 8, 2019. (ECF
3 No. 85.) In this document, Plaintiff states that, after reading Williams v. Woodford, 384 F.3d 567,
4 586 (9th Cir. 2002), which the Court cited in its June 13, 2019 order denying Plaintiff’s Rule 60(b)
5 motion, he has now realized the proper procedure to seek Rule 60(b) relief during the pendency of
6 an appeal. (Id. at 2.) Hence, Plaintiff states that he is now asking the Court to entertain or grant
7 the Rule 60(b) motion that he filed on June 7, 2019. (Id.)

8 **II. Discussion**

9 **A. The Court Will Construe Plaintiff’s Motion as a Rule 60(b) Motion**

10 Federal Rule of Civil Procedure 62.1(a) provides that: “If a timely motion is made for relief
11 that the court lacks authority to grant because of an appeal that has been docketed and is pending,
12 the court may: (1) defer considering the motion; (2) deny the motion; or (3) state either that it would
13 grant the motion if the court of appeals remands for that purpose or that the motion raises a
14 substantial issue.” “[P]rocedurally there is no basis for an independent, free-standing Rule 62.1
15 motion, asking the district court, in the abstract as it were, to advise the court of appeals what it
16 would do if the court of appeals were to remand the case.” Medgraph, Inc. v. Medtronic, Inc., 310
17 F.R.D. 208, 210 (W.D.N.Y. 2015). Instead, Rule 62.1(a) “only applies when a ‘timely motion’
18 (typically a Rule 60(b) motion) has been made for relief that the court lacks jurisdiction to grant,
19 because of the pendency of an appeal. Absent an underlying, predicate motion, there is no basis
20 for relief under Rule 62.1.” Id.

21 In this case, there is no pending Rule 60(b) motion because the Court denied Plaintiff’s June
22 7, 2019 Rule 60(b) motion on June 13, 2019. Nevertheless, rather than deny Plaintiff’s motion for
23 this procedural defect, the Court will incorporate Plaintiff’s June 7, 2019 Rule 60(b) motion into
24 this motion and construe the instant motion as a Rule 60(b) motion. Although the appeal deprives
25 this Court of jurisdiction to grant Plaintiff’s Rule 60(b) motion, Rule 62.1 grants this Court
26 jurisdiction to defer considering Plaintiff’s Rule 60(b) motion, deny Plaintiff’s Rule 60(b) motion
27 on its merits, or issue an indicative ruling stating that the Court would grant Plaintiff’s Rule 60(b)
28 motion if the Ninth Circuit Court of Appeals remands for that purpose or that Plaintiff’s Rule 60(b)

1 motion raises a substantial issue. United States v. Cox, 757 F. App'x 527, 530 (9th Cir. 2018).

2 **B. The Merits of Plaintiff's Rule 60(b) Motion**

3 In his Rule 60(b) motion, Plaintiff asks the Court to grant him relief from the judgment
4 rendered against him pursuant to Rule 60(b)(2) or Rule 60(b)(3).

5 1. Rule 60(b)(2)

6 Under Rule 60(b)(2), a party may obtain relief from judgment where there is “newly
7 discovered evidence that, with reasonable diligence, could not have been discovered in time to
8 move for a new trial under Rule 59(b)[.]” Fed. R. Civ. P. 60(b)(2). “Relief from judgment on the
9 basis of newly discovered evidence is warranted if (1) the moving party can show the evidence
10 relied on in fact constitutes ‘newly discovered evidence’ within the meaning of Rule 60(b); (2) the
11 moving party exercised due diligence to discover this evidence; and (3) the newly discovered
12 evidence must be of ‘such magnitude that production of it earlier would have been likely to change
13 the disposition of the case.’” Feature Realty, Inc. v. City of Spokane, 331 F.3d 1082, 1093 (9th
14 Cir. 2003) (citation omitted).

15 Here, Plaintiff asserts that he requested the evidence that he now submits as Exhibits C and
16 D, (also called Exhibits B and C in the same motion), but Defendants did not respond to his
17 discovery request. Instead, Exhibits C and D were discovered after Plaintiff spoke with his
18 correctional counselor and the counselor “did some digging” and “found said exhibits.” (ECF No.
19 83, at 2.)

20 However, first, while Plaintiff asserts that he obtained Exhibits C and D from his
21 correctional counselor, Plaintiff fails to state when Exhibits C and D were discovered by his
22 counselor and provided to him. Therefore, since Plaintiff has not established that Exhibits C and
23 D could not have been discovered, in the exercise of reasonable diligence, in time to move for a
24 new trial under Rule 59(b), Plaintiff has not shown that Exhibits C and D constitutes newly
25 discovered evidence within the meaning of Rule 60(b)(2). Second, Plaintiff has failed to adequately
26 explain why, with reasonable diligence, he could not have obtained Exhibits C and D from his
27 correctional counselor any sooner than he did. Third, while Plaintiff states that Exhibits C and D
28 are newly discovered evidence that proves that he attempted to appeal the cancellation of his inmate

1 grievance regarding a use of force incident on March 21, 2016 at California State Prison, Corcoran,
2 Plaintiff has failed to attach any exhibits to either his June 7, 2019 Rule 60(b) motion or his July 8,
3 2019 “Question for Review” document. Further, if Plaintiff is referring to Exhibits C and D
4 attached to any other document that he has submitted to the Court, Plaintiff has failed to clearly
5 inform the Court where Exhibits C and D can be located. Hence, Plaintiff has not demonstrated
6 that his newly discovered evidence is of “such magnitude that production of it earlier would have
7 been likely to change the disposition of the case.” Feature Realty, Inc., 331 F.3d at 1093.
8 Consequently, Plaintiff’s motion for relief from judgment pursuant to Rule 60(b)(2) is denied.

9 2. Rule 60(b)(3)

10 Under Rule 60(b)(3), a party may obtain relief from judgment where there is “fraud
11 (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing
12 party[.]” Fed. R. Civ. P. 60(b)(3). To prevail on a Rule 60(b)(3) motion, “the moving party must
13 prove by clear and convincing evidence that the verdict was obtained through fraud,
14 misrepresentation, or other misconduct and the conduct complained of prevented the losing party
15 from fully and fairly presenting the defense. Federal Rule of Civil Procedure 60(b)(3) requires that
16 fraud ... not be discover-able by due diligence before or during the proceedings.” Casey v.
17 Albertson’s Inc., 362 F.3d 1254, 1261 (9th Cir. 2004).

18 Here, Plaintiff alleges that the declaration of M. Voong, Chief of the Office of Appeals,
19 submitted as a part of Defendants’ motion for summary judgment, contains misrepresentations and
20 that Defendants failed to provide him with Exhibits C and D in response to his discovery requests
21 because Defendants knew that he would have a hard time challenging their summary judgment
22 motion without Exhibits C and D. Specifically, Plaintiff asserts that Voong’s declaration states that
23 “no other 602 (appeal) was submitted to them but Exhibits C and D [are] irrefutable evidence that
24 two appeals were sent regarding the misuse of force appeal to them and given a log number with
25 stamps that state “Received by OOA” (Office of Appeals (3rd level)).” (ECF No. 83, at 2.)

26 However, there are two issues with Plaintiff’s argument. First, as noted above, Plaintiff has
27 failed to provide the Court with Exhibits C and D and, hence, Plaintiff has not presented clear and
28 convincing evidence that Voong’s declaration contains any misrepresentations or other fraud.

1 Second, Plaintiff has failed to present clear and convincing evidence that Defendant's fraudulent
2 conduct prevented him from fully and fairly presenting his opposition to the summary judgment.
3 The fact that Defendants submitted Voong's declaration did not prevent Plaintiff from presenting
4 his opposition to Defendants' motion for summary judgment. Further, Plaintiff does not assert that
5 Defendants falsely denied possessing Exhibits C and D in response to Plaintiff's discovery requests.
6 Instead, Plaintiff states that Defendants simply did not respond to Plaintiff's discovery requests.
7 Defendant's failure to respond to Plaintiff's discovery requests does not constitute fraud. See
8 Casey, 362 F.3d at 1260-61. Therefore, Plaintiff's motion for relief from judgment pursuant to
9 Rule 60(b)(3) is denied.

10 **III. Conclusion**

11 Accordingly, pursuant to Federal Rule of Civil Procedure 62.1(a)(2), Plaintiff's motion for
12 relief from judgment pursuant to Rule 60(b), (ECF No. 85), is HEREBY DENIED.

13
14 IT IS SO ORDERED.

15 Dated: July 12, 2019

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