

1 Plaintiff alleged several prison officials including defendant violated his
2 constitutional rights. *See* Order 1:24–2:3, ECF No. 353 (describing history of case). The case
3 eventually proceeded to jury trial, with plaintiff representing himself. *Id.* at 1:22–23. The jury
4 returned a defense verdict; plaintiff appealed, the judgment was reversed in part, and the case was
5 remanded. *Id.* at 2:3–14. The case again went to trial. Plaintiff, this time represented by counsel,
6 prevailed on one claim against defendant. *See* Fee Order 1:17–21 (describing the second trial).

7 After the second trial, plaintiff sought attorney’s fees and costs for (1) serving
8 subpoenas in connection with plaintiff’s first trial and (2) an expert witness. Am. Mot. for Att’y’s
9 Fees (“Fee Mot”), ECF No. 508; Navarro Decl. 5:27–28, ECF No. 508-2. Defendant opposed the
10 motion. Opp’n to Fees Mot. (“Fee Opp’n”), ECF No. 513. The court awarded plaintiff \$1.50 in
11 attorney’s fees and \$4,000 for the cost of serving subpoenas, but denied costs associated with the
12 expert witness. Fee Order 8:20–10:16.

13 The instant motion for reconsideration concerns the \$4,000 award for the cost of
14 serving subpoenas. Plaintiff sought \$4,000 for “[f]unds spent on serving subpenas [sic] at first
15 trial by Lopez family.” Navarro Decl. 5:27–28. Plaintiff did not itemize his request or provide
16 any additional documentation concerning the service. *See id.* Defendant contended plaintiff was
17 not entitled to that amount, arguing:

18 While Plaintiff may be entitled to recover a specific amount for
19 witness fees and mileage, he submitted no proof, by way of receipts
20 or declaration, that *he* incurred such expenses. Moreover, other
21 than the parties, only [another inmate], who was produced under
Court order and writ, testified at the first trial. Thus, no evidence
shows that Plaintiff incurred any witness fee or mileage to secure
the attendance of a witness at his first trial.

22 Fee Opp’n 5:4–9 (emphasis in original) (citations omitted). The court did not address defendant’s
23 argument that plaintiff’s request lacked supporting evidence. Instead, the court focused on
24 whether the fees plaintiff sought were of the sort a party may recover, reasoning that the Ninth
25 Circuit “has held private process servers’ fees can be taxed as costs under [28 U.S.C. §] 1920(1)”
26 and awarding plaintiff the \$4,000 he sought. Fee Order 10:1–13 (citing *Alflex Corp. v.*
27 *Underwriters Labs., Inc.*, 914 F.2d 175, 178 (9th Cir. 1990)).

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1 Defendant now moves for reconsideration of that award under Federal Rule of
2 Civil Procedure 60(b)(6), arguing the court erred by awarding costs that lacked evidentiary
3 support. Mot. 1:23–27. Notwithstanding Local Rule 230(c), plaintiff did not file an opposition or
4 statement of non-opposition to defendant’s motion. Defendant represents to the court that
5 plaintiff “is agreeable to reconsideration for the limited purpose of the Court’s consideration of
6 documentary evidence to support the necessity and reasonableness of the cost incurred.” *Id.*
7 2:15–17. The motion is thus deemed unopposed.¹

8 II. LEGAL STANDARD

9 Federal Rule of Civil Procedure 60(b) permits a court to relieve a party from a
10 final judgment, order or proceeding. Fed. R. Civ. P. 60(b). The first five subsections of the rule
11 allow relief for enumerated reasons, while Rule 60(b)(6) allows relief for any justifiable reason
12 not otherwise specified in Rule 60(b). *Lyon v. Agusta S.P.A.*, 252 F.3d 1078, 1088–89 (9th Cir.
13 2001). Relief under Rule 60(b)(6) is to be “used sparingly as an equitable remedy to prevent
14 manifest injustice.” *Latshaw v. Trainer Wortham & Co., Inc.*, 452 F.3d 1097, 1103 (9th Cir.
15 2006) (citation omitted). A motion for reconsideration under Rule 60(b)(6) “should not be
16 granted, absent highly unusual circumstances, unless the district court is presented with newly
17 discovered evidence, committed clear error, or if there is an intervening change in the controlling
18 law.” *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 880 (9th Cir.
19 2009) (citation omitted). “A motion for reconsideration ‘may *not* be used to raise arguments or
20 present evidence for the first time when they could reasonably have been raised earlier in the
21 litigation.’” *Id.* (emphasis in original) (quoting *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d
22 877, 890 (9th Cir. 2000)).

23 III. DISCUSSION

24 Federal Rule of Civil Procedure 54(d)(1) allows the prevailing party in a lawsuit to
25 recover its costs, other than attorney’s fees, “[u]nless a federal statute, [the civil rules], or a court
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27 ¹ A stipulation would likely have hastened the resolution of this matter by an impacted
28 court.

1 order provides otherwise.” Fed. R. Civ. P. 54(d)(1). The ability to recover costs is generally
2 limited by 28 U.S.C. §§ 1920 and 1924. Section 1920 enumerates which fees and expenses may
3 be taxed as costs. 28 U.S.C. § 1920. Section 1924 requires “the party claiming any item of cost
4 or disbursement [to supply] an affidavit . . . that such item is correct and has been necessarily
5 incurred in the case and that the services for which fees have been charged were actually and
6 necessarily performed.” 28 U.S.C. § 1924. “With regard to individual itemized costs, the burden
7 is on the party seeking costs . . . to establish the amount of compensable costs and expenses to
8 which it is entitled.” *City of Alameda v. Nuveen Mun. High Income Opportunity Fund*,
9 No. C 08-4575 SI, 2012 WL 177566, at *1 (N.D. Cal. Jan. 23, 2012) (quotation omitted).

10 Defendant argues the court erred in awarding plaintiff \$4,000 for the cost of
11 serving subpoenas because plaintiff’s request was not accompanied by an affidavit that the cost
12 was necessary as required by § 1924. Mot. 5:25–27. Defendant’s opposition to plaintiff’s initial
13 motion for attorney’s fees and costs was notably less precise than the instant motion: he did not
14 cite § 1924 in his opposition and he characterized the costs plaintiff sought as “witness fees and
15 mileage” rather than costs for private service of subpoenas. Fee Opp’n 5:1–9. Defendant did
16 argue that plaintiff “submitted no proof, by way of receipts or declaration, that he incurred such
17 expenses.” *Id.* at 5:5–6 (emphasis removed). While the argument in context was not clearly
18 directed at the lack of support for the requested subpoena service costs, the court is persuaded that
19 reconsideration is warranted here to address the evidentiary defect in the record supporting (or
20 not) plaintiff’s request.

21 Defendant also argues reconsideration is appropriate because the court did not
22 consider whether \$4,000 exceeds the amount the U.S. Marshal would have charged for the same
23 service. Mot. 6:12–7:6. Defendant did not raise that argument before, so the court does not
24 address it here. *See Marlyn Nutraceuticals*, 571 F.3d at 880.

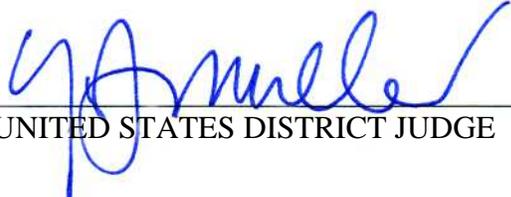
25 IV. CONCLUSION

26 Partial reconsideration of the court’s December 20, 2016 order, ECF No. 519, is
27 warranted. The court GRANTS the motion for reconsideration, ECF No. 520, and VACATES
28 the \$4,000 award for the costs plaintiff purportedly incurred serving subpoenas in connection

1 with his first trial. Plaintiff may file a new motion for costs supported by affidavit as required by
2 28 U.S.C. § 1924 within fourteen days of the date this order is filed.

3 IT IS SO ORDERED.

4 DATED: August 9, 2017.

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7 UNITED STATES DISTRICT JUDGE

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