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5 IN THE UNITED STATES DISTRICT COURT
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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8 TIMOTHY MITCHELL, SR., *et al.*

No. C 09-00794 SI

9 Plaintiffs,

**ORDER GRANTING RELIEF FROM
FINAL JUDGMENT**

10 v.

11 CITY OF PITTSBURG, *et al.*

12 Defendants.
13 _____/

14 A limited remand having been granted by the United States Court of Appeals for the Ninth
15 Circuit, pending before the Court is the Court's own Rule 60(b) motion to relieve plaintiffs from the
16 final judgment entered in this case. Having considered the papers submitted, the Court hereby
17 GRANTS to plaintiffs relief from the final judgment entered in this case, and schedules a case
18 management conference for **September 30, 2011 at 3:00 p.m.**

19
20 **BACKGROUND**

21 **I. Procedural history**

22 This suit arises out of the shooting death of decedent Timothy Mitchell, Jr. by defendant police
23 officer Lester Galer on March 11, 2008. Defendant Les Galer was a police officer employed by the City
24 of Pittsburg, and was a member of the Contra Costa County Narcotics Enforcement Team ("CCCNET").
25 The shooting occurred while several officers were attempting to execute a search warrant at Mr.
26 Mitchell's apartment. The plaintiffs in this case are Timothy Mitchell, Sr. and Paulette Mitchell, the
27 parents of Timothy Mitchell, Jr.

28 On January 26, 2011, the Court granted the summary judgment motions filed by the five

1 defendants who remained in this case, all of whom are or were police officers: Les Galer and his
2 identical twin brother Phil Galer, Sean Dexter, Louis Lombardi, and Norman Wielsch. Judgment was
3 entered against plaintiffs, and they appealed. While the appeal was pending in the Ninth Circuit, the
4 Court issued an Order in which it indicated that, on its own motion, it wished to order further briefing
5 in this case. *See* Doc. 39 (citing Fed. R. Civ. P. 60(b); *Kingvision Pay-Per-View Ltd. v. Lake Alice Bar*,
6 168 F.3d 347, 352 (9th Cir. 1999)). The Court requested that the United States Court of Appeals for the
7 Ninth Circuit grant a limited remand to allow the parties to brief, and the Court to consider, the
8 following substantial issue:

9 Whether the criminal indictment of two of the defendants in this case has any impact on
10 this case, such that plaintiffs should be relieved from the final judgment under Federal
11 Rule of Civil Procedure 60(b).

12 The Ninth Circuit remanded the case to this Court to permit the Court to consider the described
13 Rule 60 motion. With the Court’s permission, plaintiffs filed a brief in support of the Court’s motion,
14 and defendants filed briefs in opposition to the motion.¹

15 **II. New facts referenced in the indictment**

16 Norman Wielsch was arrested in February 2011, and Louis Lombardi was arrested in May 2011.
17 The Second Amended Felony Complaint charges Wielsch, Lombardi, and two others, with a total of
18 thirty-eight violations of the California Health and Safety Code and California Penal Code. *See*
19 Indictment, Request for Judicial Notice (Doc. 154-1), Ex. A.² Count three of the indictment charges a
20 conspiracy between the four defendants and other unnamed coconspirators to violate sections 11379(a),
21 11378, 11360(a), and 11359 of the Health and Safety Code, and sections “503/504” and “459/460(b)”
22 of the Penal Code. *Id.* at 3. The conspiracy is alleged to have occurred between June 1, 2008 and May
23 4, 2011. *Id.*

24 The indictment alleges 27 overt acts in furtherance of this conspiracy, related to obtaining and
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26 ¹ Plaintiffs have requested the opportunity to file a reply brief. That request is DENIED.

27 ² Upon the request of defendants Wielsch and Lombardi, the Court takes judicial notice
28 of the existence of the indictment—an official public record—and the charges contained therein. *See*
Lee v. City of Los Angeles, 250 F.3d 668, 689 (9th Cir. 2001).

1 selling marijuana, Alprazolam (Xanax) pills, anabolic steroids, ephedrine, methamphetamine, oxycontin,
2 and Ecstasy pills. *Id.* at 3–5. It is alleged that, in May 2009, Wielsch, Lombardi, and one other
3 conspirator met to “discuss[] how to make money in the marijuana business using a Contra Costa
4 Narcotics Enforcement Task Force confidential informant known by Lewis [sic] Lombardi.” *Id.* at 4–5
5 (overt act no. 23). It is alleged that Wielsch obtained methamphetamine from the Contra Costa County
6 Sheriff’s property room and marijuana from the Contra Costa County Narcotics Enforcement Task
7 Force. *Id.* at 4 (overt acts nos. 16 & 19). It is alleged that Lombardi sold marijuana seized in a raid, and
8 Ecstasy pills, to a confidential informant. *Id.* at 5 (overt acts nos. 25 & 26).

9 In addition, Lombardi was charged with felony embezzlement by an officer in violation of Penal
10 Code section 504, for actions taken in August 2007. *Id.* at 20.

11 The lead investigator in the criminal case against defendants Wielsch and Lombardi has filed
12 a declaration that his investigation has not revealed any evidence that defendants Phil Galer, Les Galer,
13 or Dexter, had any involvement in, or knowledge of, any of the criminal actions for which defendants
14 Wielsch and Lombardi have been charged. Decl. of Daryl Jackson in Supp. of Def. Oppo., ¶¶ 1 & 2.
15 Nor do any of the charges filed against defendants Wielsch and Lombardi arise out of the search and
16 shooting that occurred in this case. *Id.* ¶ 4.

17 18 LEGAL STANDARD

19 Rule 60(b) of the Federal Rules of Civil Procedure states that

20 On motion and just terms, the court may relieve a party or its legal representative from
21 a final judgment, order, or proceeding for the following reasons:

- 22 (1) mistake, inadvertence, surprise, or excusable neglect;
- 23 (2) newly discovered evidence that, with reasonable diligence, could not have been
discovered in time to move for a new trial under Rule 59(b);
- 24 (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or
25 misconduct by an opposing party;
- 26 (4) the judgment is void;
- 27 (5) the judgment has been satisfied, released, or discharged; it is based on an earlier
28 judgment that has been reversed or vacated; or applying it prospectively is no longer
equitable; or

1 (6) any other reason that justifies relief.

2 A motion under Rule 60(b) may be brought by one of the parties, or by the Court sua sponte. *See*
3 *Kingvision Pay-Per-View*, 168 F.3d at 352.

4 Under Rule 60(b)(2) for relief from judgment based upon newly discovered evidence, the
5 movant must show that “the evidence (1) existed at the time of [entry of judgment], (2) could not have
6 been discovered through due diligence, and (3) was ‘of such magnitude that production of it earlier
7 would have been likely to change the disposition of the case.’” *Jones v. Aero/Chem Corp.*, 921 F.2d
8 875, 878 (9th Cir. 1990 (quoting *Coastal Transfer Co. v. Toyota Motor Sales, U.S.A.*, 833 F.2d 208, 211
9 (9th Cir. 1987)). *Accord Fantasyland Video, Inc. v. County of San Diego*, 505 F.3d 996, 1005 (9th Cir.
10 2007).

11 Rule 60(b)(6)’s catch-all provision is “used sparingly as an equitable remedy to prevent manifest
12 injustice” and “is to be utilized only where extraordinary circumstances prevented a party from taking
13 timely action to prevent or correct an erroneous judgment.” *United States v. Alpine Land & Reservoir*
14 *Co.*, 984 F.2d 1047, 1049 (9th Cir. 1993). *Accord Fantasyland Video*, 505 F.3d at 1005. “Rule 60(b)(6)
15 relief normally will not be granted unless the moving party is able to show both injury and that
16 circumstances beyond its control prevented timely action to protect its interests.” *Alpine Land &*
17 *Reservoir*, 984 F.2d at 1049.

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19 **DISCUSSION**

20 The Court resolved defendants’ motions for summary judgment based primarily on the
21 statements of defendants—the only percipient witnesses in this case to have survived. In particular, the
22 Court relied on the September 30, 2010, deposition testimony of defendant Wielsch; the October 12,
23 2010, deposition testimony of defendant Lombardi; the October 18, 2010 declaration of defendant
24 Wielsch; and the December 2, 2010 declaration of defendant Lombardi. The Court is now faced with
25 an indictment charging that, some six months before police actions which ended with the shooting death
26 of Mr. Mitchell, defendant Lombardi had feloniously embezzled property that was in his possession and
27 control by virtue of his trust as a police officer for the Contra Costa Sheriff’s Office. *See* Indictment
28 at 20 (August 2007). And the Court is faced with an indictment charging that, at the time they were

1 deposed and signed their declarations, defendants Wielsch and Lombardi were engaged in a conspiracy
2 to obtain and sell a large variety of illegal drugs, misusing their authority as police officers, including
3 their ability to access drugs seized in raids, and their ability to sell drugs through connections with
4 confidential informants. *Id.* at 3–5 (June 2008 through May 2011). In particular, the depositions
5 occurred at almost the same time as defendant Wielsch is alleged to have given defendant Lombardi a
6 half pound of marijuana that had been seized in a raid, which defendant Lombardi is alleged to have sold
7 to an out-of-state confidential informant. *See id.* at 5 (overt act no. 26; October 2010).

8 Plaintiffs were never given the opportunity to examine defendants with regard to the facts that
9 form the basis of the indictment against defendants Wielsch and Lombardi. Plaintiffs did not have the
10 opportunity investigate whether defendants Wielsch and Lombardi changed their stories or omitted
11 information in order to escape increased scrutiny in this case, and to avoid any chance that such scrutiny
12 would lead to the discovery of the conspiracy charged in the indictment. And in fact, defendant
13 Lombardi did change his description of the raid between the coroner’s inquest in August 2008 and his
14 deposition in October 2010, in such a way that it more closely paralleled the descriptions provided by
15 the other officers. *See* Order Granting Def. Mots. for Summary Judgment (Doc. 129) at 8, 16 n.8.

16 Although the facts that form the basis of the indictment existed at the time of the summary
17 judgment motion, they could not have been discovered by plaintiffs.³ Plaintiffs simply could not have
18 asked defendants Wielsch and Lombardi during their initial depositions whether they were part of a
19 criminal conspiracy involving abuse of trust, without any evidence that such a conspiracy existed.

20 Finally, these facts are of such magnitude that production of them earlier would have been likely
21 to change the disposition of the case. This is not to say that the simple inclusion of these facts in
22 plaintiffs’ opposition to defendants’ motions for summary judgment would have been sufficient to create
23 a genuine issue of material fact. Rather, these new facts raise such substantial issues as to credibility
24 and motive/bias that plaintiffs would have been entitled to take additional discovery before summary
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26 ³ Defendant Wielsch argues that because neither he nor defendant Lombardi had been
27 indicted before judgment was entered in this case, Rule 60(b)(2) cannot support a grant of relief from
28 the judgment. It is not the indictment itself that is newly discovered evidence that needed to exist at the
time of entry of judgment—rather, it is defendant Lombardi’s alleged embezzlement and the alleged
criminal conspiracy, which are outlined in the indictment, that constitute the newly discovered evidence.

1 judgment could have been granted.⁴

2 The Federal Rules of Civil Procedure empower a district court to allow additional discovery on
3 summary judgment “[i]f a party opposing the [summary judgment] motion shows by affidavit that, for
4 specified reasons, it cannot present facts essential to justify its opposition.” Fed. R. Civ. P. 56(f); *see*
5 *also Qualls ex rel. Qualls v. Blue Cross of Cal., Inc.*, 22 F.3d 839, 844 (9th Cir. 1994) (stating that it
6 is “[c]ritical[.]” whether information sought would have shed light on any of the issues upon which the
7 summary judgment decision was based). “[T]he denial of a Rule 56(f) application is generally
8 disfavored where the party opposing summary judgment makes (a) a timely application which (b)
9 specifically identifies (c) relevant information, (d) where there is some basis for believing that the
10 information sought actually exists.” *VISA Int’l Serv. Ass’n v. Bankcard Holders of Am.*, 784 F.2d 1472,
11 1475 (9th Cir. 1986).

12 Had plaintiffs been in possession of the newly discovered evidence at the time that defendants
13 filed their motions for summary judgment, and had plaintiffs made a timely application to conduct
14 additional discovery by further deposing defendants Wielsch and Lombardi, in order to determine
15 whether either of them provided false information in this case in an attempt to cover up their criminal
16 conspiracy, they would have been entitled to the relief permitted by Rule 56(f).⁵ Certainly there is
17 “some basis for believing that th[is] information . . . actually exists.” Therefore, plaintiffs are entitled
18 to relief from the final judgment entered against them under Rule 60(b)(2).⁶

20 ⁴ Defendant Wielsch argues that, rather than granting the Rule 60(b) motion, the Court
21 should determine whether defendant Wielsch was entitled to summary judgment on an alternate
22 argument presented in his original motion for summary judgment. Even if the Court has jurisdiction
23 under the Ninth Circuit’s limited remand order to do this, the Court declines. Defendant Wielsch’s
alternate argument relies on what he calls uncontested evidence, consisting of his own declarations.
Plaintiffs should have the opportunity to take additional discovery before the Court grants a summary
judgment motion in this case on the basis of this type of uncontested evidence.

24 ⁵ Defendant Wielsch is correct that the Court was not permitted to make credibility
25 determinations at the summary judgment stage. However, the absence of evidence calling defendants’
26 narrative into question was highly relevant to the Court’s determination, and therefore this discovery
request would have been relevant to the resolution of the summary judgment motions.

27 ⁶ In the alternative, the Court finds that Rule 60(b)(6)’s catch-all provision applies. Certain
28 extraordinary circumstances beyond plaintiffs’ control are present here—evidence of the existence of
a criminal conspiracy between two of the police officers sued, at the time that the officers were
providing testimony in this case, involving an abuse of trust of their positions as law enforcement


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CONCLUSION

For the foregoing reasons and for good cause shown, the Court’s Rule 60(b) motion to relieve plaintiffs from the final judgment entered in this case is hereby GRANTED, and a case management conference is scheduled for **September 30, 2011 at 3:00 p.m.**

IT IS SO ORDERED.

Dated: September 2, 2011



SUSAN ILLSTON
United States District Judge

officers, and uncovered shortly after entry of final judgment in this case, where the Court relied in large part on the testimony of these two defendants in granting their motions for summary judgment. These extraordinary circumstances prevented plaintiffs either from taking timely discovery about defendants Wielsch and Lombardi’s motive to lie in this case, or from making a timely Rule 56(f) motion. Had plaintiffs provided the Court with an affidavit alleging the facts that form the basis of the indictment, the Court would have granted a Rule 56(f) motion, and it would not have entered summary judgment—meaning that plaintiffs were injured by the erroneous entry of summary judgment. The injustice of this situation is manifest.