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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

HOWARD YOUNG,
CDCR #F-44590,

Plaintiff,

vs.

LARRY SMALLS, et al.,

Defendants.

Civil No. 09cv2545 DMS (JMA)

**ORDER DENYING PLAINTIFF'S
MOTION FOR
RECONSIDERATION**

[Doc. No. 35]

**I.
PROCEDURAL HISTORY**

On November 10, 2009, Howard Young ("Plaintiff"), a state prisoner currently incarcerated at Kern Valley State Prison located in Delano, California, and proceeding in pro se, filed a civil rights Complaint pursuant to 42 U.S.C. § 1983. The Court issued an Order on January 19, 2010 dismissing Plaintiff's Complaint for failing to state a claim pursuant to 28 U.S.C. §§ 1915(e)(2)(B) & 1915A(b). Plaintiff was notified of the deficiencies of pleading and provided an opportunity to file a First Amended Complaint. However, on that same day, Plaintiff filed his First Amended Complaint [Doc. No. 12].

1 Because Plaintiff could not have received the Court's Order in time to correct the
2 problems the Court identified in his previous pleading, the Court dismissed Plaintiff's First
3 Amended Complaint and gave him leave to file a Second Amended Complaint. On April 5,
4 2010, Plaintiff filed his Second Amended Complaint [Doc. No. 21]. The Court, once again,
5 dismissed Plaintiff's Second Amended Complaint and gave him an opportunity to file a Third
6 Amended Complaint. On June 24, 2010, Plaintiff filed his Third Amended Complaint.
7 Plaintiff's Third Amended Complaint was also dismissed for failing to state a claim. *See* July
8 19, 2010 Order at 9-10. While Plaintiff was given the opportunity to file a Fourth Amended
9 Complaint, the Court dismissed Plaintiff's claims relating to his restitution account and his
10 personal property claims without leave to amend. *Id.* at 4-5, 9. Plaintiff was also cautioned that
11 any Defendants not named and all claims not re-alleged in the Amended Complaint would be
12 deemed to have been waived. *Id.* at 9 (citing *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987)).

13 On September 22, 2010, Plaintiff filed his Fourth Amended Complaint ("FAC").
14 However, Plaintiff no longer named Defendants Lopez, Madden, Sutton, Criman, Bellinger,
15 Badilla, Drake, Mudra, Shields, John Does and Magill in his FAC. *See* FAC at 1-3. Thus, the
16 Court issued an Order dismissing these Defendants from this action. *See King*, 814 F.2d at 567.
17 Plaintiff has now filed a Motion for Reconsideration in which he states that he mistakenly left
18 Defendant Magill off the list of Defendants but he did makes claims against this Defendant in
19 the body of the FAC. *See* Pl.'s Mot. at 1.

20 II.

21 PLAINTIFF'S MOTION FOR RECONSIDERATION

22 A. Standard of Review

23 The Federal Rules of Civil Procedure do not expressly provide for motions for
24 reconsideration.¹ However, a motion for reconsideration may be construed as a motion to alter

25
26 ¹ However, Local Rule 7.1(i) does permit motions for reconsideration. Under Local Rule
27 7.1(i)(1), a party may apply for reconsideration "[w]henver any motion or any application or petition
28 for any order or other relief has been made to any judge and has been refused in whole or in part...." S.D.
CAL. CIVLR 7.1(i). The party seeking reconsideration must show "what new or different facts and
circumstances are claimed to exist which did not exist, or were not shown, upon such prior application."
Id. Local Rule 7.1(i)(2), however, only permits motions for reconsideration within "twenty-eight (28)
days after the entry of the ruling, order or judgment sought to be reconsidered."

1 or amend judgment under Rule 59(e) or Rule 60(b). *See Osterneck v. Ernst & Whinney*, 489
2 U.S. 169, 174 (1989); *In re Arrowhead Estates Development Co.*, 42 F.3d 1306, 1311 (9th Cir.
3 1994). Under Rule 60, a motion for “relief from a final judgment, order or proceeding” may
4 be filed within a “reasonable time,” but usually must be filed “no more than a year after the entry
5 of the judgment or order or the date of the proceeding.” FED.R.CIV.P. 60(c). Reconsideration
6 under Rule 60 may be granted in the case of: (1) mistake, inadvertence, surprise or excusable
7 neglect; (2) newly discovered evidence; or (3) fraud; or if (4) the judgment is void; (5) the
8 judgment has been satisfied; or (6) for any other reason justifying relief. FED.R.CIV. P. 60(b).

9 **B. Discussion**

10 In Plaintiff’s Fourth Amended Complaint, he does refer to Defendant Magill on page
11 eight. *See* FAC at 8. Plaintiff appears to claim that Defendant Magill was deliberately
12 indifferent to his serious medical needs because she diagnosed Plaintiff with a “routine” skin
13 condition when in fact, he alleges that he had a “MRSA staph infection.” *Id.*

14 In order to assert a claim for inadequate medical care, Plaintiff must allege facts which
15 are sufficient to show that each person sued was “deliberately indifferent to his serious medical
16 needs.” *Helling v. McKinney*, 509 U.S. 25, 32 (1993); *Estelle v. Gamble*, 429 U.S. 97, 106
17 (1976). Thus, to state a claim, Plaintiff must allege facts sufficient to show both: (1) an
18 objectively “serious” medical need, i.e., one that a reasonable doctor would think worthy of
19 comment, one which significantly affects his daily activities, or one which is chronic and
20 accompanied by substantial pain, *see Doty v. County of Lassen*, 37 F.3d 540, 546 (9th Cir.
21 1994); and (2) a subjective, and “sufficiently culpable” state of mind on the part of each
22 individual Defendant. *See Wilson v. Seiter*, 501 U.S. 294, 302 (1991).

23 Here, Plaintiff states that Nurse Magill “misdiagnosed” his skin condition. *See* FAC at
24 8. However, inadequate treatment due to malpractice, or even gross negligence, does not
25 amount to a constitutional violation. *Estelle*, 429 U.S. at 106; *Wood v. Housewright*, 900 F.2d
26 1332, 1334 (9th Cir. 1990).

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1 Thus, even if Plaintiff inadvertently failed to list Nurse Magill as a Defendant, the Court
2 will not add this Defendant to this action because Plaintiff cannot allege an Eighth Amendment
3 claim as to Nurse Magill.

4 Accordingly, the Court finds that Plaintiff has provided no newly discovered evidence,
5 has failed to show clear error or that the Court rendered a manifestly unjust decision, and has
6 further failed to identify any intervening changes in controlling law that would demand
7 reconsideration of the Court's September 30, 2010 Order.

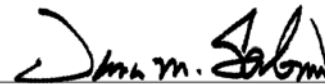
8 **III.**

9 **CONCLUSION AND ORDER**

10 In light of the foregoing, the Court hereby **DENIES** Plaintiff's Motion for
11 Reconsideration [Doc. No. 35] of the Court's September 30, 2010 Order.

12 **IT IS SO ORDERED.**

13
14 DATED: October 29, 2010



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HON. DANA M. SABRAW
United States District Judge