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5 **UNITED STATES DISTRICT COURT**
6 **SOUTHERN DISTRICT OF CALIFORNIA**
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8 ARCTURUS THERAPEUTICS LTD.,
9 Plaintiff,
10 v.
11 JOSEPH E. PAYNE; PETER FARRELL;
12 ANDREW SASSINE; BRADLEY
13 SORENSON; JAMES BARLOW; and
14 DOES 1 THROUGH 100,
15 Defendants.

Case No.: 18cv766-MMA (NLS)

**ORDER DENYING PLAINTIFF'S EX
PARTE MOTION FOR
RECONSIDERATION OF ORDER
ON MOTION FOR EXPEDITED
DISCOVERY AND PRELIMINARY
INJUNCTION BRIEFING
SCHEDULE**

[Doc. No. 20]

16 Currently pending before the Court is Plaintiff Arcturus Therapeutics Ltd.'s
17 ("Plaintiff") *ex parte* motion for reconsideration. Doc. Nos. 20-1 ("Mtn."). Defendant
18 Payne opposes the motion. Doc. No. 22 ("Oppo."). For the reasons set forth below, the
19 Court **DENIES** Plaintiff's *ex parte* motion.

20 **LEGAL STANDARD**

21 A motion for reconsideration may be brought under Federal Rules of Civil
22 Procedure 59(e) or 60(b). A motion is treated as a motion to alter or amend judgment
23 under Rule 59(e) if it is filed within twenty-eight days of entry of judgment or the ruling;
24 otherwise, it is treated as a Rule 60(b) motion for relief from a judgment or order. *Am.*
25 *Ironworks & Erectors, Inc. v. N. Am. Construction Corp.*, 248 F.3d 892, 898-99 (9th Cir.
26 2001)(a motion for reconsideration is treated as a motion under Rule 59(e) if it is timely
27 filed under that rule and as a motion under 60(b) otherwise). Here, the order referenced
28 was filed on April 26, 2018, and Plaintiff's motion was filed on May 3, 2018. *See* Doc.

1 No. 19; Mtn. Accordingly, Plaintiff’s motion is properly brought under Rule 59(e). *See*
2 *Am. Ironworks & Erectors, Inc.*, 248 F.3d at 898-99.

3 Pursuant to Federal Rule of Civil Procedure 59(e), district courts have the power to
4 reconsider a previous ruling or entry of judgment. Fed. R. Civ. P. 59(e). A Rule 59(e)
5 motion seeks “a substantive change of mind by the court.” *Tripati v. Henman*, 845 F.2d
6 205, 206 n.1 (9th Cir. 1988). Rule 59(e) provides an extraordinary remedy and, in the
7 interest of finality and conservation of judicial resources, such a motion should not be
8 granted absent highly unusual circumstances. *Carroll v. Nakatani*, 342 F.3d 934, 945
9 (9th Cir. 2003); *McDowell v. Calderon*, 197 F.3d 1253, 1255 (9th Cir. 1999). Rule 59
10 may not be used to re-litigate old matters, raise new arguments, or present evidence that
11 could have been raised prior to entry of the judgment. *Exxon Shipping Co. v. Baker*, 554
12 U.S. 471, 485 n.5 (2008).

13 Under Rule 59(e), it is appropriate to alter or amend a previous ruling or judgment
14 if “(1) the district court is presented with newly discovered evidence, (2) the district court
15 committed clear error or made an initial decision that was manifestly unjust, or (3) there
16 is an intervening change in controlling law.” *United Nat’l Ins. Co. v. Spectrum*
17 *Worldwide, Inc.*, 555 F.3d 772, 780 (9th Cir. 2009) (citation omitted).

18 DISCUSSION

19 Plaintiff moves for reconsideration of the Court’s April 26, 2018 order denying
20 Plaintiff’s request for a temporary restraining order and setting a hearing date and
21 briefing schedule on Plaintiff’s motion for preliminary injunction and expedited
22 discovery. *See* Mtn. Recon. Specifically, Plaintiff asks the court to reconsider its
23 decision to set its motion for expedited discovery and preliminary injunction for hearing
24 on the same day. *Id.* at 2. Plaintiff contends that it needs “expedited discovery to more
25 fully inform its motion for preliminary injunction.”¹ *Id.* In the present motion, Plaintiff
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28 ¹ The Court notes that Plaintiff’s motion to expedite discovery does not indicate a need for discovery
prior to the Court issuing a ruling on its motion for preliminary injunction. *See* Doc. No. 10-1 at 26-29;

1 states it has “new facts” which warrant reconsideration of the Court’s previous order. *See*
2 *id.* at 4.

3 First, Plaintiff contends expedited discovery is necessary for all parties to prepare
4 for the preliminary injunction hearing so that it can fully inform its shareholders of the
5 issues prior to the Extraordinary General Meeting (“EGM”) which could be held as early
6 as June 13, 2018. Mtn. at 4-6. Second, Plaintiff contends that Defendant Payne has
7 “wiped all data”² from his company cell phone before returning it to Plaintiff and,
8 therefore, there is a “risk of [Defendant] Payne’s further spoliation of evidence.” *Id.* at 6.
9 Further, Plaintiff states that it “recently learned that another former employee [], Neda
10 Safarzadeh, [] tampered with Arcturus property[,] removed shareholder contact
11 information[,]” and has not returned this material to Plaintiff. *Id.* at 7. Plaintiff also
12 suspects that someone informed Defendant Payne of an inquiry made by shareholder Ron
13 Karp. *Id.*

14 As Defendant Payne points out, Plaintiff’s arguments fall short because the
15 evidence upon which it relies has been in its possession since the start of litigation. *See*
16 *Oppo.* at 4; *see also Coastal Transfer Co.v. Toyota Motor Sales, U.S.A.*, 833 F.2d 208,
17 212 (9th Cir. 1987). Evidence is not “newly discovered” under the Federal Rules if it
18 was in the moving party’s possession before the ruling or judgment was rendered. *Id.*;
19 *Engelhard Indus., Inc. v. Research Instrumental Corp.*, 324 F.2d 347, 352 (9th Cir.
20 1963), *cert. denied*, 377 U.S. 923 (1964). Here, Plaintiff became aware of Sefarzadeh’s
21 conduct on or around April 13, 2018 – eleven days before Plaintiff filed the underlying
22 motion for expedited discovery – and became aware of the incident with shareholder
23 Karp in “early April 2018.” Doc. No. 20-4 (“Herbert Decl.”), ¶¶ 5-6, 14. Finally, while
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26 *see also Oppo.* at 2. Plaintiff is essentially requesting the Court grant expedited discovery and permit
27 Plaintiff to re-file a motion for preliminary injunction. *See* Mtn. at 9. The Court declines to do so and
28 reminds Plaintiff that it may file a motion for injunctive relief at any time throughout the litigation.

² Defendant Payne contends he “reset his company cell phone to factory settings when he returned the
phone.” *Oppo.* at 5.

1 Plaintiff did not know of the requested June 13, 2018 date for the upcoming EGM,
2 Plaintiff was aware of an EGM on the “immediate horizon.” *See id.*, ¶ 12; *see also* Doc.
3 No. 10-1 at 11 n.2. The Court notes that Plaintiff raised its two main arguments – the risk
4 of spoliation of evidence and the timing of the upcoming EGM – in its original motion
5 and that the Court considered that information in setting the motion for preliminary
6 injunction and expedited discovery for hearing on the same day, with the same briefing
7 schedule. *See* Doc. No. 10-1 at 26-29. The information raised by Plaintiff in the instant
8 motion for reconsideration does not alter the Court’s decision.

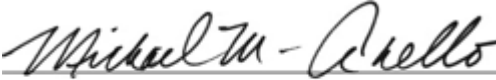
9 The Court also notes that it neither granted nor denied Plaintiff’s underlying
10 motion to expedite discovery, but merely set a briefing schedule and hearing for the
11 matter. Doc. No. 19. While Plaintiff stylizes its request as a motion for reconsideration,
12 Plaintiff is actually moving the Court to issue a ruling on its motion for expedited
13 discovery and permit Plaintiff to supplement its motion for preliminary injunction or re-
14 file its motion. *See* Mtn. After reviewing the instant motion, the motion for preliminary
15 injunction and to expedite discovery, and Defendant Payne’s opposition to the motion for
16 reconsideration, the Court declines to do so. The Court reminds Plaintiff that
17 reconsideration is an “extraordinary remedy, to be used sparingly in the interests of
18 finality and conservation of judicial resources.” *Kona Enterprises, Inc. v. Estate of*
19 *Bishop*, 229 F.3d 877, 890 (9th Cir. 2000).

20 CONCLUSION

21 For the reasons stated herein, the Court **DENIES** Plaintiff’s *ex parte* motion.
22 Accordingly, all other dates, guidelines, and requirements remain as previously set. *See*
23 Doc. No. 19.

24 **IT IS SO ORDERED.**

25 Dated: May 10, 2018

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27 Hon. Michael M. Anello
28 United States District Judge