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3 **UNITED STATES DISTRICT COURT**

4 EASTERN DISTRICT OF CALIFORNIA

5
6 KENNETH SCHULTZ,

7 Plaintiff,

8 v.

9 STATE OF CALIFORNIA DEPARTMENT
10 OF CORRECTIONS AND
REHABILITATION, et al.,

11 Defendant(s).

CASE No. 1:11-cv-00988-LJO-MJS (PC)

**ORDER GRANTING DEFENDANT'S
RENEWED MOTION TO STAY ACTION
DUE TO MILITARY DUTY**

(ECF No. 63)

**ACTION STAYED TO AND INCLUDING
APRIL 1, 2015**

**STATUS AND SCHEDULING
CONFERENCE: MAY 7, 2015, AT 1:30
P.M., IN COURTROOM 6 (MJS)**

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14 Plaintiff Kenneth Schultz, a state prisoner incarcerated at Corcoran State Prison
15 ("CSP"), is proceeding pro se and in forma pauperis in this civil rights action filed June
16 15, 2011 pursuant to 42 U.S.C. § 1983. This matter proceeds on a claim of medical
17 indifference against Defendant Kim, M.D. On July 29, 2014, Defendant Kim moved to
18 stay the action because, and while, he is on active military duty. On August 22, 2014,
19 the Court denied the motion, as lacking an appropriate evidentiary showing, but did so
20 without prejudice to refiling.

21 Before the Court is Defendant's renewed motion to stay the action on grounds
22 his military duty prevents appearance in this action until his deployment expires. Plaintiff
23 filed opposition to the renewed motion. Defendant replied to the opposition. Plaintiff filed
24 a surreply reiterating arguments in his opposition.¹ The matter is deemed submitted for
25 ruling. Local Rule 230(f).

26 Defendant Kim is currently serving in Afghanistan as a member of the United
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28 ¹ The Court considered the surreply, though unauthorized, because Plaintiff proceeds pro se.

1 States Navy. Attached to his motion is a letter from the officer in charge of U.S. Naval
2 Forces Central Command Forward Headquarters Afghanistan, Captain E.J. Eder,
3 stating that Defendant will be in Afghanistan until at least April 1, 2015, that military
4 leave is not authorized, and that Defendant's military duty prevents his appearance in
5 court.

6 The Service Members Civil Relief Act, 50 App. U.S.C. §§ 501 to 596, known until
7 2003 as the Soldiers' and Sailors' Civil Relief Act, 50 App. U.S.C. § 501, provides for the
8 suspension of legal proceedings involving persons in military service when necessary to
9 avoid prejudice to their civil rights. 50 App. U.S.C. § 502. Specifically, the Act allows for
10 a stay of any civil action in which a service member is a party if certain conditions are
11 met. To satisfy the conditions under which a stay may be granted, an application for
12 stay must include the following:

13 (A) A letter or other communication setting forth facts stating the manner in which
14 current military duty requirements materially affect the servicemember's ability to
15 appear and stating a date when the servicemember will be available to appear.

16 (B) A letter or other communication from the servicemember's commanding
17 officer stating that the servicemember's current military duty prevents
18 appearance and that military leave is not authorized for the service member at
19 the time of the letter.

20 50 App. U.S.C. § 522(b)(2).

21 Defendant Kim has satisfied these conditions and is therefore entitled to a stay
22 pending completion of his current deployment to Afghanistan on or about April 1, 2015.

23 The fact that Kim is deployed and on duty overseas materially affects his ability to
24 conduct a defense in this case. See e.g., *Franklin v. Police Officer Balestrieri*, No. 00
25 Civ. 5883(BJS)(DFE), 2002 WL 54600, at *1 (S.D.N.Y. Jan. 15, 2002) (finding that
26 activation of defendant Navy reservist officer to military duty materially affected his
27 ability to conduct his defense). If Defendant requires a continuation of the stay, he may
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1 apply for such relief pursuant to 50 U.S.C. app. § 522(d).

2 Plaintiff's opposition and surreply, arguing for bench trial and disputing that
3 Defendant's military service leaves him unable to participate in the action, is refuted by
4 the evidence presented in support of the renewed motion for stay.
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6 Accordingly, it is HEREBY ORDERED that:

- 7 1. Defendant's renewed motion (ECF No. 63), is GRANTED such that the
8 action is stayed against Defendant Kim until completion of his current
9 military deployment to Afghanistan on or about April 1, 2015,
- 10 2. The current September 12, 2014 deadline for Defendant to file and
11 oppose dispositive motions is vacated and shall be reset when the stay is
12 lifted,
- 13 3. Counsel for Defendant Kim is directed to notify Plaintiff and the Court of
14 any changes in Kim's military deployment and duty status, and
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- 16 4. This matter is set for status and scheduling conference on May 7, 2015, at
17 1:30 p.m. in Courtroom 6 (MJS), counsel for Defendant is required to
18 arrange for the participation of Plaintiff in the status conference and to
19 initiate the conference by calling the following conference call number and
20 access code. Conference Call Number: 1-888-204-5984, Access Code:
21 4446176.
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23
24 IT IS SO ORDERED.

25 Dated: September 29, 2014

26 /s/ Michael J. Seng
27 UNITED STATES MAGISTRATE JUDGE
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