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8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA
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11 LEROY MANNING,

12 Plaintiff,

13 vs.

14 L. D. ZAMORA, et al.,

15 Defendants.
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1:12-cv-01621-LJO-GSA-PC

ORDER DENYING MOTION FOR
COURT HEARING

ORDER DENYING MOTION TO
WITHDRAW CONSENT TO
MAGISTRATE JUDGE

ORDER DENYING MOTION FOR
ASSIGNMENT OF DISTRICT COURT
JUDGE AS MOOT

ORDER DENYING MOTION FOR
RECONSIDERATION

ORDER DENYING MOTION FOR
REASSIGNMENT OF MAGISTRATE
JUDGE

(Doc. 6.)

25 **I. RELEVANT PROCEDURAL HISTORY**

26 Leroy Manning (Plaintiff) is a state prisoner proceeding pro se and in forma pauperis
27 in this civil rights action filed pursuant to 42 U.S.C. § 1983. On October 3, 2012, Plaintiff filed
28 the Complaint commencing this action. (Doc. 1.) This case now proceeds with the initial

1 Complaint against defendant Julie Kelly (“Defendant”) for inadequate medical care, in
2 violation of the Eighth Amendment.¹ (Id.)

3 On October 15, 2012, Plaintiff consented to the jurisdiction of a Magistrate Judge
4 pursuant to 28 U.S.C. § 636(c). (Doc. 5.) On October 28, 2014, Defendant declined the
5 jurisdiction of a Magistrate Judge. (Doc. 33.) On October 29, 2014, this case was assigned to
6 District Court Judge Lawrence J. O’Neill as presiding judge, with Magistrate Judge Gary S.
7 Austin assigned as Magistrate Judge. (Doc. 34.)

8 On September 24, 2014, Plaintiff filed a motion for the District Court Judge to set a
9 court hearing to consider Plaintiff’s motion to withdraw his consent to the Magistrate Judge,
10 motion for reconsideration of the screening order, motion for reconsideration of the order
11 discharging the court’s order to show cause, and motion to reassign this action to a different
12 Magistrate Judge. (Doc. 28.) Plaintiff’s motions are now before the court.

13 **II. MOTION FOR COURT HEARING**

14 As a rule, the court does not hear motions in court for prisoner civil rights cases. Local
15 Rule 230(*l*) provides that “[a]ll motions, except motions to dismiss for lack of prosecution, filed
16 in cases wherein one party is incarcerated and proceeding in propria persona, shall be submitted
17 upon the record without oral argument unless otherwise ordered by the Court.” L.R. 230(*l*).
18 Plaintiff is incarcerated and proceeding in propria persona with this action, and the court finds
19 no good cause to schedule a court hearing to hear Plaintiff’s motions. Therefore, Plaintiff’s
20 motion for a court hearing shall be denied.

21 **III. WITHDRAWAL OF CONSENT AND ASSIGNMENT OF DISTRICT JUDGE**

22 Plaintiff seeks to withdraw his consent to Magistrate Judge jurisdiction and to have a
23 United States District Judge assigned to this case. Plaintiff argues that he has a statutory right
24 to seek relief before a District Court Judge.

25 A party to a federal civil case has, subject to some exceptions, a constitutional right to
26 proceed before an Article III judge. Dixon v. Ylst, 990 F.2d 478, 479 (9th Cir. 1993);

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28 ¹ On September 16, 2013, the court dismissed all other claims and defendants from this action, based on
Plaintiff’s failure to state a claim. (Doc. 15.)

1 Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc., 725 F.2d 537, 541 (9th Cir.
2 1984) (en banc), cert. denied, 469 U.S. 824, 105 S.Ct. 100, 83 L.Ed.2d 45 (1984). This right
3 can be waived, allowing parties to consent to trial before a magistrate judge. Dixon at 479-480;
4 Pacemaker at 542; 28 U.S.C. § 636(c)(1). Once a civil case is referred to a magistrate judge
5 under section 636(c), the reference can be withdrawn only by the district court, and only “for
6 good cause shown on its own motion, or under extraordinary circumstances shown by any
7 party.” Dixon at 480 (quoting Fellman v. Fireman's Fund Ins. Co., 735 F.2d 55, 58 (2d
8 Cir.1984)); 28 U.S.C. § 636(c)(6); Fed. R. Civ. P. 73(b). There is no absolute right, in a civil
9 case, to withdraw consent to trial and other proceedings before a magistrate judge. Dixon at
10 480.

11 **Discussion**

12 Plaintiff seeks to withdraw his consent under 28 U.S.C. § 636(c), because his case was
13 unreasonably delayed by the Magistrate Judge, and the Magistrate Judge issues arbitrary orders
14 and fails to adhere to required procedures or time limits. The Court has thoroughly reviewed
15 the case record and Plaintiff’s arguments, and does not find evidence of extraordinary
16 circumstances for the Court to allow Plaintiff to withdraw his consent to jurisdiction of the
17 Magistrate Judge. Therefore, Plaintiff’s motion shall be denied.

18 Plaintiff’s motion for this case to be assigned to a District Court Judge is moot and shall
19 be denied as such, because on October 29, 2014, District Court Judge Lawrence J. O’Neill was
20 assigned to this case as presiding judge.

21 **III. MOTION FOR RECONSIDERATION BY A DISTRICT COURT JUDGE**

22 **A. Legal Standard**

23 Local Rule 303 provides that “[a] party seeking reconsideration of the Magistrate
24 Judge's ruling shall file a request for reconsideration by a Judge . . . specifically designat[ing]
25 the ruling, or party thereof, objected to and the basis for that objection. This request shall be
26 captioned 'Request for Reconsideration by the District Court of Magistrate Judge's Ruling.'”
27 Local Rule 303(c). “The standard that the assigned Judge shall use in all such requests is the
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1 'clearly erroneous or contrary to law' standard set forth in 28 U.S.C. § 636(b)(1)(A)." Local
2 Rule 303(f).

3 **B. Reconsideration of Screening Order**

4 Plaintiff requests reconsideration by a District Court Judge of the screening order issued
5 by the Magistrate Judge on July 25, 2013. (Docs. 11, 25.) Plaintiff complains that the
6 Magistrate has issued arbitrary screening orders which “deprive Plaintiff of due process rights
7 in the first instance regarding violation of his Fifth, Eighth and Fourteenth Amendment rights
8 as specified (*sic*) within the amended complaint² which necessitates modification of the
9 screening order.” (Motion, Doc. 28 at 2.) Plaintiff asserts that it has been determined that the
10 amended complaint is not frivolous or malicious, and that it states a claim upon which relief
11 may be granted. Plaintiff argues that the “screening order arbitrarily deprives Plaintiff of
12 access to the courts against culpable and legally liable defendants.” (*Id.* at 2 ¶¶1-4.) Plaintiff
13 argues that the Magistrate Judge’s preliminary approach with the initial screening, apparently
14 due to work overload, was to eliminate named defendants who were properly named and liable
15 under the Constitution and statutes of the United States. Plaintiff argues that he is entitled to
16 appropriate screening of the complaint and service upon all properly named defendants.

17 **Discussion**

18 Plaintiff has not explained why he believes the screening order was arbitrary or how he
19 was deprived of due process. Plaintiff offers no evidence in support of his argument that the
20 Magistrate Judge eliminated properly named defendants or violated time frames under Rule 12
21 in the screening order. The Court has considered Plaintiff’s arguments and reviewed the
22 Magistrate Judge’s screening order of July 25, 2013, and does not find the order be clearly
23 erroneous or contrary to law. Therefore, Plaintiff’s motion for reconsideration of the screening
24 order shall be denied.

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27 ² The court assumes that Plaintiff refers to the Complaint filed on October 3, 2012. Plaintiff has not filed
28 an amended complaint in this action.

1 **C. Reconsideration of Order Discharging Order to Show Cause**

2 Plaintiff also requests reconsideration by the District Court Judge of the Magistrate
3 Judge's order of September 15, 2014, which discharged the court's order to show cause of
4 August 14, 2014 and granted Defendant an extension of time to respond to the Complaint.
5 (Doc. 25.)³ Plaintiff argues that he was improperly denied an opportunity to respond before the
6 court discharged the order to show cause. Plaintiff asserts that he was not served with
7 Defendant's request for an extension of time, or permitted time to oppose it, before it was
8 granted. Plaintiff argues that he was improperly denied an opportunity to "show how granting
9 an extension would and does prejudice [his] rights," and the court's order should be set aside.
10 (Motion, Doc. 28 at 2.) Plaintiff argues that he should have been permitted to show that
11 sanctions were appropriate against Defendant, based on the prejudice against Plaintiff and
12 Defendant's failure to show excusable neglect.

13 **Discussion**

14 The court record shows that on July 2, 2014, Plaintiff was served with notice that
15 Defendant Kelly had signed a Waiver of Service and had sixty days, or until July 25, 2014, to
16 respond to the Complaint. (Doc. 22.) After the expiration of Defendant's deadline on July 25,
17 2014, Plaintiff had the opportunity to file a motion for entry of default under Rule 55, but
18 Plaintiff did not do so. Thus, Plaintiff failed to set forth arguments why default should be
19 entered against Defendant.

20 Now Plaintiff seeks another opportunity to make such arguments, in opposition to the
21 discharge of the order to show cause. However, Plaintiff has not shown any authority for his
22 assertion that he was entitled by law to an opportunity to oppose the discharge. The order to
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24 ³ On July 2, 2014, a Waiver of Service was filed by Defendant, which allowed her sixty days, or until
25 July 25, 2014, to file a response to the Complaint. (Doc. 22.) Defendant failed to timely respond to the
26 Complaint. (Court Record.) On August 14, 2014, the court issued an order requiring Defendant to show cause
27 why default should not be entered against her for failure to timely respond to the Complaint. (Doc. 23.) The order
28 granted Defendant a thirty-day extension of time in which to respond to the Complaint. (Id.) On September 10,
2014, Defendant filed a response to the court's order. (Doc. 24.) On September 15, 2014, the court issued an
order discharging the order to show cause, finding no evidence of bad faith or willful disobedience by Defendant
in her failure to timely respond to the Complaint, and granting Defendant additional time in which to respond to
the Complaint. (Doc. 25.)

1 show cause was directed only to Defendant, and not to Plaintiff, and it was Defendant's burden
2 to show cause why default should not be entered against her. The court found that Defendant
3 had met her burden and was entitled to an extension of time to respond to the Complaint.

4 The undersigned does not find the Magistrate Judge's order of September 15, 2014 to
5 be clearly erroneous or contrary to law. Therefore, Plaintiff's motion for reconsideration of the
6 order discharging the order to show cause shall be denied.

7 **IV. MOTION FOR REASSIGNMENT OF MAGISTRATE JUDGE**

8 Plaintiff requests that his case be reassigned from Magistrate Judge Gary S. Austin to
9 another Magistrate Judge. Plaintiff's request suggests a motion for recusal under 28 U.S.C. §
10 144 or 28 U.S.C. § 455. Under 28 U.S.C. § 144, "[w]henver a party to any proceeding in a
11 district court makes and files a timely and sufficient affidavit that the judge before whom the
12 matter is pending has a personal bias or prejudice either against him or in favor of any adverse
13 party, such judge shall proceed no further therein, but another judge shall be assigned to hear
14 such proceeding." 28 U.S.C. § 144; see Pesnell v. Arsenault, 543 F.3d 1038, 1043 (9th Cir.
15 2008); U.S. v. Johnson, 610 F.3d 1138, 1147 (9th Cir. 2010). Under 28 U.S.C. § 455(a), "[a]ny
16 ... judge ... shall disqualify himself in any proceeding in which his impartiality might
17 reasonably be questioned." Pesnell, 543 F.3d at 1043. 28 U.S.C. § 455(b) provides in relevant
18 part, "[h]e shall also disqualify himself in the following circumstances: [w]here he has a
19 personal bias or prejudice concerning a party ..." 28 U.S.C. §455(b)(1). The substantive
20 standard is "[W]hether a reasonable person with knowledge of all the facts would conclude that
21 the judge's impartiality might reasonably be questioned." Pesnell, 543 F.3d at 1043 (quoting
22 United States v. Hernandez, 109 F.3d 1450, 1453 (9th Cir. 1997)). However, the bias must
23 arise from an extra-judicial source and cannot be based solely on information gained in the
24 course of the proceedings. Id. (citing Liteky v. United States, 510 U.S. 540, 554-56 (1994).
25 "Judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." In
26 re Focus Media, Inc., 378 F.3d 916, 930 (9th Cir. 2004) (quoting Liteky, 510 U.S. at 555). "In
27 and of themselves . . . , they cannot possibly show reliance upon an extrajudicial source; and can

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1 only in the rarest circumstances evidence the degree of favoritism or antagonism required . . .
2 when no extrajudicial source is involved.” Id.

3 Plaintiff argues that Magistrate Judge Austin’s judicial rulings have been erroneous and
4 have prejudiced Plaintiff. Plaintiff complains that his case was unreasonably delayed because
5 of inaction by the Magistrate Judge, and that the Magistrate Judge issues arbitrary orders and
6 does not adhere to required procedures or time limits. Plaintiff argues that he has been
7 prejudiced in his ability to timely pursue discovery, service of the complaint and summons, and
8 timely access to the federal court. Plaintiff argues that the delays affect the future availability
9 of witnesses. Plaintiff asserts that service of process was delayed until after the principal
10 defendant had relocated, causing Plaintiff to be required to find the new location.

11 **Discussion**

12 Plaintiff has not supported his motion with any evidence that the Magistrate Judge has a
13 personal bias against him from an extra-judicial source. As discussed above, a judge’s rulings
14 while presiding over a case do not constitute extra-judicial conduct. In re Focus Media, Inc.,
15 378 F.3d at 930. Plaintiff’s disagreement with the court’s rulings or procedures is not a
16 legitimate ground for seeking disqualification. Therefore, Plaintiff’s motion for reassignment
17 of the Magistrate Judge shall be denied.

18 **V. CONCLUSION**

19 Based on the foregoing, IT IS HEREBY ORDERED that:

- 20 1. Plaintiff’s motion for a court hearing is DENIED;
- 21 2. Plaintiff’s motion to withdraw his consent to the jurisdiction of a Magistrate
22 Judge is DENIED;
- 23 3. Plaintiff’s motion for assignment of a District Court Judge to this case is
24 DENIED AS MOOT;
- 25 4. Plaintiff’s motion for reconsideration of the Magistrate Judge’s orders by the
26 District Court Judge is DENIED; and

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5. Plaintiff's motion for his case be reassigned from Magistrate Judge Gary S. Austin to another Magistrate Judge is DENIED.

IT IS SO ORDERED.

Dated: October 31, 2014

/s/ Lawrence J. O'Neill
UNITED STATES DISTRICT JUDGE