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6 UNITED STATES DISTRICT COURT
7 FOR THE EASTERN DISTRICT OF CALIFORNIA
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9 RODERICK WILLIAM LEAR,

10 Plaintiff,

11 v.

12 JOHNATHAN AKANNO and
13 JENNIFER PALOMINO,

14 Defendants.

Case No. 1:15-cv-01903-DAD-JDP

ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFF'S
MOTIONS FOR LEAVE TO AMEND
OPPOSITION TO SUMMARY JUDGMENT
ON EXHAUSTION, FOR EXTENSIONS,
FOR SANCTIONS, FOR LEAVE TO
SUBMIT DOCUMENTS, AND FOR
APPOINTMENT OF COUNSEL

(Doc. Nos. 48, 54, 64, 66)

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16 On January 22, 2018, defendants Johnathan Akanno and Jennifer Palomino moved for
17 summary judgment, arguing that plaintiff Roderick William Lear has failed to exhaust his
18 administrative remedies. (Doc. No. 51.) As of April 20, 2018, the parties had fully briefed
19 defendants' motion. Plaintiff now moves for a variety of relief: (1) leave to amend his
20 opposition to defendants' motion for summary judgment on exhaustion; (2) an extension of time
21 to oppose the motion for summary judgment on exhaustion; (3) leave to submit documents to
22 show that he exhausted his administrative remedies; (4) an extension of the discovery schedule;
23 (5) a temporary restraining order precluding the California Department of Corrections and
24 Rehabilitation ("CDCR") from confiscating his legal materials; (6) an order sanctioning
25 defendants for denying that he exhausted his administrative remedies; and (7) appointment of
26 counsel. (Doc. Nos. 48, 54, 64, 66.)¹ The court will grant plaintiff's first three requests and

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28 ¹ Although the clerk of court labeled plaintiff's May 9, 2018 motion as, *inter alia*, a motion to
amend the complaint, plaintiff is seeking to amend not his complaint but rather his opposition to

1 deny his fourth, sixth, and seventh requests. The court will address plaintiff’s fifth request—his
2 request for a temporary restraining order—in findings and recommendations, which will appear
3 in a separate docket entry. *See* 28 U.S.C. § 636(b)(1)(A).

4 **I. Plaintiff’s request for leave to amend his opposition to defendants’ motion, for an**
5 **extension of time to file an opposition, for leave to submit documents related to**
6 **exhaustion, and for an extension of the discovery schedule**

7 Plaintiff indicates that he did not understand the procedure for opposing defendants’
8 motion for summary judgment. He also indicates that he suffers from mental illness that has led
9 to attempted suicide and mental-crisis treatment. (Doc. No. 64, at 1-2.) Considering these
10 claims, the court will allow plaintiff to amend his opposition to defendants’ motion for summary
11 judgment on exhaustion.

12 In his amended opposition, plaintiff must address the defects in his original opposition
13 that are highlighted by defendants. In particular, he must submit evidence to support his factual
14 claims. Plaintiff can do this by submitting a declaration, which can be his own statement—under
15 penalty of perjury—explaining what happened. If plaintiff chooses to submit such a declaration,
16 he may not rely on conclusory statements, and he must provide details of the circumstances
17 surrounding his institutional grievance; he must state, at a minimum, the date he submitted his
18 grievance, whether prison officials denied his grievance, whether he appealed the denied
19 grievance, and the date on which he appealed. Plaintiff must submit his amended opposition and
20 evidence to support his version of facts by the deadline set forth below. Defendants need not file
21 a reply to plaintiff’s amended opposition unless later ordered to do so by the court.

22 Plaintiff states that he has made copies of his “exhausted appeals” and asks for leave to
23 submit those copies to the court. (Doc. No. 48, at 1.) Plaintiff’s request to submit those
24 documents is granted.

25 Plaintiff also asks for an extension of the discovery schedule as part of his request for an
26 extension of time to respond to the summary judgment motion on exhaustion. (Doc. No. 54,
27 at 1.) Plaintiff can withstand summary judgment on exhaustion by telling his side of the story in

28 defendants’ summary judgment motion on exhaustion.

1 a declaration, without discovery, as outlined above. Plaintiff’s request for an extension of the
2 discovery schedule is therefore denied.

3 The current deadline for filing summary judgment motions on the merits is July 2, 2018.
4 (Doc. No. 40, at 1, 3.) Because the court will extend plaintiff’s deadline for opposing the
5 summary judgment motion on exhaustion, the court will also extend the deadline for dispositive
6 motions on the merits.

7 Shortly before issuance of this order, defendants moved to vacate the scheduled deadline
8 for dispositive motions. (Doc. No. 67.) Because the court will extend the dispositive-motions
9 deadline, the court will deny as moot defendants’ motion to vacate the prior deadline.

10 **II. Plaintiff’s request for a temporary restraining order**

11 In his motion for leave to amend his opposition to the motion for summary judgment on
12 exhaustion, plaintiff seeks an order restraining CDCR from confiscating his legal materials.
13 (Doc. No. 64, at 2.)² The undersigned will discuss this request in findings and recommendations,
14 which will appear in a separate docket entry and which will be reviewed by the district judge.
15 *See* 28 U.S.C. § 636(b)(1)(A).

16 **III. Plaintiff’s request that the court sanction defendants for denying that plaintiff
17 exhausted his claims**

18 Plaintiff asks the court to impose sanctions on defendants for denying that he has
19 exhausted his claims. (Doc. No. 48, at 1.) Although plaintiff contends that defendants know that
20 he has exhausted his administrative remedies (*id.*), he has not provided evidence supporting this
21 claim. Plaintiff’s request for sanctions is denied.

22 **IV. Plaintiff’s request for appointment of counsel**

23 A pro se litigant has no right to counsel in a civil action, *see Palmer v. Valdez*, 560 F.3d
24 965, 970 (9th Cir. 2009), and a district court may only “request,” not appoint, an attorney to
25 represent a pro se litigant who cannot afford an attorney, *see* 28 U.S.C. § 1915(e)(1). A district

26 ² Plaintiff’s motion for a temporary restraining order closely resembles a motion that he filed
27 earlier in this case, which the court denied. (*See* Doc. Nos. 53, 65.) Plaintiff’s new motion
28 differs from his prior motion only in that it asks that CDCR, not the Pelican Bay State Prison
infirmery, be enjoined.

1 court’s ability to recruit counsel is further limited by the fact that the court can offer counsel no
2 compensation. Given the court’s limited ability to recruit counsel, judges in this district—where
3 there are four federal and nineteen state prisons—find themselves in the unenviable position of
4 having to select a small number of parties to receive counsel from an enormous pool of pro se
5 litigants.

6 Accordingly, and in keeping with Ninth Circuit precedent, this court will seek counsel for
7 pro se civil litigants only under “exceptional circumstances.” *Palmer v. Valdez*, 560 F.3d 965,
8 970 (9th Cir. 2009). To decide whether a case presents exceptional circumstances, the court
9 considers two factors: (1) whether the pro se litigant has a “likelihood of success on the merits”;
10 and (2) whether the pro se litigant can “articulate his claims in light of the complexity of the
11 legal issues involved.” *Cano v. Taylor*, 739 F.3d 1214, 1218 (9th Cir. 2014). Neither factor is
12 dispositive, and the district court must consider both factors cumulatively. *Id.* Weighing the
13 factors is a matter committed to the court’s discretion, *see id.*, and no bright-line rule dictates
14 how the court should carry out this task. Unfortunately, the court cannot find counsel for every
15 prisoner who suffers from serious mental illness.³

16 At this time, the court will decline to assist plaintiff with recruiting counsel. Plaintiff has
17 provided no support for his claim that he is likely to succeed on the merits on his claims, and so
18 the first factor weighs against assisting in recruiting counsel. *See id.* at 1219 (concluding that pro
19 se litigant has not shown likelihood of success on the merits where he presented no evidence in
20 support of his claims at summary judgment). The court expresses no opinion whether plaintiff is
21 likely to succeed on the merits.

22 As for the second factor—whether plaintiff can articulate his claims—the undersigned
23 has, *sua sponte*, considered plaintiff’s mental illness. Plaintiff does not specify what mental

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25 ³ *See, e.g., McAllister v. Penzone*, No. 17-cv-2884, 2017 WL 6884001, at *1 (D. Ariz. Sept. 28,
26 2017) (declining to assist in recruiting counsel despite plaintiff’s paranoid schizophrenia and
27 bipolar disorder); *Rios v. Paramo*, No. 14-cv-1073, 2016 WL 4248624, at *3 (S.D. Cal. Aug. 11,
28 2016) (learning disabilities); *Neumann v. Veal*, No. 06-cv-2874, 2008 WL 2705549, at *3 (E.D.
Cal. July 10, 2008) (post-traumatic stress disorder); *see also Farley v. Kernan*, No. 16-cv-188,
2017 WL 412259, at *1 (S.D. Cal. Jan. 31, 2017) (denying appointment of counsel in habeas
context despite petitioner’s “suicidal ideation” and “psychotic features”).

1 illness affects him, but the court understands that he is alleging that he suffers from a serious
2 condition. (See Doc. No. 64, at 1.) In evaluating plaintiff’s situation, the undersigned has
3 considered plaintiff’s submissions both in this case and in other cases that plaintiff has litigated.
4 See *Lear v. Avila*, No. 17-cv-326 (E.D. Cal. filed Jan 17, 2017); *Lear v. Manasrah*, No. 17-cv-71
5 (E.D. Cal. filed Jan 17, 2017); *Lear v. Leftler*, No. 13-cv-882 (E.D. Cal. filed June 12, 2013).
6 From the filings that the court has reviewed, it does not appear that plaintiff has unusual
7 difficulty articulating his claims.

8 For these reasons, the court will deny plaintiff’s motion for assistance in recruiting
9 counsel. This order is without prejudice; plaintiff may renew his motion later in the case. He
10 may also seek to recruit counsel on his own. If plaintiff decides to renew his motion, he should
11 explain why he is likely to succeed on the merits of his case. He should also identify his mental
12 illness, the impacts of that illness on his ability to articulate his claims, his educational level, his
13 litigation experience, and any other information that would help the court assess his ability to
14 articulate his claims. The court will read any such motion from plaintiff generously.

15 **V. Order**

- 16 1. Plaintiff Roderick William Lear’s motion for leave to submit exhausted appeals to the
17 court and for sanctions on defendants Johnathan Akanno and Jennifer Palomino for
18 denying that plaintiff exhausted his claims (Doc. No. 48) is granted in part and denied
19 in part:
- 20 i. Plaintiff’s request for leave to submit to the court documents related to his
21 exhausted appeals is granted.
 - 22 ii. Plaintiff’s request for sanctions on defendants is denied.
- 23 2. Plaintiff’s motion for an extension of time to oppose defendants’ motion for summary
24 judgment on exhaustion and an extension of the discovery schedule (Doc. No. 54) is
25 granted in part and denied in part:
- 26 i. Plaintiff’s request for an extension of time to oppose defendants’ motion
27 for summary judgment on exhaustion is granted.
 - 28 ii. Plaintiff’s request for an extension of the discovery schedule is denied.

1 3. Plaintiff's motion for leave to amend his opposition to defendants' motion for
2 summary judgment on exhaustion, a temporary restraining order, an extension of
3 time, and assistance in recruiting counsel (Doc. No. 64) is granted in part and denied
4 in part:

5 i. Plaintiff's request for leave to amend his opposition to defendants' motion
6 for summary judgment on exhaustion is granted.

7 ii. Plaintiff's request for an extension of time to oppose defendants' motion
8 for summary judgment on exhaustion is granted.

9 iii. Plaintiff's request for assistance in recruiting counsel is denied without
10 prejudice.

11 iv. The court will address plaintiff's request for a temporary restraining order
12 in a separate docket entry.

13 4. Plaintiff's motion for an extension of time to oppose defendants' motion for summary
14 judgment on exhaustion (Doc. No. 66) is granted.

15 5. Defendants' motion to vacate the deadline for dispositive motions (Doc. No. 67) is
16 denied as moot.

17 6. Plaintiff's new deadline for opposing defendants' motion for summary judgment on
18 exhaustion is Monday, July 16, 2018.

19 7. The parties' new deadline for filing any motion for summary judgment on the merits
20 is Monday, September 3, 2018.

21 IT IS SO ORDERED.
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23 Dated: June 27, 2018

/s/ Jeremy D. Peterson
24 UNITED STATES MAGISTRATE JUDGE
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