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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

NICHOLAS PATRICK,  
Plaintiff,  
v.  
REYNAGA, *et al.*,  
Defendant.

Case No.: 1:16-cv-00239-LJO-JDP  
ORDER REQUIRING PLAINTIFF’S  
RESPONSE TO DEFENDANTS’ MOTION TO  
DISMISS  
(Doc. No. 64.)  
ORDER DENYING PLAINTIFF’S  
MISCELLANEOUS REQUESTS FOR RELIEF  
(Doc. Nos. 69, 71.)

Plaintiff Nicholas Patrick is a former federal prisoner proceeding pro se and *in forma pauperis* with this civil action. Defendants have filed a motion to dismiss (Doc. No. 64), and plaintiff did not respond within the required time frame. Instead, plaintiff has lodged several requests with the court (Doc. Nos. 69, 71). Plaintiff’s response to the motion to dismiss and his various requests will be discussed below.

**I. Plaintiff Must Respond to Defendants’ Motion to Dismiss (Doc. No. 64.)**

On June 27, 2018, defendants filed a motion to dismiss the case and served the motion on plaintiff. (Doc. No. 64, at 3.) Plaintiff had 21 days from the date of service to respond to defendants’ motion to dismiss. *See* E.D. Cal. Local Rule 230(1). The deadline for plaintiff’s response has now passed. The court will allow plaintiff one more opportunity to respond to

1 defendants' motion before dismissing this case.

2 To manage its docket effectively, the court imposes deadlines on litigants and requires  
3 litigants to meet those deadlines. When a plaintiff repeatedly fails to comply with court-imposed  
4 deadlines, the court may dismiss the plaintiff's case for failure to prosecute. *See* Fed. R. Civ. P.  
5 41; *Hells Canyon Pres. Council v. U.S. Forest Serv.*, 403 F.3d 683, 689 (9th Cir. 2005) (“[T]he  
6 consensus among our sister circuits, with which we agree, is that courts may dismiss under Rule  
7 41(b) sua sponte, at least under certain circumstances.”). Involuntary dismissal is a harsh  
8 penalty, but a district court has a duty to administer justice expeditiously and avoid needless  
9 burden for the parties. *See Pagtalunan v. Galaza*, 291 F.3d 639, 642 (9th Cir. 2002);  
10 Fed. R. Civ. P. 1.

11 The court will give plaintiff one final chance to explain why the court should not dismiss  
12 the case. Plaintiff must file a response to defendants' motion to dismiss by the deadline set forth  
13 below and respond to the arguments raised by defendants in their motion to dismiss. Plaintiff's  
14 failure to respond to defendants' motion will result in dismissal.

## 15 **II. Plaintiff's Request to Participate in E-Filing (Doc. No. 69.)**

16 On June 25, 2018, plaintiff requested the court's permission to file documents  
17 electronically through the electronic case management/filing (“CM/ECF”) system. (Doc. No. 63.)  
18 The Local Rules generally require pro se parties to file and serve paper documents. *See* E.D. Cal.  
19 Local Rule 133(a). A pro se litigant may request an exception to this requirement by filing a joint  
20 stipulation or by “written motion[] setting out an explanation of reasons for the exception.” E.D.  
21 Cal. Local Rule 133(b)(2), (3). On July 2, 2018, the court denied plaintiff's request for access to  
22 the electronic filing system because it contained no explanation for or justification of his request.  
23 (Doc. No. 66.)

24 On July 5, 2018, plaintiff again requested the court's permission to file documents  
25 electronically through the CM/ECF system. (Doc. No. 69.) Given the timing of this motion, the  
26 court presumes that plaintiff filed it without reviewing the court's July 2, 2018 order. Plaintiff's  
27 second request again fails to explain or justify his request for access to the electronic filing  
28 system. It is therefore denied.

1           **III. Plaintiff’s Request for “30 Additional Days Leave to Amend” (Doc. No. 71.)**

2           On August 23, 2018, plaintiff “request[ed] the court for 30 additional days leave to amend  
3 for [this] case.” (Doc. No. 71.) Federal Rule of Civil Procedure 15(a)(1) provides that a party  
4 may amend a pleading once as a matter of course either (A) within 21 days of service, or, (B) if  
5 the pleading is one requiring a response, within 21 days of service of a responsive pleading or  
6 within 21 days of service of a motion under Rule 12(b), (e), or (f)—whichever is earlier. “In all  
7 other cases, a party may amend its pleading only with the opposing party’s written consent or the  
8 court’s leave.” Fed. R. Civ. P. 15(a)(2).

9           Here, defendants filed a motion to dismiss under Rule 12(b) on June 27, 2018 (Doc. 64);  
10 twenty-one days thereafter was July 19, 2018. Since plaintiff failed to act before July 19, 2018,  
11 plaintiff may not file an amended complaint as a matter of course. *See* Fed. R. Civ. P. 15(a)(1).  
12 Defendants have not consented to plaintiff’s amendment of his complaint, so plaintiff requires  
13 leave of the court to file an amended complaint. *See* Fed. R. Civ. P. 15(a)(2).

14           The court has discretion to grant or deny leave to amend a complaint, *Swanson v. United*  
15 *States Forest Serv.*, 87 F.3d 339, 343 (9th Cir. 1996), though leave should be “freely give[n]  
16 when justice so requires.” Fed. R. Civ. P. 15(a)(2). “In exercising this discretion, a court must be  
17 guided by the underlying purpose of Rule 15 to facilitate decision on the merits, rather than on the  
18 pleadings or technicalities.” *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981).  
19 Consequently, the policy to grant leave to amend is applied with extreme liberality. *Id.*  
20 However, there is no abuse of discretion “in denying a motion to amend where the movant  
21 presents no new facts but only new theories and provides no satisfactory explanation for his  
22 failure to fully develop his contentions originally.” *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir.  
23 1995).

24           In evaluating a motion to amend under Rule 15, the court may consider (1) whether the  
25 plaintiff has previously amended his complaint, (2) undue delay, (3) bad faith, (4) futility of  
26 amendment, and (5) prejudice to the opposing party. *See Allen v. City of Beverly Hills*, 911 F.2d  
27 367, 373 (9th Cir. 1990); *Loehr v. Ventura County Cmty. Coll. Dist.*, 743 F.2d 1310, 1319 (9th  
28 Cir. 1984); *see also Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003)

1 (“As this circuit and others have held, it is the consideration of prejudice to the opposing party  
2 that carries the greatest weight.”).

3 The court will deny plaintiff’s request without prejudice. Plaintiff did not state whether he  
4 was requesting leave to file an amended complaint or an extension of time to respond to  
5 defendants’ currently unopposed motion to dismiss.<sup>1</sup> If plaintiff meant to ask for an extension of  
6 time to respond to defendants’ currently unopposed motion to dismiss, then his request is  
7 obviated by the court’s order giving him one final chance to respond. If, on the other hand,  
8 plaintiff intended to request leave to amend the complaint, he may file a motion stating this  
9 explicitly.

10 **IV. Plaintiff’s Request for an Attorney (Doc. No. 71.)**

11 On August 23, 2018, plaintiff filed a motion seeking the appointment of counsel. Plaintiff  
12 does not have a constitutional right to appointed counsel in this action, *Rand v. Rowland*, 113  
13 F.3d 1520, 1525 (9th Cir. 1997), and the court cannot require that an attorney represent plaintiff  
14 under 28 U.S.C. § 1915(e)(1), *see Mallard v. United States District Court for the Southern*  
15 *District of Iowa*, 490 U.S. 296, 298 (1989). However, in certain exceptional circumstances the  
16 court may request the voluntary assistance of counsel under § 1915(e)(1). *Rand*, 113 F.3d at  
17 1525.

18 Without a reasonable method of securing and compensating counsel, the court will seek  
19 volunteer counsel only in the most serious and exceptional cases. In determining whether  
20 exceptional circumstances exist, “a district court must evaluate both the likelihood of success of  
21 the merits [and] the ability of the plaintiff to articulate his claims pro se in light of the complexity  
22 of the legal issues involved.” *Id.* (internal quotation marks and citations omitted).

23 Though plaintiff is homeless and has been diagnosed with an unspecified schizoaffective  
24 disorder (Doc. No. 71), the court cannot make a determination that plaintiff is likely to succeed on  
25 the merits at this early stage in the proceedings. Plaintiff’s request is therefore denied.

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<sup>1</sup> On August 27, defendants asked that the court issue an order providing clarification on  
plaintiff’s request. (Doc. No. 72.)

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**V. Order**

Accordingly,

1. Plaintiff must respond to defendants’ motion to dismiss by Friday, September 28, 2018.
2. Defendants’ reply, if any, is due by Friday, October 5, 2018.
3. Plaintiff’s request to participate in e-filing (Doc. No. 69) is DENIED, without prejudice.
4. Plaintiff’s request for leave to amend (Doc. No. 71) is DENIED, without prejudice.
5. Plaintiff’s request for the appointment of counsel (Doc. No. 71) is DENIED, without prejudice.

IT IS SO ORDERED.

Dated: August 30, 2018

  
UNITED STATES MAGISTRATE JUDGE