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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LARRY WILLIAM CORTINAS,
Plaintiff,
v.
CONALL MCCABE, et al.,
Defendants.

1:16-cv-0558 LJO MJS (PC)

**ORDER DENYING PLAINTIFF’S MOTION
TO SHORTEN TIME FOR FILING AND
HEARING MOTION; AND**

FINDINGS AND RECOMMENDATIONS TO:

- (1) DENY PLAINTIFF’S MOTION FOR
PRELIMINARY INJUNCTION
AND/OR PROTECTIVE ORDER;**
- (2) DENY PLAINTIFF’S MOTION FOR A
COURT ORDERED TELEPHONIC
CONFERENCE;**
- (3) DENY PLAINTIFF’S MOTION FOR
TEMPORARY RESTRAINING
ORDER; AND**
- (4) DENY PLAINTIFF’S REQUEST FOR
A PRELIMINARY INJUNCTION AND
A TEMPORARAY RESTRAINING
ORDER**

(ECF NOS. 24, 31, 32, 35, 38)

Plaintiff is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. This case proceeds on Plaintiff’s First Amended Complaint against Defendants E. Clark, O. Beregovskaya, P. Lenoir, and C. McCabe on an Eighth Amendment medical indifference claim; against R. Vogel on an

1 Eighth Amendment excessive force claim; and against E. Clark, O. Beregovskaya, P.
2 Lenoir, C. McCabe, and R. Vogel on a Fourteenth Amendment equal protection claim.

3 Pending before the Court are the following motions filed by Plaintiff: (1) a motion
4 for preliminary injunction and/or protective order (ECF No. 24); (2) a motion to shorten
5 time for filing and hearing motion (ECF No. 31); (3) a motion for a “court order
6 emergency circumstance[s] telephonic conference” (ECF No. 32); (4) a motion for
7 temporary restraining order (ECF No. 35); and (5) a request for a preliminary injunction
8 and a temporary restraining order (ECF No. 38).

9 **I. Plaintiff’s Allegations¹**

10 Plaintiff is incarcerated in California State Prison Corcoran (“Corcoran”). Plaintiff
11 brings three claims for violations of his constitutional rights against the following
12 individuals: (1) Connall McCabe, M.D., Chief Physician and surgeon at Corcoran; (2)
13 Pierrette Lenoir, M.D., physician and Surgeon at Corcoran; (3) Olga Beregovskaya,
14 M.D., physician and surgeon at North Kern State Prison; (4) E. Clark, M.D., physician
15 and surgeon at Corcoran; and (5) Corcoran Correctional Sergeant Vogel.

16 At some unknown time in March 2015, Clark and Beregovskaya prescribed
17 Plaintiff Tylenol for his pain, and McCabe later prescribed him Tylenol and gabapentin
18 for his pain.

19 On March 25, 2015, Clark, Beregovskaya, McCabe, and Lenoir, who composed a
20 “pain committee,” intentionally stopped Plaintiff’s pain medication in order “to inflict
21 extreme pain over the next year” due to Plaintiff’s Islamic faith. Nurse Practitioner Rouch
22 stated that the committee members “said to live with the pain. We do not treat Muslims.
23 What a mess, a mentally ill Muslim who wants to be treated humanely.” Clark,
24 Beregovskaya, McCabe, and Lenoir stopped Plaintiff’s pain medication without
25 examining him, knowing that it would cause him pain and suffering.

26 In June 2015, McCabe approved gabapentin for Plaintiff’s pain. In March 2016,

27 _____
28 ¹ These allegations are reproduced from the March 1, 2017, Screening Order issued by the Honorable
Lawrence J. O’Neill. (ECF No. 14.)

1 McCabe and Lenoir prescribed Plaintiff methadone for his pain, allegedly because they
2 no longer think Plaintiff is a Muslim.

3 On August 4, 2015, Sergeant Vogel “slammed [Plaintiff] into a wall” while he was
4 handcuffed, “hit [him] twice in [his] lower back, resulting in [him] dropping to [his] knees,
5 then hit [him] upon the top of [his] head.” Vogel said “die like the Muslim piece of shit
6 [you] are. Beregovskaya warned you about medical appeals.” Two unknown officers then
7 “dragged [Plaintiff] across the floor and to the transport bus.”

8 Later that night, two officers “conducted a use of force video.” One of them,
9 Lieutenant Gonzales, “called the acute care hospital” and described Plaintiff’s symptoms.
10 “The medical personal [sic] . . . said ‘Cortinas is not to be seen by anyone in medical’ per
11 Doctor O. Beregovskaya.”

12 Plaintiff seeks damages and “medical treatment that meets the community
13 medical standards.”

14 **II. Plaintiff’s Motions**

15 **A. Motion for Preliminary Injunction and/or Protective Order (ECF No. 24)**

16 In his Motion for Preliminary Injunction and/or Protective Order (ECF No. 24),
17 Plaintiff accuses non-party Dr. Gill of abruptly discontinuing Plaintiff’s pain medication in
18 May 2017 in retaliation for Plaintiff’s initiation of this action. Plaintiff speculates that Dr.
19 Gill did this at the direction of Defendants Dr. McCabe and Dr. Clark. Plaintiff seeks an
20 order for 20 mg of methadone and 15 mg of baclofen three times daily with a six month
21 review. He also seeks “proper medical care that meets the community standards.”

22 The purpose of a temporary restraining order is to preserve the status quo before
23 a preliminary injunction hearing may be held; its provisional remedial nature is designed
24 merely to prevent irreparable loss of rights prior to judgment. Sierra On-Line, Inc. v.
25 Phoenix Software, Inc., 739 F.2d 1415, 1422 (9th Cir. 1984). Under Federal Rule of Civil
26 Procedure 65, a temporary restraining order may be granted only if “specific facts in an
27 affidavit or verified complaint clearly show that immediate and irreparable injury, loss, or
28 damage will result to the movant before the adverse party can be heard in opposition.”

1 Fed. R. Civ. P. 65(b)(1)(A).

2 The standard for issuing a temporary restraining order is identical to the standard
3 for a preliminary injunction. See Stuhlberg Int'l Sales Co., Inc. v. John D. Brush & Co.,
4 Inc., 240 F.3d 832, 839 n.7 (9th Cir. 2001). A preliminary injunction is an extraordinary
5 and drastic remedy, never awarded as of right. Munaf v. Geren, 553 U.S. 674, 689-90
6 (2008) (citations omitted). A plaintiff seeking a preliminary injunction must establish that
7 he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the
8 absence of preliminary relief, that the balance of equities tips in his favor, and that an
9 injunction is in the public interest. Winter v. Natural Res. Def. Council, 555 U.S. 7, 20
10 (2008). A preliminary injunction may issue where the plaintiff demonstrates the existence
11 of serious questions going to the merits and the hardship balance tips sharply toward the
12 plaintiff, assuming the other two elements of the Winter test are also met. Alliance for the
13 Wild Rockies v. Cottrell, 632 F.3d 1127, 1131-32 (9th Cir. 2011). Under either
14 formulation of the principles, preliminary injunctive relief should be denied if the
15 probability of success on the merits is low. See Johnson v. Cal. State Bd. of
16 Accountancy, 72 F.3d 1427, 1430 (9th Cir. 1995) (even if the balance of hardships tips
17 decidedly in favor of the moving party, it must be shown as an irreducible minimum that
18 there is a fair chance of success on the merits).

19 In cases brought by prisoners involving conditions of confinement, any preliminary
20 injunction must be narrowly drawn, extend no further than necessary to correct the harm
21 the court finds requires preliminary relief, and be the least intrusive means necessary to
22 correct the harm. 18 U.S.C. § 3626(a)(2).

23 The Court finds that Plaintiff is not entitled to injunctive relief for several reasons.
24 First, the relief that Plaintiff seeks is different in kind from that set forth in the First
25 Amended Complaint. Additionally, the motion appears to be based on a retaliation claim
26 not asserted in the First Amended Complaint. It is appropriate to grant a preliminary
27 injunction providing “intermediate relief of the same character as that which may be
28 granted finally.” De Beers Consol. Mines v. U.S., 325 U.S. 212, 220 (1945). A court

1 should not issue an injunction when the relief sought is not of the same character and
2 the injunction deals with a matter lying wholly outside the issues in the underlying action.
3 Id. To the extent Petitioner is asserting a retaliation claim against Dr. Gill or any of the
4 named Defendants, that claim must be brought in a separate action (after Plaintiff
5 exhausts his administrative remedies). It cannot provide the basis for a preliminary
6 injunction in this lawsuit.

7 Moreover, it appears that Plaintiff is seeking an order directed to a non-party. The
8 Court does not have jurisdiction to order injunctive relief which would require directing
9 parties not before the Court to take action. Zepeda v. United States Immigration &
10 Naturalization Serv., 753 F.2d 719, 727 (9th Cir. 1985) (“A federal court may issue an
11 injunction if it has personal jurisdiction over the parties and subject matter jurisdiction
12 over the claim; it may not attempt to determine the rights of persons not before the
13 court.”).

14 Accordingly, this motion should be denied.

15 **B. Motion for a Court Ordered Emergency Circumstances Telephonic**
16 **Conference (ECF No. 32) and Motion to Shorten Time for Filing and**
17 **Hearing Motion (ECF No. 31)**

18 In Plaintiff’s request for a “court order emergency circumstance’s telephonic
19 conference” (ECF No. 32), Plaintiff seeks an order directing Chief Physician Dr. Conall
20 McCabe, non-party Attorney General Brian Chan, and non-party Dr. Donald Ramberg to
21 address Plaintiff’s pain and treatment plan through a telephonic conference. Plaintiff
22 again claims that he is being denied treatment in retaliation for filing this action.

23 Construing this motion as a request for injunctive relief, it fails for the same reasons set
24 forth above. The undersigned will therefore recommend that it be denied. The Court will
25 also deny Plaintiff’s motion to shorten the time for filing and hearing this motion. (ECF
26 No. 31.)

27 **C. Temporary Restraining Order (ECF No. 35)**

28 Plaintiff’s Temporary Restraining Order (ECF No. 35) seeks an order stopping

1 Defendants from withholding Plaintiff's pain medication in retaliation for filing this action.
2 Once more, Plaintiff claims that Dr. Gill abruptly discontinued all of his pain medication,
3 and that this was at the direction of Dr. McCabe and Dr. Clark in retaliation for filing this
4 suit. This motion should also be denied for the reasons discussed.

5 **D. Request for a Preliminary Injunction and a Temporary Restraining Order**
6 **(ECF No. 38)**

7 Finally, in the Request for a Preliminary Injunction and a Temporary Restraining
8 Order (ECF No. 38), Plaintiff repeats his claim that he is being denied pain medication in
9 retaliation for filing this action. The Court will recommend that this motion be denied.

10 **III. Conclusion**

11 Based on the foregoing, IT IS HEREBY ORDERED that Plaintiff's motion to
12 shorten time for filing and hearing motion (ECF No. 31) is DENIED; and

13 IT IS HEREBY RECOMMENDED that:

- 14 1. Plaintiff's motion for preliminary injunction and/or protective order (ECF No.
15 24) be DENIED;
- 16 2. Plaintiff's motion for a "court order emergency circumstance[s] telephonic
17 conference" (ECF No. 32) be DENIED;
- 18 3. Plaintiff's motion for temporary restraining order (ECF No. 35) be DENIED;
19 and
- 20 4. Plaintiff's request for a preliminary injunction and a temporary restraining order
21 (ECF No. 38) be DENIED.

22 The findings and recommendations will be submitted to the United States District
23 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1).
24 Within fourteen (14) days after being served with the findings and recommendations, the
25 parties may file written objections with the Court. The document should be captioned
26 "Objections to Magistrate Judge's Findings and Recommendations." A party may
27 respond to another party's objections by filing a response within fourteen (14) days after
28 being served with a copy of that party's objections. The parties are advised that failure to

1 file objections within the specified time may result in the waiver of rights on appeal.
2 Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923
3 F.2d 1391, 1394 (9th Cir. 1991)).

4
5 IT IS SO ORDERED.

6 Dated: November 6, 2017

1st Michael J. Seng
7 UNITED STATES MAGISTRATE JUDGE

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