

1 Pursuant to E.D. Local Rule 303(f), a magistrate judge's orders shall be upheld unless
2 "clearly erroneous or contrary to law." Upon review of the entire file, for the reasons set forth
3 herein, the court finds that the magistrate judge's ruling was clearly erroneous.

4 By order filed November 2, 2010 (ECF No. 18), this action was referred to the prisoner
5 civil rights pro bono panel administrator of this court for appointment of counsel. Counsel was
6 appointed by order filed February 7, 2011 (ECF No. 21). It took two and one half years from that
7 point for the operative pleading, the third amended complaint, to be filed and served on
8 defendants and for defendants to answer the complaint. Defendants' answer was filed on August
9 12, 2013 (ECF No. 53). Four days later, on August 16, 2013, the magistrate judge issued a
10 Discovery and Scheduling Order, which was served on counsel of record. On the same day,
11 plaintiff's court-appointed attorney filed a motion to withdraw (ECF No. 56). On August 28,
12 2013, plaintiff filed a motion for substitution of counsel (ECF No. 57). By order filed September
13 30, 2013 (ECF No. 60), the magistrate judge granted counsel's motion to withdraw and denied
14 plaintiff's request for substitution of counsel. Plaintiff's motion for reconsideration of that order
15 (ECF No. 61) was denied as untimely. See Order filed December 11, 2013 (ECF No. 64).

16 Although the magistrate judge's September 30, 2013 order informed plaintiff that he
17 would be proceeding pro se in this action, there is no evidence in the record that plaintiff was ever
18 served with a copy of the August 16, 2013 Discovery and Scheduling Order. In his declaration in
19 support of the motion to withdraw, counsel averred, inter alia, that he had sent at least three letters
20 to plaintiff apprising him of "updates to his case" and responding to his "queries." Declaration of
21 Aldon L. Bolanos, filed August 16, 2013 (ECF No. 56-2) at 1-2. That declaration is dated August
22 12, 2013, prior to issuance of the Discovery and Scheduling order. In his March 13, 2014 motion
23 for extension of time, plaintiff represents that on November 8, 2013, he received part of his case
24 file and learned that no discovery had been conducted. There is nothing in the record from his
25 former counsel certifying delivery of the complete file.

26 In the March 20, 2014 order, the magistrate judge denied plaintiff's motion to extend time
27 to conduct discovery on the ground that plaintiff had not shown good cause to reopen discovery.
28 The magistrate judge's order proceeds from the assumption that plaintiff was seeking to reopen

1 discovery; in fact, the motion was predicated on plaintiff's assertion that defendants had moved
2 for summary judgment "before the discovery process even began." Motion for Enlargement, filed
3 March 13, 2014 (ECF No. 66) at 1. The latter assertion is consistent with plaintiff's assertions
4 that he never received the August 16, 2013 Discovery and Scheduling Order.

5 The August 16, 2013 Discovery and Scheduling order set a deadline of December 6, 2013
6 for completion of discovery, and required all discovery requests to be served sixty days prior to
7 that date. See Order filed August 16, 2013 (ECF No. 55) at 5. Under the terms of that order,
8 which was served on plaintiff by mail at a prison facility in Corcoran, California, discovery
9 requests were to be served by October 7, 2013, one week after issuance of the magistrate judge's
10 order granting counsel's motion to withdraw. Thus, even if plaintiff had received a copy of the
11 Discovery and Scheduling Order, he would have had less than one week to prepare or serve any
12 discovery requests.

13 Based on the foregoing, it appears that plaintiff has not had any opportunity to conduct
14 discovery in this action. It further appears, however, that defendants' motion for summary
15 judgment was filed in accordance with the schedule set in the August 16, 2013 Discovery and
16 Scheduling Order, and that plaintiff has been served with a copy of that motion. Thus, plaintiff is
17 now able to determine what facts are "essential to justify" his opposition to the motion for
18 summary judgment, whether those facts are unavailable to him, and whether he requires
19 discovery to obtain evidence of those facts. See Fed. R. Civ. P. 56(d).¹ Under the circumstances,
20 plaintiff's general request to postpone consideration of defendants' motion for summary judgment
21 must be supplemented by a request which demonstrates what specific discovery he requires to
22 obtain facts "essential to justify" an opposition to defendants' motion for summary judgment.

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24 ¹ Fed. R. Civ. P. 56(d) provides:

25 (d) When Facts Are Unavailable to the Nonmovant. If a nonmovant shows by affidavit or
26 declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the
27 court may:

- 28 (1) defer considering the motion or deny it;
- (2) allow time to obtain affidavits or declarations or to take discovery; or
- (3) issue any other appropriate order.

1 The court will grant plaintiff an additional period of thirty days in which to file either a
2 supplemental motion pursuant to Fed. R. Civ. P. 56(d) in accordance with this order or, if plaintiff
3 determines that he has sufficient evidence with which to oppose the summary judgment motion
4 without additional discovery, an opposition to defendants' motion for summary judgment.

5 In accordance with the above, IT IS HEREBY ORDERED that:

6 1. Plaintiff's April 21, 2014 request for reconsideration is granted;

7 2. Plaintiff is granted thirty days from the date of this order in which to file either a
8 supplemental motion pursuant to Fed. R. Civ. P. 56(d) in accordance with this order or an
9 opposition to defendants' motion for summary judgment.

10 DATED: May 14, 2014

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13 LAWRENCE K. KARLTON
14 SENIOR JUDGE
15 UNITED STATES DISTRICT COURT
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