

1 1. Motion to Modify Scheduling Order

2 In this 65 page filing, plaintiff seeks an extension of the discovery deadline “due to his
3 inability to gain physical law library access required to research relevant case law, Federal Rules
4 of Civil Procedure, CDCR policy, procedures, rules, and regulations as well as copying
5 documents, exhibits, and motions filed with the court and defendants’ attorneys.” (ECF No. 38 at
6 1.) Plaintiff seeks an extension of thirty days after the court rules on plaintiff’s motion for
7 appointment of counsel to “continue propounding discovery requests on defendants. (Id.)
8 Plaintiff then recites detailed facts surrounding his efforts to exhaust his administrative remedies
9 in connection with the claims raised herein. (ECF No. 38 at 3-6.) Plaintiff appends 56 pages of
10 exhibits, most of which are copies of his administrative appeals and responses thereto. Plaintiff
11 argues that good cause exists under Rule 16(b) of the Federal Rules of Civil Procedure to modify
12 the scheduling order.

13 Despite plaintiff’s reliance on Rule 16(b), the pendency of defendants’ motion for
14 summary judgment requires the court to consider plaintiff’s request under Rule 56(d) of the
15 Federal Rules of Civil Procedure. Federal Rule of Civil Procedure 56(d) provides that “[i]f a
16 nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts
17 essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2)
18 allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other
19 appropriate order.” Fed. R. Civ. P. 56(d).

20 Plaintiff does not identify the specific discovery he seeks to propound. Rather, the bulk of
21 his request appears focused on his inability to gain sufficient law library time to perform legal
22 research, not to obtain facts. Indeed, plaintiff’s motion contains detailed facts concerning his
23 efforts to exhaust his administrative remedies, and provides copies of his appeals and responses
24 thereto. Thus, plaintiff has not made the required showing in his motion under Rule 56(d).²
25 Because defendants’ motion for summary judgment is based on the affirmative defense of failure
26 to exhaust administrative remedies, a prerequisite to filing suit under the PLRA, the court

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28 ² Plaintiff will be able to pursue discovery as to the merits of his claims once the motion for
summary judgment is resolved. See July 18, 2014 Order. (ECF No. 36.)

1 previously stayed discovery pending resolution of defendants' motion. (ECF No. 36.) Because
2 plaintiff failed to identify specific discovery of facts needed to refute defendants' pending motion,
3 plaintiff's motion is denied without prejudice. However, the court will grant plaintiff an
4 extension of time in which to file an opposition to the pending motion for summary judgment.
5 Because plaintiff provided numerous exhibits that may be pertinent to the motion for summary
6 judgment, plaintiff is not required to re-submit such exhibits in support of his opposition, but may
7 simply refer to the exhibits contained in the August 20, 2014 filing.

8 2. Motion for Appointment of Counsel

9 Plaintiff requests that the court appoint counsel. District courts lack authority to require
10 counsel to represent indigent prisoners in section 1983 cases. Mallard v. United States Dist.
11 Court, 490 U.S. 296, 298 (1989). In exceptional circumstances, the court may request an attorney
12 to voluntarily to represent such a plaintiff. See 28 U.S.C. § 1915(e)(1). Terrell v. Brewer, 935
13 F.2d 1015, 1017 (9th Cir. 1991); Wood v. Housewright, 900 F.2d 1332, 1335-36 (9th Cir. 1990).
14 When determining whether "exceptional circumstances" exist, the court must consider plaintiff's
15 likelihood of success on the merits as well as the ability of the plaintiff to articulate his claims pro
16 se in light of the complexity of the legal issues involved. Palmer v. Valdez, 560 F.3d 965, 970
17 (9th Cir. 2009) (district court did not abuse discretion in declining to appoint counsel). The
18 burden of demonstrating exceptional circumstances is on the plaintiff. Id. Circumstances
19 common to most prisoners, such as lack of legal education and limited law library access, do not
20 establish exceptional circumstances that warrant a request for voluntary assistance of counsel.

21 Having considered the factors under Palmer, the court finds that plaintiff has failed to
22 meet his burden of demonstrating exceptional circumstances warranting the appointment of
23 counsel at this time.

24 Accordingly, IT IS HEREBY ORDERED that:

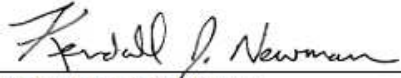
- 25 1. Plaintiff's motion to modify the scheduling order (ECF No. 38) is denied without
26 prejudice;
- 27 2. Plaintiff is granted thirty days from the date of this order in which to file an opposition
28 to defendants' motion for summary judgment; defendants' reply is due seven days thereafter; and

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3. Plaintiff's motion for the appointment of counsel (ECF No. 39) is denied without prejudice.

Dated: August 25, 2014

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KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE