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8	UNITED STATES DISTRICT COURT	
9	FOR THE EASTERN DISTRICT OF CALIFORNIA	
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11	MAURICE JOHNSON,	No. 2:12-cv-2719 GEB KJN P
12	Plaintiff,	
13	v.	<u>ORDER</u>
14	FELKER, et al.,	
15	Defendants.	
16		
17	Plaintiff is a state prisoner proceeding pro se in an action brought under 42 U.S.C. § 1983.	
18	On August 18, 2014, defendants filed a motion for summary judgment based on plaintiff's	
19	alleged failure to exhaust administrative remedies. On August 20, 2014, plaintiff filed a motion	
20	to modify the court's scheduling order, and a motion to appoint counsel.	
21	The Prison Litigation Reform Act of 1995 ("PLRA") provided that "[n]o action shall be	
22	brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative	
23	remedies as are available are exhausted." 42 U.S.C. § 1997e(a). To satisfy exhaustion, a	
24	grievance must alert prison officials to the claims plaintiff raised in the complaint, but need only provide the level of detail required by the grievance system. <u>Jones v. Bock</u> , 549 U.S. 199, 218-19 (2007); Porter v. Nussle, 534 U.S. 516, 524 25 (2002) (purpose of exhaustion is to give officials	
25	(2007); Porter v. Nussle, 534 U.S. 516, 524-25 (2002) (purpose of exhaustion is to give officials "time and opportunity to address complaints internally before allowing the initiation of a federal case.") Proper exhaustion of available remedies is mandatory. Booth v. Churner, 532 U.S. 731	
26	case.") Proper exhaustion of available remedies is mandatory, <u>Booth v. Churner</u> , 532 U.S. 731, 741 (2001), and "[p]roper exhaustion demands compliance with an agency's deadlines and other critical procedural rules[.]" <u>Woodford v. Ngo</u> , 548 U.S. 81, 90 (2006). A prisoner need not	
27	exhaust further levels of review once he has either received all the remedies that are "available" at an intermediate level of review, or has been reliably informed by an administrator that no more	
28	remedies are available. Brown v. Valoff, 422	2 F.3d 926, 934-35 (9th Cir. 2005).
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1. Motion to Modify Scheduling Order

In this 65 page filing, plaintiff seeks an extension of the discovery deadline "due to his inability to gain physical law library access required to research relevant case law, Federal Rules of Civil Procedure, CDCR policy, procedures, rules, and regulations as well as copying documents, exhibits, and motions filed with the court and defendants' attorneys." (ECF No. 38 at 1.) Plaintiff seeks an extension of thirty days after the court rules on plaintiff's motion for appointment of counsel to "continue propounding discovery requests on defendants. (Id.)

Plaintiff then recites detailed facts surrounding his efforts to exhaust his administrative remedies in connection with the claims raised herein. (ECF No. 38 at 3-6.) Plaintiff appends 56 pages of exhibits, most of which are copies of his administrative appeals and responses thereto. Plaintiff argues that good cause exists under Rule 16(b) of the Federal Rules of Civil Procedure to modify the scheduling order.

Despite plaintiff's reliance on Rule 16(b), the pendency of defendants' motion for summary judgment requires the court to consider plaintiff's request under Rule 56(d) of the Federal Rules of Civil Procedure. Federal Rule of Civil Procedure 56(d) provides that "[i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (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." Fed. R. Civ. P. 56(d).

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

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

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

2. Motion for Appointment of Counsel

Plaintiff requests that the court appoint counsel. District courts lack authority to require counsel to represent indigent prisoners in section 1983 cases. Mallard v. United States Dist.

Court, 490 U.S. 296, 298 (1989). In exceptional circumstances, the court may request an attorney to voluntarily to represent such a plaintiff. See 28 U.S.C. § 1915(e)(1). Terrell v. Brewer, 935

F.2d 1015, 1017 (9th Cir. 1991); Wood v. Housewright, 900 F.2d 1332, 1335-36 (9th Cir. 1990).

When determining whether "exceptional circumstances" exist, the court must consider plaintiff's likelihood of success on the merits as well as the ability of the plaintiff to articulate his claims pro se in light of the complexity of the legal issues involved. Palmer v. Valdez, 560 F.3d 965, 970 (9th Cir. 2009) (district court did not abuse discretion in declining to appoint counsel). The burden of demonstrating exceptional circumstances is on the plaintiff. Id. Circumstances common to most prisoners, such as lack of legal education and limited law library access, do not establish exceptional circumstances that warrant a request for voluntary assistance of counsel.

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

Accordingly, IT IS HEREBY ORDERED that:

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

1	3. Plaintiff's motion for the appointment of counsel (ECF No. 39) is denied without	
2	prejudice.	
3	Dated: August 25, 2014	
4	Fredel J. Newman	
5	/john2719.56d KENDALL J. NEWMAN UNITED STATES MAGISTRATE JUDGE	
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