UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

ABDIKIDAR AHMED, Plaintiff, v. S. RINGLER, Defendant.	No. 2:13-cv-1050 MCE DB P ORDER AND FINDINGS AND RECOMMENDATIONS

Plaintiff is a state prisoner proceeding pro se and in forma pauperis with a civil rights action under 42 U.S.C. § 1983. Plaintiff claims defendant Ringler conducted unnecessary searches of plaintiff's cell on November 21, 2012 and May 7, 2013 in retaliation for plaintiff's submission of grievances regarding Ringler's July 2, 2012 search of his cell. Before the court are plaintiff's motions to stay these proceedings, to supplement his complaint, for the appointment of counsel, for a transcript, and for judicial notice. Defendant opposes each motion. In addition, defendant moves to strike plaintiff's motion for judicial notice and seeks to modify the scheduling order.

For the reasons set forth below, this court denies plaintiff's motions for the appointment of counsel, for a copy of the deposition transcript, and for judicial notice, and denies defendant's motion to strike. The court recommends plaintiff's motions to stay and to supplement the complaint be denied and defendant's motion to modify the scheduling order be granted.

BACKGROUND

I. Allegations in the Complaint

Plaintiff filed his complaint on May 28, 2013. (ECF No. 1.) Therein, plaintiff alleges the following. On July 2, 2012, defendant Ringler as well as Sergeants Ramirez and Clark conducted a two and a half hour search of plaintiff's personal property and housing area at California State Prison at Solano. Sergeant Clark confiscated plaintiff's television and radio, believing they were contraband. Plaintiff showed Sergeant Clark documentation establishing plaintiff's rightful ownership, and Clark subsequently summoned plaintiff to retrieve the seized property. Plaintiff observed that his radio had been damaged due to defendant Ringler's attempt to open it to search for contraband. When plaintiff mentioned this to Sergeant Clark, plaintiff was ordered to leave. Later that day, plaintiff was summoned back to the center complex where Sergeants Ramirez and Clark and defendants Ringler and Scotland were all seated. Plaintiff made a verbal complaint about the prior search and seizure of his property, and defendant Ringler reached over and broke off a piece of plaintiff's radio, saying "There, it's fixed." Immediately thereafter, defendant Scotland warned plaintiff that the searches would continue if he continued to press the issues about which he was verbally complaining. (Compl. (ECF No. 1) at 5-5b.)

Plaintiff pursued a formal inmate grievance about defendants' alleged conduct in the center complex, which prison officials denied. On November 21, 2012, Correctional Officers Henderson and DeStefano conducted a search of plaintiff's living area. Shortly thereafter, defendant Ringler arrived at the scene and went straight to plaintiff's living area. Although Officer Henderson told defendant Ringler he had already searched plaintiff's area, defendant Ringler proceeded to search it again. Plaintiff pursued another formal inmate grievance about defendant Ringler's conduct, which prison officials partially granted by conducting an inquiry. However, the grievance was denied. On May 7, 2013, defendant Ringler and Correctional Officer Ruiz conducted another search of plaintiff's living area and again confiscated more of plaintiff's property. In terms of relief, plaintiff requests damages, and injunctive and declaratory relief. (Id. at 5b-5d.)

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II. Procedural History

When the complaint was screened, the magistrate judge previously assigned to this case found plaintiff stated First Amendment claims against defendants Ringler and Scotland. (ECF No. 9.) In June 2014, defendants moved to dismiss the case based on plaintiff's failure to state a First Amendment claim against each defendant and based on qualified immunity. (ECF No. 17.) The court held that defendant Ringler was protected by qualified immunity from plaintiff's claim that Ringler broke his radio and that defendant Scotland was protected by qualified immunity from plaintiff's claim that Scotland threatened him in retaliation for his verbal complaint about a prior cell search and property seizure. The court held that plaintiff's claims against Ringler for cell searches in retaliation for plaintiff's submission of formal grievances survived the motion to dismiss. (ECF Nos. 26, 27.)

Defendant Ringler filed an answer to the complaint on April 9, 2015. (ECF No. 28.) On April 16, 2015, the court set a schedule for discovery and pretrial motions. (ECF No. 29.) The deadline for conducting discovery expired on July 31, 2015 and the deadline for filing pretrial motions expired on October 23, 2015. Plaintiff's May 21, 2015 request for an extension of the discovery cut-off was denied. (ECF No. 45.)

The motions presently before the court begin with plaintiff's September 17, 2015 motion to "supplement" his complaint and for the appointment of counsel. (ECF No. 40.) Defendant opposes those motions. (ECF Nos. 44, 46.) On September 22, 2015, plaintiff requested that he be provided a copy of the transcript of his deposition. (ECF No. 42.) Defendant opposes that request. (ECF No. 43.) Finally, on November 10, 2015, plaintiff filed a request for judicial notice. (ECF No. 50.) Defendant opposes that request, and moves to strike it. (ECF No. 51.)

The final motion before the court is defendant's October 23, 2015 motion to modify the scheduling order. (ECF No. 47.)

On August 2, 2016, this case was re-assigned to the undersigned magistrate judge. (ECF No. 54.)

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DISCUSSION

I. Motion to Stay

If granted, plaintiff's motion to stay could defer this court's consideration of the other pending motions. Accordingly, the court considers it first.

On October 31, 2016, plaintiff moved to stay these proceedings while the Immigration and Naturalization Service ("INS") determines whether plaintiff should be deported. (ECF No. 55.) Plaintiff states that he is scheduled to be transferred to the custody of the INS within 30 to 60 days. Defendant opposes the stay. (ECF No. 56.) Defendant argues that an indefinite stay will prejudice his ability to litigate this case.

The United States Supreme Court has clearly indicated that "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." Landis v. North American Co., 299 U.S. 248, 254–55 (1936). In this regard, "the proponent of the stay bears the burden of establishing its need." Clinton v. Jones, 520 U.S. 681, 706 (1997).

Plaintiff has failed to show why a stay of these proceedings is necessary. Plaintiff has not shown that he will be unable to litigate this action while he is in federal custody or that he will otherwise be prejudiced in the present case when he is transferred. Therefore, the undersigned will recommend denial without prejudice of plaintiff's motion for a stay of these proceedings.

II. Motion to Supplement Complaint

A. Background

Plaintiff requests permission to file a supplement and an appendix of exhibits to his complaint. He states that he "recently exhausted additional prison grievances to supplement to the [] Original Complaint." (ECF No. 40 at 2.) In the body of his motion, plaintiff states that he has attached two exhibits: the "State Prison Final Review Level of the Director on October 2013 (Log No#SOL-13-01366) and in December 2014 (Log No#SOL-14-00475)." (Id.) While not attached, those exhibits are part of a "Supplemental Complaint and Appendix of Exhibits" filed

the same date. (See ECF No. 41.) In this supplemental complaint, plaintiff appears to explain in more detail the May 2013 search. He now alleges defendant Ringler conducted a strip search, as well as a cell search, at that time. Plaintiff then makes a second claim of "on-going civil rights constitutional violations by defendant Ringler" regarding Ringler's conduct on January 13, 2014. (Id. at 2-3.)

Attached to the supplemental complaint are exhibits reflecting the grievances and appeals plaintiff made regarding cell searches on May 7 and May 13, 2013 (Log No. SOL-13-01366) and regarding retaliatory harassment he alleges by Ringler on January 13, 2014 (Log No. SOL-14-00475). (Id. at 7-32.) It appears that plaintiff's grievance regarding the May 7, 2013 search was denied as being untimely.[1] (Id. at 8.) After an inquiry was conducted at the second level of review regarding the May 13, 2013 search, plaintiff's grievance regarding the May 13 search was denied at the third level of review on October 10, 2013. (Id. at 8-9.) Plaintiff's grievance shows that the complained-of strip search occurred during the May 13 search. (Id. at 12.)

Plaintiff's grievance about Ringler's conduct on January 13, 2014 was denied at the third level of review on December 10, 2014. (Id. at 18.)

Defendant opposes plaintiff's motion to supplement his complaint on the grounds that plaintiff's filing shows plaintiff failed to exhaust his remedies so amendment would be futile, and because plaintiff's delay in moving to supplement the complaint is unjustified and will prejudice defendant if granted. (ECF No. 44.) Defendant also seeks an extension of the deadline for filing dispositive motions.

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[1] The court is not aware, however, whether plaintiff filed a separate, timely grievance regarding the May 7, 2013 search. In his complaint, plaintiff states that he has completed the grievance process for his claims. (Compl. (ECF No. 1) at 4.) He notes that his grievance regarding the July 2, 2012 search was Log No. CSP-S 12-01670 and was denied at the third level. (Id. at 5b.) However, he does not identify the log numbers for his grievances regarding the November 21, 2012 and May 7, 2013 searches. That said, the court notes that a § 1983 plaintiff is not required to show that he has exhausted his administrative remedies in his complaint. Rather, failure to exhaust is an affirmative defense. See Albino v. Baca, 747 F.3d 1162, 1169 (9th Cir. 2014) (en banc).

B. Legal Standards

Where a plaintiff seeks to add claims that arose after the date he filed his complaint, he may move to supplement the complaint. See Rhodes v. Robinson, 621 F.3d 1002, 1006-07 (9th Cir. 2010). Under Federal Rule of Civil Procedure 15(d), "the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented." See Fed. R. Civ. P. 15(d). Rule 15(d) does not require the moving party to satisfy a transactional test, but there must still be a relationship between the claim in the original pleading and the claims sought to be added. Keith v. Volpe, 858 F.2d 467, 474 (9th Cir. 1988). Thus, "[w]hile leave to permit supplemental pleading is favored, it cannot be used to introduce a separate, distinct and new cause of action." Planned Parenthood of Southern Arizona v. Neely, 130 F.3d 400, 402 (9th Cir. 1997) (internal quotation marks and citation omitted); see also Contreraz v. Stockbridge, No. 1:06–cv–01817 LJO SKO PC, 2012 WL 396503, at *1 (E.D. Cal. Feb.7, 2012) (denying plaintiff's motion to file supplemental complaint because his proposed supplement allegations gave rise to a new causes of action); Gonzalez v. Mason, No. C 07–180 SI (pr), 2008 WL 2079195, at *2 (N.D. Cal. May 15, 2008) (denying plaintiff's motion to file supplemental complaint because the proposed supplement included different defendants and new claims). "The purpose of Rule 15(d) is to promote as complete an adjudication of the dispute between the parties as possible by allowing the addition of claims which arise after the initial pleadings are filed." William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co., Inc., 668 F.2d 1014, 1057 (9th Cir. 1981) (internal citations omitted).

Where the plaintiff seeks to add claims that arose prior to filing his complaint, he must move to amend the complaint. Cano v. Taylor, 739 F.3d 1214, 1220 (9th Cir. 2014). The Federal Rules provide that leave to amend pleadings "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). " [T]his policy is to be applied with extreme liberality." Morongo Band of Mission Indians v. Rose, 893 F.2d 1074, 1079 (9th Cir.1990) (citing DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 186 (9th Cir.1987)). However, the Supreme Court has stated that a court

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may decline to grant leave for reasons that are apparent and stated on the record. Foman v. Davis, 371 U.S. 178, 182 (1962).

The standards for granting a motion to supplement or amend are similar. The primary difference is that to amend, plaintiff must file a new complaint. See E.D. Cal. R. 220 (amended complaint be complete in itself without reference to any prior pleading). He need not do so to supplement his complaint with new, related claims.

The Ninth Circuit has interpreted the decision in Foman as identifying "four factors relevant to whether a motion for leave to amend the pleadings should be denied: undue delay, bad faith or dilatory motive, futility of amendment, and prejudice to the opposing party." United States v. Webb, 655 F.2d 977, 980 (9th Cir. 1981). These factors are also examined when considering a motion to supplement the complaint. Keith, 858 F.2d at 474; San Luis & Delta-Mendota Water Auth. v. U.S. Dept. of Interior, 236 F.R.D. 491, 497 (E.D. Cal. May 17, 2006). The factors do not carry equal weight. "[D]elay alone no matter how lengthy is an insufficient for denial of leave to amend." Webb, 655 F.2d at 980. "Prejudice to the opposing party is the most important factor." Jackson v. Bank of Hawai'i, 902 F.2d 1385, 1387 (9th Cir. 1990). "Absent prejudice, or a strong showing of any of the remaining Foman factors, there exists a presumption under Rule 15(a) in favor of granting leave to amend." Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003).

Futility of an amendment can, standing alone, justify denial of a request to file an amended pleading. See Bonin v. Calderon, 59 F.3d 815, 845 (9th Cir. 1995). A proposed amendment is futile if it presents no set of facts that would, even if proven, constitute a valid claim. See Miller v. Rykoff–Sexton, Inc., 845 F.2d 209, 214 (9th Cir. 1988). The standard for assessing whether a proposed amendment is futile is therefore the same as the standard imposed under Federal Rule of Civil Procedure 12(b)(6). Id. In that analysis, the court reviews the complaint for "facial plausibility." "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id.

C. Analysis

Before considering defendant's opposition to plaintiff's motion to supplement, it is worth clarifying the various incidents that appear to be the subject of plaintiff's original and supplemental complaints.

- First, in his original complaint, plaintiff describes a lengthy search of his belongings and living area which occurred on July 2, 2012 and which resulted in the seizure of, and damage to, a radio. Plaintiff states that he filed a grievance, and appeals, regarding this search, which he identifies as Log No. CSP-S 12-01670.
- Second, also in his original complaint, plaintiff appears to challenge searches conducted by defendant Ringler on November 21, 2012 and May 7, 2013. Plaintiff argues that defendant Ringler conducted these November 2012 and May 2013 searches in retaliation for plaintiff's submission of the grievance regarding the July 2, 2012 search.
- Third, in his supplemental complaint, plaintiff raises for the first time a May 13, 2013 search by Ringler. He provides documentation that shows he filed a grievance regarding that search that he appealed through the third level. The denial of his third level appeal is dated October 10, 2013.
- Fourth, also in his supplemental complaint, plaintiff raises a January 13, 2014 search by Ringler. He again shows that he filed a grievance regarding that search, and that he appealed that grievance to the third level of review. The denial of his third level appeal regarding the January 13, 2014 search is dated December 10, 2014.

Defendant's first argument in opposition to plaintiff's motion to supplement is that supplementing the complaint would be futile because plaintiff's new pleading shows that he failed to exhaust his administrative remedies prior to filing the present suit. (ECF No. 44 at 2-4.) Specifically, defendant contends that plaintiff's claim involving the May 7, 2013 search is unexhausted. He also contends plaintiff's two new claims, regarding the May 13, 2013 search and the January 13, 2014 search were unexhausted at the time plaintiff filed his original

complaint herein.

The Prison Litigation Reform Act of 1995 (PLRA) mandates that "[n]o action shall be brought with respect to prison conditions under section 1983 . . . or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). A review of the records before this court does not validate any of defendant's arguments that plaintiff failed to exhaust.

First, with respect to the May 7, 2013 search, the grievance attached to plaintiff's supplemental complaint discussed the May 13, 2013 search and added information about the May 7, 2013 search. It is not clear whether plaintiff intended to challenge both searches through his grievance. The third level review mentioned that the May 7 search was untimely and stated that it would "not be addressed in this response." (ECF No. 41 at 8.) This court recognizes that even if plaintiff did file a separate grievance about the May 7 search, it is unlikely that grievance was resolved through all three levels of review prior to plaintiff's submission of his original complaint, filed here on May 28, 2013 but was signed by plaintiff on May 10, 2013. In any event, the court will not address the question of plaintiff's exhaustion of his original claims at this stage of the proceedings. The Ninth Circuit has made clear that questions of exhaustion are best resolved through a motion for summary judgment. Albino v. Baca, 747 F.3d 1162, 1168 (9th Cir. 2014) (en banc). For this reason, the court also declines to consider plaintiff's request for judicial notice and second supplemental filing (ECF No. 50) regarding his exhaustion of other claims.

Second, plaintiff's two new claims regarding the May 13, 2013[2] and January 13, 2014 searches appear to be sufficiently exhausted because plaintiff completed all levels of

[2] There is some question whether plaintiff's May 13 claim occurred before or after he "filed" his complaint. While the complaint was filed here on May 28, 2013, plaintiff signed it on May 10. Under the Mailbox Rule of Houston v. Lack, 487 U.S. 266 (1988), a pro se prisoner's court filing is deemed filed at the time the prisoner delivers it to prison authorities for forwarding to the court clerk. Douglas v. Noelle, 567 F.3d 1103, 1107 (9th Cir. 2009). It is not clear when plaintiff delivered his complaint to prison authorities. The court need not make that determination for purposes of this order because the court finds below that the prejudice to defendant dictates against permitting plaintiff to add new claims. Therefore, for purposes of this order it does not matter whether the May 13 claim occurred before plaintiff filed his complaint and could be amended into his complaint or whether the May 13 claim occurred after plaintiff filed his complaint and could be supplemented to his complaint.

administrative review before seeking to include them in this action.[3] The Ninth Circuit has specifically permitted the amendment and supplementation of a section 1983 complaint with new claims so long as those claims were exhausted before the plaintiff sought to add them to his case. Rhodes, 621 F.3d at 1006-07; Cano, 739 F.3d at 1220.

Defendant's arguments that plaintiff delayed seeking to add these new claims, to defendant's prejudice, has merit. In his grievances regarding the May 13, 2013 and January 13, 2014 searches, plaintiff complained of the same sort of conduct, searches, conducted by the same person, Officer Ringler, for the same reasons, retaliation, as he did in his original complaint. Therefore, plaintiff had every reason to know these new claims would be relevant to his pending case. Yet, plaintiff did not seek to add the grievance regarding the May 13 search to his complaint until almost two years after the conclusion of his grievance procedures on October 10, 2013. He waited nine months to add the January 13, 2014 search. He knew of these new claims, but failed to add them until over a month after discovery closed on July 31, 2015. Defendant deposed plaintiff during the discovery period regarding the allegations in plaintiff's complaint. (Decl. of Arthur B. Mark III (ECF No. 44-1) ¶¶2-3.) If plaintiff is now permitted to add new allegations, discovery should be re-opened to permit defendant to conduct discovery regarding these issues. The time and expense of re-opening discovery has been recognized by courts as sufficiently prejudicial to prevent the addition of new claims. See Lockheed Martin Corp. v. Network Solutions, Inc., 194 F.3d 980, 986 (9th Cir. 1999) ("A need to reopen discovery and therefore delay the proceedings supports a district court's finding of prejudice from a delayed

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[3] Defendant argues that plaintiff is not asserting new claims regarding the May 13, 2013 and January 13, 2014 searches, but is asserting a single claim of retaliation that was not exhausted when he filed his complaint. Defendant's argument is not sensible. By that measure, a defendant would never be able to exhaust if he is repeatedly subjected to retaliatory conduct. Plaintiff seeks to add to his complaint just the sort of new allegations that the Ninth Circuit permitted the plaintiff to add in Rhodes. In Rhodes, the plaintiff alleged prison guards retaliated against him for exercising his First Amendment rights by pursuing a prison grievance against them. Just like plaintiff in the present case, plaintiff Rhodes sought to add to his action additional retaliatory acts perpetrated by the same defendant guards. 621 F.3d at 1003-04. The Ninth Circuit held that the new claims could be supplemented into the plaintiff's action. Id. at 1007.

motion to amend the complaint."). For these reasons, this court will recommend denial of plaintiff's motion to supplement.

III. Motion for Appointment of Counsel

Plaintiff bases his request for the appointment of counsel on the fact that he is a native of Somalia and is not fluent in English. (ECF No. 40 at 3.) He states that he has been able to file documents thus far only with the help of other inmates. Defendant opposes the motion. (ECF No. 46.) According to defendant's counsel, during plaintiff's almost three-hour deposition, which was conducted in English, "[p]laintiff understood and responded to all of the questions [counsel] asked. At no time did he state that he did not understand any question or could not respond because English was his second language." (Id. at 4.)

The United States Supreme Court has ruled that district courts lack authority to require counsel to represent indigent prisoners in § 1983 cases. Mallard v. United States Dist. Court, 490 U.S. 296, 298 (1989). In certain exceptional circumstances, the district court may request the voluntary assistance of counsel pursuant to 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).

The test for exceptional circumstances requires the court to evaluate the plaintiff's likelihood of success on the merits and the ability of the plaintiff to articulate his claims pro se in light of the complexity of the legal issues involved. See Wilborn v. Escalderon, 789 F.2d 1328, 1331 (9th Cir. 1986); Weygandt v. Look, 718 F.2d 952, 954 (9th Cir. 1983). Circumstances common to most prisoners, such as lack of legal education and limited law library access, do not establish exceptional circumstances that would warrant a request for voluntary assistance of counsel.

This court is sympathetic to plaintiff's difficulties with the English language. However, it appears he has some understanding of English and "the court does not have the resources to appoint counsel for every prisoner with limited English language and reading skills who files a civil rights action." Nguyen v. Bartos, No. 2:10-cv-1461 WBS KJN P, 2012 WL 3589797, at *2 (E.D. Cal. Aug. 20, 2012). In the present case, the court does not find the required exceptional circumstances for the appointment of counsel.

IV. Request for Deposition Transcript

Plaintiff states that he received a copy of his deposition transcript, but was not provided sufficient time by his counselor to read it. As a result, his counselor returned it "un-signed" and "un-read." (ECF No. 42.) Plaintiff asks the court to provide him a copy of the transcript "to read and sign for myself." Plaintiff was notified at that time that "There is no transcript filed on the docket of this case."

To the extent plaintiff is requesting the court order defendant to provide plaintiff a copy of the transcript free of charge, the court will not do so. There is no statutory requirement for the government to provide a litigant proceeding in forma pauperis with a copy of a deposition transcript. See 28 U.S.C. § 1915(d); see also Whittenberg v. Roll, No. 2:04–cv–2313 FCD JFM, 2006 WL 657381, at *5 (E.D. Cal. Mar. 15, 2006) (denying plaintiff's motion to compel defendant to provide him with a copy of the deposition transcript free of charge). Moreover, under Rule 30(f)(3) of the Federal Rules of Civil Procedure, the officer before whom a deposition is taken must provide a copy of the transcript to any party or to the deponent upon payment of reasonable charges therefor. Id. Thus, the court will not order the court reporter, defense counsel, or the defendant to provide plaintiff with a copy of his deposition transcript without charge. Plaintiff must obtain the deposition transcript from the officer before whom the deposition was taken on. See Boston v. Garcia, No. 2:10–cv–1782 KJM DAD, 2013 WL 1165062, at *2 (E.D. Cal. Mar. 20, 2013) (denying plaintiff's request for a court order directing the defendant to provide him with a copy of his deposition transcript). Thus, to the extent that plaintiff seeks a copy of the deposition transcript without charge, plaintiff's request is denied.

To the extent plaintiff is requesting that he be provided an opportunity to examine the original copy of the deposition transcript again, plaintiff has failed to show defendant did not provide him sufficient time to review the transcript previously. If plaintiff wishes to review the deposition transcript, he should contact the court reporter to obtain a copy.

V. Request for Judicial Notice & Motion to Strike

After plaintiff filed a reply to defendant's opposition to plaintiff's motion to supplement the complaint, plaintiff filed a motion entitled "JUDICIAL NOTICE REQUEST" and "2ND

SUPPLEMENTAL PLEADINGS ON SUBMISSION OF EVIDENTIARY DOCUMENTS PROVING EXHAUSTION OF ADMINISTRATIVE REMEDIES." (ECF No. 50.) Therein, plaintiff asks the court to take judicial notice of the attached copies of his grievance and appeals regarding the July 2, 2012 search by defendant Ringler, and others. Defendant opposes the motion and moves to strike this filing as an unauthorized supplemental brief. (ECF No. 51.)

As stated above, the court will not address exhaustion issues at this time. Accordingly, the materials plaintiff seeks the court to judicially notice are not relevant and plaintiff's request will be denied. Because the court denies plaintiff's request, defendant's motion to strike is denied as moot.

VI. Motion to Modify Scheduling Order

In October 2015, defendant requested modification of the scheduling order based on the need to resolve plaintiff's pending motion to supplement the complaint. As discussed above, the court will recommend denial of plaintiff's motion to supplement. Discovery has closed. The only date to be continued is the date for filing pretrial motions. The parties should be permitted thirty days after the district judge's ruling on these recommendations to file any pretrial motion as described in the court's April 16, 2015 scheduling order (ECF No. 29).

For the foregoing reasons, IT IS HEREBY ORDERED as follows:

1. Plaintiff's motion for the appointment of counsel (ECF No. 40) is denied;
2. Plaintiff's motion for a copy of his deposition transcript (ECF No. 42) is denied;
3. Plaintiff's request for judicial notice (ECF No. 50) is denied; and
4. Defendant's motion to strike (ECF No. 51) is denied.

Further, IT IS HEREBY RECOMMENDED that:

1. Plaintiff's motion to stay (ECF No. 55) be denied;
2. Plaintiff's motion to supplement the complaint (ECF No. 40) be denied; and
3. Defendant's motion to modify the scheduling order (ECF No. 47) be granted and the parties be permitted thirty days after the district judge's ruling on these findings and recommendations to file any pretrial motions.

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These findings and recommendations will be submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within fourteen days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. The document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any response to the objections shall be filed and served within seven days after service of the objections. The parties are advised that failure to file objections within the specified time may result in waiver of the right to appeal the district court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

Dated: January 3, 2017

DEBORAH BARNES
UNITED STATES MAGISTRATE JUDGE

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