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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

TED DARNELL DANIELS,

Plaintiff,

v.

ERIC ARNOLD, et al.,

Defendants.

No. 2:16-cv-0551 KJM AC P

ORDER

I. Introduction

Plaintiff is a state prisoner incarcerated at California State Prison Solano (CSP-SOL), proceeding pro se and in forma pauperis with this civil rights action filed pursuant to 42 U.S.C. § 1983. This order addresses plaintiff’s request that the United States Marshal personally serve his proposed subpoenas duces tecum, and plaintiff’s request for appointment of counsel. For the reasons set forth below, both motions are denied without prejudice but counsel for defendant Lotersztain is directed to provide plaintiff with a copy of his medical records that defendant independently subpoenaed.

II. Request for Service of Subpoenas Duces Tecum

By order filed April 30, 2020, this court granted plaintiff’s request for three signed subpoena forms, and informed plaintiff of the showing he must make to obtain the assistance of

1 the United States Marshal in serving the completed subpoenas. ECF No. 52. In response,¹
2 plaintiff filed one completed subpoena that seeks a full copy of his medical records, which were
3 previously obtained by counsel for defendant Dr. Mariana Lotersztain,² Deputy California
4 Attorney General Amie McTavish (hereafter “defense counsel”). Plaintiff requests that the
5 subpoena be served on: (1) defendant Lotersztain, through defense counsel, id., and (2) Mr. Marc
6 A. Weeks, Supervisor HRT II, CSP-SOL Health Records Unit. Id. at 7; see also ECF No. 51.
7 Plaintiff also requests issuance of a subpoena on the California Medical Board to obtain any
8 evidence that defendant Lotersztain has been professionally disciplined.

9 The extended discovery deadline in this case is now July 31, 2020. ECF No. 49. Due to
10 this extended time, plaintiff’s prior motion for discovery was denied without prejudice. ECF No.
11 52. As plaintiff was previously informed, to obtain service of a proposed subpoena by the U.S.
12 Marshal, a pro se plaintiff must clearly identify the proposed recipient and the requested
13 documents, and must demonstrate that the requested documents are relevant to the issues in the
14 case and obtainable through the person subpoenaed. ECF No. 52 at 2 (citing Fed. R. Civ. P. 45).

15 Review of plaintiff’s prior filings demonstrates that he has been attempting for some time
16 to obtain a complete copy of his medical records from defense counsel, as well as to obtain an
17 Olson review³ of his medical records. See ECF Nos. 48, 51. In response to plaintiff’s second
18 request for production propounded on defendant Lotersztain, ECF No. 51 at 13-7, defense
19 counsel responded in part that she would provide plaintiff with a copy of his medical records, id.
20 at 27-9, a representation plaintiff has acknowledged, id. at 2:4. However, the status of this
21 production remains unclear.

22 Plaintiff’s request from defendant for a copy of his medical records, which were
23

24 ¹ Plaintiff’s request for service of his proposed subpoenas duces tecum and supporting
25 documents are not on the court’s docket but have been submitted only for this court’s
consideration.

26 ² Findings and Recommendations are pending that recommend the dismissal of all other
defendants in this action. See ECF No. 27.

27 ³ An Olson review refers to the right of California inmates to inspect and copy non-confidential
28 records maintained in their central and medical files, as established by In re Olson, 37 Cal. App.
3d 783 (1974).

1 independently subpoenaed by defense counsel, was properly made in his second production
2 request pursuant to Rule 34, Federal Rules of Civil Procedure. In contrast, subpoenas under Rule
3 45, Federal Rules of Civil Procedure, are intended for nonparties. See Fed. R. Civ. P. 34(c).
4 Therefore, plaintiff's proposed Rule 45 subpoena is inappropriately directed to defendant
5 Lotersztain and will be denied on that basis.

6 However, in light of defense counsel's agreement to provide plaintiff with a copy of his
7 medical records, the court will, in part, construe the instant motion as a motion to compel
8 discovery pursuant to Rule 37, Federal Rules of Civil Procedure. Defense counsel will be
9 directed to provide plaintiff with a complete copy of his medical records, as obtained by
10 defendant, within fourteen days after the filing date of this order, and to file and serve a statement
11 of compliance. If the records were previously produced to plaintiff, defense counsel shall so
12 state.

13 Plaintiff has also actively sought an Olson review of his medical records, and has
14 corresponded directly with Marc Weeks, Supervisor HRT II in the CSP-SOL Health Records
15 Unit. See e.g. ECF No. 48 at 6-19; ECF No. 51 at 13-23, 33-5. Plaintiff's exhibits indicate that
16 the most recent correspondence was plaintiff's April 10, 2020 response to Weeks' April 2, 2020
17 memorandum announcing a temporary suspension of Olson reviews of healthcare records due to
18 the current COVID-19 health crisis *unless* an inmate can show, with "substantiation," that the
19 records are needed "urgently for a legal matter." See ECF No. 51 at 33-5 (includes plaintiff's
20 March 3, 2020 request); ECF No. 48 at 14. Plaintiff's response noted the instant legal proceeding
21 and was forwarded to Weeks on April 13, 2020. ECF No. 51 at 35. It remains unclear whether
22 plaintiff has obtained access to his medical records through an Olson review.

23 As a general rule, the court will not issue a subpoena for a prisoner's prison medical or
24 other records unless he has demonstrated an inability to obtain them through regular prison
25 procedures. See e.g. Glass v. Diaz, 2007 WL 2022034, at *4, 2007 U.S. Dist. LEXIS 53535
26 (E.D. Cal. July 9, 2007) (where prison medical records are "equally available to plaintiff, plaintiff
27 must attempt to obtain them through the proper prison channels" before seeking court
28 intervention based on a "showing that he has been unable to obtain these records on his own");

1 Valenzuela v. Smith, 2006 WL 403842, at *2, 2006 U.S. Dist. LEXIS 6078 (E.D. Cal. Feb. 16,
2 2006) (“[d]efendants cannot be compelled to produce documents . . . that are equally available to
3 plaintiff in his prison medical file”); Singleton v. Hedgepath, 2011 WL 1806515, at *8 (E.D. Cal.
4 May 10, 2011) (denying plaintiff’s motion to compel defendants’ production of documents from
5 his prison file because the documents were “equally accessible to both parties”); Cortinas v.
6 Huerta, 2019 WL 6050833, at *4, 2019 U.S. Dist. LEXIS 198712 (E.D. Cal. Nov. 15, 2019)
7 (declining to compel defendants to produce plaintiff’s prison medical records without a showing
8 of plaintiff’s “efforts to request and access these files through an Olson review or a subpoena
9 duces tecum”).

10 Thus, a subpoena may be served on Mr. Weeks only upon a showing that plaintiff’s
11 efforts to review and copy his medical records through regular prison procedures have been
12 unsuccessful. See id. Although plaintiff has submitted numerous exhibits demonstrating such
13 efforts, it is plaintiff’s responsibility to clearly identify the chronology and substance of these
14 efforts, including the precise medical records sought, the responses plaintiff received, and
15 whether plaintiff has exhausted all available procedures. For example, although plaintiff’s
16 proposed subpoena to Mr. Weeks generally seeks “medical records” in his possession
17 “concerning” plaintiff, his most recent correspondence with the CSP-SOL HRT (effectively Mr.
18 Weeks) indicates that plaintiff is seeking limited medical records. See ECF No. 51 at 33. Due to
19 the lack of clarity regarding plaintiff’s efforts, the responses he received and the precise medical
20 records he continues to seek, his request for service of a subpoena on Mr. Marc Weeks will be
21 denied without prejudice.

22 Nevertheless, in light of the temporary suspension of Olson review requests at CSP-SOL
23 due to the COVID-19 pandemic, this order shall serve as further substantiation that plaintiff’s
24 medical records are relevant to the instant legal proceeding which has a discovery deadline of
25 July 31, 2020.

26 Finally, plaintiff’s proposed subpoena directed to the California Medical Board does not
27 meet the threshold requirements of relevance and unavailability by other means. Defendant
28 Lotersztain’s professional disciplinary history, if any, is not relevant to the quality of medical care

1 she provided plaintiff. Moreover, some such information is publicly available by a search of
2 defendant's name on the Board's website⁴ and through further inquiry by telephone or letter.⁵
3 Indeed, it appears that plaintiff has made such an inquiry in letter form. See ECF No. 51 at 10.
4 For these reasons, plaintiff's request for service of a subpoena on the California Medical Board
5 will be denied.

6 III. Request for Appointment of Counsel

7 Plaintiff also requests appointment of counsel, particularly to assist him in obtaining
8 discovery if the court rejects plaintiff's proposed subpoenas. ECF No. 53. Plaintiff argues, inter
9 alia, that appointed counsel could retain a medical expert who would address the complex
10 medical issues in this case concerning the use of topical steroids. Plaintiff also notes that he is
11 facing a potential dispute concerning his current prescription for topical steroids. In addition,
12 plaintiff notes his indigence and lack of access to the prison law library due to the current
13 COVID-19 health crisis. This is plaintiff's first request for appointment of counsel.

14 District courts are without authority to require an attorney to represent an indigent
15 prisoner in a civil rights case. Mallard v. United States District Court, 490 U.S. 296, 298 (1989)
16 Although the district court may request the voluntary assistance of counsel pursuant to 28 U.S.C.
17 § 1915(e)(1), this is appropriate only in certain "exceptional circumstances." Terrell v. Brewer,
18 935 F.2d 1015, 1017 (9th Cir. 1991); Wood v. Housewright, 900 F.2d 1332, 1335-36 (9th Cir.
19 1990). When determining whether "exceptional circumstances" exist, the court must consider
20 plaintiff's likelihood of success on the merits as well as his ability to articulate his claims pro se
21 in light of the complexity of the legal issues involved. Palmer v. Valdez, 560 F.3d 965, 970 (9th
22 Cir. 2009). The burden of demonstrating exceptional circumstances is on the plaintiff. Id.
23 Circumstances common to most prisoners, such as lack of legal education and limited law library
24 access, do not establish exceptional circumstances supporting appointment of counsel. Id.

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26 ⁴ See https://www.mbc.ca.gov/Breeze/License_Verification.aspx City of Sausalito v. O'Neill,
27 386 F.3d 1186, 1224 n.2 (9th Cir. 2004) ("We may take judicial notice of a record of a state
28 agency not subject to reasonable dispute."); see also Fed. R. Evid. 201 (this court may take
judicial notice of facts that are capable of accurate determination by sources whose accuracy
cannot reasonably be questioned).

⁵ See https://www.mbc.ca.gov/Consumers/Public_Disclosure.aspx

1 In the present case, the court does not find the required exceptional circumstances at this
2 time. Proceeding pro se, plaintiff has propounded detailed and substantive discovery requests on
3 defendant, while also independently pursuing the information he seeks through an Olson review
4 and from the California Medical Board. Appointed counsel would not be of significant assistance
5 in the discovery process, and whether appointed counsel could obtain the court's approval for
6 expert witness fees is not a foregone conclusion. Moreover, as plaintiff himself notes, "this case
7 involves simple and straightforward facts concerning two distinct acts of 'Deliberate
8 Indifference[.]' Plaintiff [has] these certain specific time[s] and date[s] when he was prescribed
9 treatment with Prednisolone corticosteroid and the time[s] and [date[s] he did not." ECF No. 53
10 at 1. Hence, while it is not possible at this juncture to assess plaintiff's likelihood of success on
11 the merits of his claims, he has demonstrated that he is capable of articulating and pursuing his
12 claims pro se in light of the complexity of the legal issues involved. Therefore, plaintiff's instant
13 motion for appointment of counsel will be denied without prejudice.

14 IV. Conclusion

15 Accordingly, for the foregoing reasons, IT IS HEREBY ORDERED that:

16 1. Plaintiff's motion for an order directing the United States Marshal to serve plaintiff's
17 proposed subpoenas duces tecum, ECF No. 55, is: (a) denied without prejudice as to defendant
18 Lotersztain, subject to the directive below; (b) denied without prejudice to the custodian of CSP-
19 SOL's prison medical records (currently Mr. Marc Weeks); and (c) denied with prejudice as to
20 the California Medical Board.

21 2. Plaintiff's motion directed to defendant Lotersztain is construed, in part, as a motion to
22 compel discovery under Rule 37, Federal Rules of Civil Procedure; so construed, defense counsel
23 shall, within fourteen (14) days after the filing date of this order, provide plaintiff with a copy of
24 his medical records as independently obtained by defendant, and shall file and serve a statement
25 reflecting such production.

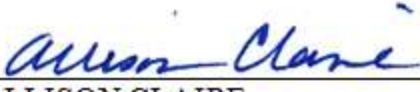
26 3. Plaintiff's motion for appointment of counsel, ECF No. 53, is denied without
27 prejudice.

28 4. This order shall serve as substantiation to prison officials that plaintiff's medical

1 records are relevant to the instant legal proceeding which has a discovery deadline of July 31,
2 2020.

3 IT IS SO ORDERED.

4 DATED: June 8, 2020

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6 ALLISON CLAIRE
7 UNITED STATES MAGISTRATE JUDGE
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