

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF CALIFORNIA

3 LARRY LEWIS HIGHTOWER,
4 Plaintiff,
5 v.
6 EDWARD BIRDSONG,
7 Defendant.
8

Case No. [15-cv-03966-YGR](#) (PR)

ORDER DENYING IN PART AND GRANTING IN PART PLAINTIFF'S REQUEST FOR EXTENSION OF TIME TO FILE OPPOSITION TO MOTION FOR SUMMARY JUDGMENT; AND DENYING PLAINTIFF'S REQUEST FOR INJUNCTIVE RELIEF

9 **INTRODUCTION**

10 Plaintiff, a state prisoner currently incarcerated at Salinas Valley State Prison ("SVSP"),
11 filed a *pro se* civil rights complaint under 42 U.S.C. § 1983. He alleged a claim of deliberate
12 indifference to medical needs against Defendant SVSP Physician Edward Birdsong, M.D.,
13 stemming from severe complications from treatment Plaintiff received from February and April
14 2013. Dkt. 1 at 3. On January 6, 2016, the Court ordered service of process on Defendant. Dkt.
15 9.

16 Before the Court is Plaintiff's motion for a preliminary injunction. Dkt. 16.

17 Also before the Court is Defendant's motion for summary judgment. Dkt. 24. Plaintiff did
18 not file a timely opposition to the motion for summary judgment, and instead, on October 19,
19 2016, he filed a document entitled, "Plaintiff's Motion for Extension of Time to File Response
20 [sic] to Defendant[']s Motion for Summary Judgment." Dkt. 26.

21 The Court will resolve Plaintiff's pending motions below.

22 **I. PLAINTIFF'S MOTION FOR AN EXTENSION OF TIME TO FILE OPPOSITION**
23 **TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

24 In his "Motion for Extension of Time to File Response [sic] to Defendant[']s Motion for
25 Summary Judgment," Plaintiff makes a conclusory argument that outstanding discovery issues
26 prevent him from filing an opposition to Defendant's motion for summary judgment. *Id.* at 4.
27 Specifically, Plaintiff claims that he served "discovery documents on Defendant Birdsong" on
28 September 7, 2016, and that these "discovery documents are needed in order to oppose

1 Defendant’s motion for summary judgment.” *Id.* at 5. Thus, the Court construes Plaintiff’s
2 motion as a request for a continuance pursuant to Federal Rule of Civil Procedure 56(d), which
3 involves a procedure by which a party may avoid summary judgment when such party has not had
4 sufficient opportunity to discover affirmative evidence necessary to oppose the motion. *See*
5 *Garrett v. San Francisco*, 818 F. 2d 1515, 1518 (9th Cir. 1987). In particular, Rule 56(d) provides
6 that a court may deny a summary judgment motion and permit the opposing party to conduct
7 discovery where it appears that the opposing party, in the absence of such discovery, is unable to
8 present facts essential to opposing the motion. *See Fed. R. Civ. P. 56(d).*

9 Defendant opposes Plaintiff’s request under Rule 56(d) and argue that Plaintiff failed to
10 comply with the requirements of Rule 56(d), stating as follows:

11 [Plaintiff’s] brief and conclusory declaration does not identify the
12 facts that the discovery would provide. He has not shown that the
13 facts exist. He has not shown that the facts to be obtained from
14 discovery are essential to oppose the motion for summary judgment.
15 Plaintiff has not shown that the information he wishes to obtain from
16 Dr. Birdsong would have any effect on the court’s determination of
17 Defendant[’]s motion for summary judgment.

18 Dkt. 27 at 4 (brackets added). Furthermore, Defendant argues that Plaintiff has not been diligent
19 in seeking discovery. *Id.* at 5. Defendant claims that while Plaintiff had filed the instant
20 complaint “more than fourteen months ago,” it was “undisputed that Plaintiff only recently
21 propounded discovery.” *Id.* Defendant argues that “[i]t is not an abuse of discretion to deny a
22 request to defer consideration of a motion for summary judgment where, as here, the movant has
23 failed to diligently pursue discovery in the past.” *Id.* (citing *California Union Ins. Co. v. Am.*
24 *Diversified Sav. Bank*, 914 F.2d 1271, 1278 (9th Cir. 1990) (internal citations omitted)).

25 Thereafter, Plaintiff filed a reply to Defendant’s opposition. Dkt. 28. Plaintiff claims that
26 he is seeking “initial discovery,” but he does not elaborate on what discovery he is seeking and
27 why such discovery is necessary to oppose Defendant’s motion for summary judgment. *Id.* at 1.
28 Instead, Plaintiff again makes a conclusory statement that “[t]he discovery sought is needed to
oppose the Defendant[’]s motion for summary judgment.” *Id.* at 2. Finally, Plaintiff states that if
the Court denies his Rule 56(d) motion, then he requests an extension of thirty days (from the date
of the Court’s ruling) to file his response to Defendant’s motion for summary judgment.

1 Rule 56(d) allows the Court to defer consideration of a motion where “a nonmovant shows
2 by affidavit or declaration that, for specified reasons, it cannot represent facts essential to justify
3 its opposition.” To obtain relief under Rule 56(d), “[t]he requesting party must show: (1) it has set
4 forth in affidavit form the specific facts it hopes to elicit from further discovery; (2) the facts
5 sought exist; and (3) the sought-after facts are essential to oppose summary judgment.” *Family*
6 *Home & Fin. Ctr., Inc. v. Fed. Home Loan Mortg. Corp.*, 525 F.3d 822, 827 (9th Cir. 2008).

7 Here, Plaintiff failed to file the required affidavit setting forth specific facts he hopes to
8 elicit from discovery, a deficiency that itself justifies denying the instant Rule 56(d) request.
9 Specifically, Plaintiff fails to describe the specific facts that would be revealed or why this
10 discovery would preclude summary judgment. “Failure to comply with the requirements of Rule
11 [56(d)] is a proper ground for denying discovery and proceeding to summary judgment.” *Brae*
12 *Transp., Inc. v. Coopers & Lybrand*, 790 F.2d 1439, 1443 (9th Cir. 1986). Therefore, Plaintiff’s
13 request for a continuance pursuant to Rule 56(d) is DENIED.

14 However, the Court finds that a brief extension of time for Plaintiff to file his opposition is
15 warranted. Accordingly, Plaintiff’s “Motion for Extension of Time to File Response [sic] to
16 Defendant[’]s Motion for Summary Judgment” is DENIED in part and GRANTED in part. Dkt.
17 26. As mentioned above, Plaintiff’s request for a continuance pursuant to Rule 56(d) is DENIED.
18 However, the Court GRANTS Plaintiff’s alternative request for a brief extension of time to file his
19 opposition to the motion for summary judgment. The parties shall abide by the briefing schedule
20 outlined below.

21 **II. PLAINTIFF’S MOTION FOR A PRELIMINARY INJUNCTION**

22 On April 21, 2016, Plaintiff filed an *ex parte* motion for a temporary restraining order
23 (“TRO”) in which he contended that he had an appointment at the SVSP Correctional Treatment
24 Center on March 29, 2016, but he refused to be examined when he found the appointment was
25 with Defendant. Dkt. 16 at 1-2. Plaintiff further alleges that he needs to be examined for
26 “medical issues resultive [sic] of the prior medical treatment by Defendant Birdsong.” *Id.* at 1.
27 However, Plaintiff claims that he “should not be denied further medical treatment proximate of
28 refusing healthcare services from Defendant Birdsong.” *Id.* at 2. On May 9, 2016, Defendant

1 filed a response to the motion for a TRO. Dkt. 17. However, in an Order dated May 11, 2016, the
2 Court determined that Defendant’s response was not supported with adequate factual
3 documentation. Dkt. 18 at 1. The Court then directed Defendant to file further briefing on the
4 motion for a TRO. *Id.* at 2. Thereafter, Defendant filed a second opposition to Plaintiff’s motion
5 for a TRO along with his declaration. Dkts. 19, 19-1. In his declaration, Defendant claims that he
6 “does not treat [Plaintiff] directly.” Dkt. 19 at 3; Birdsong Decl. ¶ 3. Defendant further claims
7 that Plaintiff has “ready access to the ‘D’ Yard physician and is not being denied medical
8 treatment” at “the ‘D’ Yard Medical Clinic, which, except on rare occasions, is staffed by another
9 physician.” Dkt. 19 at 3; Birdsong Decl. ¶ 5.

10 “A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on
11 the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the
12 balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v.*
13 *Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). *Winter* did not, however,
14 completely reject the validity of the sliding scale approach to preliminary injunctions. *Alliance for*
15 *the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134 (9th Cir. 2011). Under the “sliding scale”
16 approach used in the Ninth Circuit—also dubbed the “serious question” test in *Alliance for Wild*
17 *Rockies*—“the elements of the preliminary injunction test are balanced, so that a stronger showing
18 of one element may offset a weaker showing of another.” *Id.* at 1131. Thus, even after *Winter*,
19 “serious questions going to the merits and a hardship balance that tips sharply toward the plaintiff
20 can support issuance of an injunction, assuming the other two elements of the *Winter* test are also
21 met.” *Id.* at 1132 (citations and internal quotation marks omitted).

22 Plaintiff’s motion for preliminary injunction is DENIED. Dkt. 16. Plaintiff has not
23 satisfied the *Winter* standard for a preliminary injunction because he has not established a
24 likelihood of success on the merits of his deliberate indifference claim. The record shows that
25 Defendant does not treat Plaintiff directly, and that Plaintiff has ready access to the “D” Yard
26 physician and is not being denied medical treatment. Birdsong Decl. ¶¶ 3, 5. Plaintiff also has not
27 satisfied the *Alliance for Wild Rockies* standard because: (1) Plaintiff does not face irreparable
28 harm in the absence of an injunction—the record shows he obtains medical treatment, as

1 necessary, even when he refuses treatment from Defendant, because the “D” Yard Medical Clinic
2 is staffed by another physician, *see* Birdsong Decl. ¶ 4; and (2) granting Plaintiff’s request to
3 require the CDCR to prohibit Defendant from providing any and all health care services to
4 Plaintiff during this litigation is too broad a request that would adversely impact SVSP’s
5 operations and its ability to offer medical treatment to Plaintiff and its inmates, especially in light
6 of the fact that on rare occasions, “it is possible that [Defendant] would see [Plaintiff] for [a]
7 follow-up appointment” when Defendant “occasionally” fills in for the “D” Yard physician if he is
8 absent, *see id.* Finally, to grant such a request from Plaintiff would result in the Court interfering
9 with the ordinary day-to-day operations of the prison, which generally federal courts are
10 discouraged from doing. *See Turner v. Safley*, 482 U.S. 78, 84-85 (1987) (“Running a prison is an
11 inordinately difficult undertaking that requires expertise, planning, and the commitment of
12 resources, all of which are peculiarly within the province of the legislative and executive branches
13 of government. Prison administration is, moreover, a task that has been committed to the
14 responsibility of those branches, and separation of powers concerns counsel a policy of judicial
15 restraint. Where a state penal system is involved, federal courts have . . . additional reason to
16 accord deference to the appropriate prison authorities.”)

17 Accordingly, Plaintiff’s motion for a TRO, which has been construed as a motion for a
18 preliminary injunction, is DENIED. Dkt. 16.

19 CONCLUSION

20 For the reasons outlined above, the Court orders as follows:

21 1. Plaintiff’s “Motion for Extension of Time to File Response [sic] to Defendant[’]s
22 Motion for Summary Judgment” is DENIED in part and GRANTED in part. Dkt. 26. Plaintiff’s
23 request for a continuance pursuant to Rule 56(d) is DENIED. However, Plaintiff’s request for a
24 brief extension of time to file his opposition is GRANTED. The parties shall abide by the
25 following briefing schedule:

26 a. No later than **thirty (30) days** from the date of this Order, Plaintiff shall file
27 his opposition to Defendant’s motion for summary judgment.

28 b. Defendant shall file a reply no later than **fourteen (14) days** from the date

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the opposition is filed.

c. **No further extensions of time will be granted absent extraordinary circumstances.**

2. Plaintiff's motion for a TRO, which has been construed as a motion for a preliminary injunction, is DENIED. Dkt. 16.

3. This Order terminates Docket Nos. 16 and 26.

IT IS SO ORDERED.

Dated: January 10, 2017



YVONNE GONZALEZ ROGERS
United States District Judge