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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

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9 Timothy Paul Olmos,

No. 10-CV-2564-PHX-GMS

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Plaintiff,

ORDER

11

vs.

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13 Charles Ryan, et al.,

13

14 Defendants.

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16 Pending before the Court are several motions filed by Plaintiff: 1) Motion for Class
17 Action Certification and Appointment of Counsel (Doc. 53); 2) Motion for District Court
18 Judge to Vacate Orders of Magistrate Judge and Rule on Underlying Motions (Doc. 74); 3)
19 Motion for District Court Judge to Vacate Order of Magistrate (Doc. 88); and 4) Motion for
20 Cease and Desist Order upon Magistrate (Doc. 92). For the reasons discussed below,
21 Plaintiff's motions are denied.

22

BACKGROUND

23

24 On November 28, 2010, Plaintiff Timothy Olmos, who is confined in the Arizona
25 State Prison Complex-Florence, filed his initial complaint in this action alleging numerous
26 violations by Defendants of his Constitutional rights. In that complaint, Plaintiff sought to
27 represent not only himself, but also several other named inmates and "all others that are
28 similarly situated." (Doc. 2 at 1). The Court interpreted this as an "attempt[] to bring this
action in part as a class action." (Doc. 11 at 4). Because Plaintiff is not a licensed attorney

1 and therefore cannot represent other plaintiffs, much less represent a class, the Court
2 determined that “this action will not be allowed to proceed as a class action.” (*Id.* at 5).

3 On March 14, 2011, Plaintiff filed his First Amended Complaint. (Doc. 21). The First
4 Amended Complaint lists Olmos as the sole plaintiff and alleges fifteen counts for relief,
5 including numerous claims of cruel and unusual punishment pursuant to the Eighth and
6 Fourteenth Amendments; various claims of violation of the right to adequate, meaningful
7 access to the courts pursuant to the First, Fifth, and Fourteenth Amendments; claims of
8 violation of the rights of due process, equal protection and freedom from unconstitutional
9 takings pursuant to the Fifth and Fourteenth Amendments; claims of violation of the right to
10 be free from unsafe work conditions pursuant to the Fifth, Eighth, and Fourteenth
11 Amendments; and claims of violations of the right to free speech under the First Amendment.
12 (*Id.*).

13 On May 5, 2011, the Court dismissed all defendants to Plaintiff’s complaint except
14 for Defendants Charles L. Ryan and Allen Ortega and referred the action fo Magistrate Judge
15 Mark E. Aspey for “all pretrial proceedings as authorized under 28 U.S.C. § 636(b)(1).”
16 (Doc. 27). On September 26, 2011, Defendants answered Plaintiff’s amended complaint, and
17 on October 4, 2011, Magistrate Judge Aspey issued a scheduling order, requiring that
18 discovery be completed by April 6, 2012, and that dispositive motions be filed by June 29,
19 2012. (Doc. 39).

20 On November 11, 2011, Plaintiff filed a Motion for Class Action Certification and
21 Appointment of Counsel. (Doc. 53). The class for which Plaintiff seeks certification is “all
22 male and female prisoners committed to ADC’s [i.e. Arizona Department of Corrections’]
23 legal custody.” (Doc. 53 at 3). On January 12, 2012, Magistrate Judge Aspey issued an R &
24 R recommending that the motion for class certification be denied. (Doc. 70).

25 On January 27, 2012, Plaintiff filed a Motion for District Court Judge to Vacate
26 Orders of Magistrate Judge, in which Plaintiff requests that the Court vacate its referral of
27 this action to the magistrate judge on the grounds that Plaintiff did not consent to the referral.
28 (Doc. 74). Plaintiff also moves that the Court vacate several of the magistrate judge’s orders

1 and issue an order that he “cease and desist from making any future rulings in this case.”
2 (Docs. 74, 88, 92). On February 2, 2012, Plaintiff filed a Motion to District Court Judge to
3 Reset Scheduling Order. (Doc. 75). The Court will address each outstanding motion in turn.

4 DISCUSSION

5 I. Motion for Class Action Certification

6 A. Legal Standard

7 A class may not be certified unless it meets each of the four requirements of Rule
8 23(a), typically referred to as numerosity, commonality, typicality, and adequacy of
9 representation. FED. R. CIV. P. Rule 23(a). The party seeking certification bears the burden
10 of demonstrating that it has met all of these requirements, and “the trial court must conduct
11 a ‘rigorous analysis’” to determine whether it has met that burden. *Zinser v. Accufix Research*
12 *Inst.*, 253 F.3d 1180, 1186 (9th Cir. 2001) (quoting *Velentino v. Carter-Wallace, Inc.*, 97 F.3d
13 1227, 1233 (9th Cir. 1996)).

14 B. Analysis

15 In a February 9, 2011 Order, the Court interpreted Plaintiff’s initial complaint as an
16 “attempt[] to bring this action in part as a class action.” (Doc. 11 at 4). Because Plaintiff is
17 not an attorney and could not provide adequate representation for the class, the Court held
18 that “this action will not be allowed to proceed as a class action.” (*Id.* at 5). On November
19 22, 2011, Plaintiff filed a more overt motion for class certification. (Doc. 53). Magistrate
20 Judge Aspey has issued an R & R recommending that Plaintiff’s motion for class
21 certification be denied under the “law of the case” doctrine, given the Court’s February 9
22 Order. (Doc. 70 at 5–6).

23 Plaintiff objects to the R & R, arguing that the Court erred in its February 9, 2011
24 Order “by presuming that Olmos had moved for class certification” in his original complaint
25 and accompanying filings. (Doc. 73 at 2). “Although ‘law of the case’ is not an inexorable
26 command, prior decision of legal issues should be followed unless there is substantially
27 different evidence at a subsequent trial, new controlling authority, or the prior decision was
28 clearly erroneous and would result in injustice.” *Handi Inv. Co. v. Mobil Oil Corp.*, 653 F.2d

1 391, 392 (9th Cir. 1981) (internal quotation omitted). Plaintiff argues that the Court’s prior
2 decision was “clearly erroneous” and therefore that the law of the case doctrine cannot
3 attach. (Doc. 73 at 3).

4 The Court’s construal of Plaintiff’s initial filings as a motion for class certification
5 was not clearly erroneous. Plaintiff contends that he did not even know at the time he
6 submitted his complaint of the need for class certification, and that under *Estelle v. Gamble*,
7 his complaint should have been “liberally construed” in his favor. 429 U.S. 97, 106 (U.S.
8 1976) (internal quotations omitted). *Estelle*, however, was a case in which the Supreme Court
9 addressed the *factual* allegations a plaintiff must include in a complaint for it to survive a
10 Rule 12(b)(6) motion. *Id.* (“[A] pro se complaint, however inartfully pleaded, must be held
11 to less stringent standards than formal pleadings drafted by lawyers and can only be
12 dismissed for failure to state a claim if it appears beyond doubt that the plaintiff can prove
13 no set of facts in support of his claim which would entitle him to relief.”). The Court in
14 *Estelle* did not state that courts must give *pro se* litigants procedural leeway. Rather, as held
15 by the Ninth Circuit, “[a]lthough [the Court] construe[s] pleadings liberally in their favor, pro
16 se litigants are bound by the rules of procedure.” *Ghazali v. Moran*, 46 F.3d 52, 54 (9th Cir.
17 1995) (citing *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987)). Plaintiff is not entitled to
18 leeway based on his ignorance of class action procedures.

19 Moreover, even had the Court been in error to construe Plaintiff’s initial filing as a
20 class certification motion, Plaintiff’s instant certification motion would fail for the same
21 reason his initial motion failed, namely Plaintiff’s failure to procure adequate representation
22 for the proposed class. *See* FED. R. CIV. P. Rule 23(a)(4). The party seeking certification
23 bears the burden of demonstrating adequate representation. *Zinser*, 253 F.3d at 1186.
24 Because Plaintiff is not represented by counsel, and because he may not appear as an attorney
25 for other persons in the class, there is no adequate representation for the proposed class. *See*
26 *McShane v. United States*, 366 F.2d 286, 288 (9th Cir. 1966) (non-lawyer had no authority
27 to appear as an attorney for other persons in a purported class action). The Court will deny
28 Plaintiff’s motion for class certification.

1 **II. Motion to Appoint Counsel**

2 Plaintiff next requests that the Court appoint counsel for him. “[T]here is no
3 constitutional right to appointed counsel in civil-rights cases.” *Wright v. Director of*
4 *Corrections*, 443 Fed. Appx. 289, 293 (9th Cir. 2011). However, “*in exceptional*
5 *circumstances*, the court may request counsel to voluntarily provide representation.” *Id.*
6 (emphasis added). “In deciding whether to appoint counsel . . . the district court must
7 evaluate both [1] the likelihood of success on the merits and [2] the ability of the petitioner
8 to articulate his claims *pro se* in light of the complexity of the legal issues involved.” *Id.*
9 (citing *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991) (“Neither of these factors is
10 dispositive and both must be viewed together before reaching a decision.”)).

11 In the magistrate judge’s R & R, he recommends that Plaintiff’s motion to appoint
12 counsel be denied. (Doc. 70 at 6). As Plaintiff alludes to in his objection to the R & R, the
13 magistrate judge does not, in recommending this denial, address the likelihood of success on
14 the merits or the ability of Plaintiff to articulate his claims *pro se*. (*See id.*). Having
15 considered both these elements, however, it does not appear at this time that exceptional
16 circumstances are present that would require the appointment of counsel in this case. Plaintiff
17 is in no different position than most other *pro se* prisoner litigants. The Court will therefore
18 deny Plaintiff’s motion to appoint counsel.

19 Plaintiff alternatively contends that he is entitled to representation under Federal Rule
20 of Civil Procedure 23(g), which states that “a court that certifies a class must appoint class
21 counsel.” Rule 23(g), however, “contemplates appointment of class counsel from among the
22 lawyers representing the members of the class *after* the class is certified.” *Ayazi v. New York*
23 *City Bd. of Educ.*, 2010 WL 4789403 at *2 (E.D.N.Y. Nov. 17, 2010) (emphasis in original).
24 Accordingly, this Rule “does not provide for appointment of class counsel to represent a pro
25 se Plaintiff before class certification has taken place.” *Id. See also Day v. Wall*, 2008 WL
26 4773054, at *2 (D.R.I. Oct. 20, 2008). (“Federal Rule 23(g) instructs federal courts that have
27 certified a class to choose counsel to represent the class from among counsel representing the
28 parties that make up the class; it does not require courts to appoint free counsel to a proposed

1 class.”).

2 **III. Motions Regarding Magistrate Judge’s Authority to Issue Pre-Trial,
3 Nondispositive Orders**

4 Plaintiff has made three motions challenging the magistrate judge’s authority to issue
5 orders in this action. (Docs. 74, 88, 92). Plaintiff contends, citing Federal Rule of Civil
6 Procedure 73, that the magistrate judge lacks authority to issue orders in this action because
7 Plaintiff did not consent to magistrate judge jurisdiction. (Docs. 74, 84, 88). As the Ninth
8 Circuit has made clear, however, Plaintiff’s consent is not required for magistrate judge
9 jurisdiction over pretrial, nondispositive matters—which are governed by Rule 72, not Rule
10 73:

11 Rule 73 implements the procedural protections envisioned in 28
12 U.S.C. § 636(c), and therefore only addresses the prerequisites
13 of a magistrate judge-conducted *trial* or magistrate-issued
14 *dispositive order*. Notwithstanding subsection 636(c), the
15 magistrate judge’s jurisdiction over any *pretrial nondispositive*
16 matters, including magistrate-recommended dispositions, is not
17 contingent on litigant consent, 28 U.S.C. § 636(b)(1), and Rule
18 72, not 73, codifies the attendant procedures.

19 *Anderson v. Woodcreek Venture Ltd.*, 351 F.3d 911, 917 (9th Cir. 2003) (emphasis in
20 original).

21 The orders which Plaintiff seeks vacated or overruled are all orders resolving pretrial,
22 nondispositive matters. (*See* Docs. 31, 39, 64, 87). Plaintiff’s motions to vacate and motion
23 for a cease and desist order on the magistrate judge, will therefore be denied.

24 Lastly, Plaintiff has filed a Motion to District Court Judge to Reset Scheduling Order
25 (Doc. 75). Plaintiff apparently addressed this motion to the district court judge under the
26 assumption that the magistrate judge lacks authority to reset the scheduling order without
27 Plaintiff’s consent. Scheduling orders, however, are nondispositive, pretrial matters. As
28 discussed above, a magistrate judge’s jurisdiction over such matters is not contingent on
litigant consent. The magistrate judge will, therefore, rule on Plaintiff’s scheduling motion.

CONCLUSION

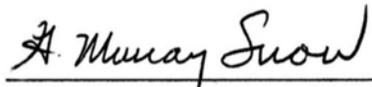
The Court denied Plaintiff’s request for class certification in a prior order. Moreover,
Plaintiff has not made a showing of adequate representation for the proposed class. His

1 proposed class will not, therefore, be certified. In addition, Plaintiff has not demonstrated the
2 requisite exceptional circumstances in this action for the Court to appoint counsel. The
3 magistrate judge has authority under Rule 72 to rule on this action's nondispositive, pretrial
4 matters.

5 **IT IS THEREFORE ORDERED THAT:**

- 6 1. Magistrate Judge Aspey's R & R (Doc. 70) is **ACCEPTED**.
- 7 2. Plaintiff's Motion for Class Action Certification and Appointment of Counsel
8 (Doc. 53) is **DENIED**.
- 9 3. Plaintiff's Motion for District Court Judge to Vacate Orders of Magistrate
10 Judge and Rule on Underlying Motions (Doc. 74) is **DENIED**.
- 11 4. Plaintiff's Motion for District Court Judge to Vacate Order of Magistrate (Doc.
12 88) is **DENIED**.
- 13 5. Plaintiff's Motion for Cease and Desist Order upon Magistrate (Doc. 92) is
14 **DENIED**.

15 DATED this 4th day of May, 2012.

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19 G. Murray Snow
20 United States District Judge
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