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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Jhon Nigel Brisken,

10 Plaintiff,

11 v.

12 Unknown Griego, et al.,

13 Defendants.  
14

No. CV-16-02434-PHX-JJT (ESW)

**ORDER**

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16 This is a civil rights action initiated by Arizona state prisoner Jhon Nigel Brisken  
17 (“Plaintiff”) pursuant to 42 U.S.C. § 1983. On March 30, 2017, the Court ordered (i)  
18 Defendants Beare and Gilwraith to answer Count One of the Third Amended Complaint  
19 and (ii) Defendants Thomas and Griego to answer Counts Two and Three of the Third  
20 Amended Complaint. (Doc. 19 at 5). Pending before the Court are several motions  
21 discussed below.

22 **I. DISCUSSION**

23 **A. “Request for Discovery” (Doc. 43)**

24 Federal Rules of Civil Procedure Rule 5(d) states that “the following discovery  
25 requests and responses must not be filed until they are used in the proceeding or the court  
26 orders filing: depositions, interrogatories, requests for documents or tangible things or to  
27 permit entry onto land, and requests for admission.” LRCiv 5.2 provides that “[a]  
28 ‘Notice of Service’ of the disclosures and discovery requests and responses listed in Rule

1 5(d) of the Federal Rules of Civil Procedure must be filed within a reasonable time after  
2 service of such papers.”

3 Plaintiff propounds a number of discovery requests in his Request filed on August  
4 9, 2017 (Doc. 43), which the Clerk of Court has docketed as a “Motion (Request) for  
5 Discovery.” Plaintiff has not “used” these discovery requests in the proceeding (e.g. by  
6 relying upon responses in support of a motion, supporting a motion to compel, etc.).  
7 Therefore, Plaintiff’s filing of the actual discovery requests instead of a “Notice of  
8 Service” is in violation of LRCiv 5.2 and Rule 5(d) of the Federal Rules of Civil  
9 Procedure. Accordingly, Plaintiff’s Request for Discovery (Doc. 43) shall be stricken.  
10 August 9, 2017 is deemed the date of service of Plaintiff’s Request for Discovery.<sup>1</sup>

11 The Court notes that Plaintiff requests that the Court send to the Plaintiff another  
12 two blank complaint forms (Doc. 43 at 6). On June 6, 2017, the Court ordered the Clerk  
13 of Court to mail to Plaintiff a blank complaint form. The docket reflects that the Clerk of  
14 Court did so on June 6, 2017. The Court again will order the Clerk of Court to mail to  
15 Plaintiff two blank complaint forms as requested.

16 **B. Motion to Appoint Counsel (Doc. 45)**

17 On April 24, 2017, Plaintiff requested that the Court appoint him counsel (Doc.  
18 20). The Court denied the request (Doc. 22).

19 On August 11, 2017, Plaintiff again requests in further detail that the Court  
20 appoint Plaintiff counsel because (i) he is indigent, not trained in the law, receives  
21 medication for mental health, and possesses a sixth grade education, (ii) he is unable to  
22 investigate and prosecute his case due to his segregation status and limited access to the  
23 law library, (iii) he anticipates the need for medical experts, (iv) discovery and legal  
24 issues are complex, (v) he has limited access to pens and paper, and (vi) Plaintiff wishes  
25 to pursue a class action lawsuit (Docs. 45, 55, 56).

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28 <sup>1</sup> The docket reflects that a Notice of Electronic Filing was transmitted to defense  
counsel when Plaintiff filed his Request for Discovery.

1           In the alternative, Plaintiff requests that the Court send him a list of lawyers that  
2 Plaintiff can write to who specialize in his type of case (Doc. 56 at 5).

3           As the Court previously explained in its denial of Plaintiff's first request for  
4 counsel, there is no constitutional right to the appointment of counsel in a civil case. *See*  
5 *Johnson v. U.S. Dep't of Treasury*, 939 F.2d 820, 824 (9th Cir. 1991); *Ivey v. Bd of*  
6 *Regents of the Univ. of Alaska*, 673 F.2d 266, 269 (9th Cir. 1982). In pro se and *in forma*  
7 *pauperis* proceedings, district courts do not have the authority "to make coercive  
8 appointments of counsel." *Mallard v. United States District Court*, 490 U.S. 296, 310  
9 (1989). District courts, however, do have the discretion to request that an attorney  
10 represent an indigent civil litigant upon a showing of "exceptional circumstances." 28  
11 U.S.C. § 1915(e)(1); *Agyeman v. Corrections Corp. of America*, 390 F.3d 1101, 1103  
12 (9th Cir. 2004); *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991). A determination  
13 with respect to exceptional circumstances requires an evaluation of the likelihood of  
14 success on the merits as well as the ability of Plaintiff to articulate his claims pro se in  
15 light of the complexity of the legal issue involved. *Id.* "Neither of these factors is  
16 dispositive and both must be viewed together before reaching a decision." *Id.* (quoting  
17 *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986)).

18           Plaintiff's filings with the Court continue to indicate that Plaintiff is capable of  
19 navigating this proceeding and presenting arguments to the Court. Having considered the  
20 likelihood of success on the merits and Plaintiff's continued ability to articulate his  
21 claims, the Court does not find that exceptional circumstances are present that would  
22 require the appointment of counsel in this case. Plaintiff remains in a position no  
23 different than many pro se prisoner litigants. The Court will deny Plaintiff's second  
24 Motion to Appoint Counsel (Doc. 45). The Court does not provide lists of attorneys to  
25 litigants. Plaintiff's previous request for a list of attorneys from the Arizona State Bar  
26 was referred to the District Judge for ruling as a request for injunctive relief (Doc. 29).

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1           **C. “To the Courts” (Doc. 42) and “Plaintiff’s Motion to File a 4<sup>th</sup> Amended**  
2           **Complaint” (Doc. 61)**

3           In the documents set forth as “To the Courts” (Doc. 42) and “Plaintiff’s Motion to  
4           File a 4<sup>th</sup> Amended Complaint” (Doc. 61), Plaintiff requests leave to file a fourth  
5           amended complaint. However, as the Court carefully explained in its Order of June 6,  
6           2017 (Doc. 24), Plaintiff must comply with the Local Rules of Civil Procedure and  
7           Federal Rules of Civil Procedure when moving for leave to file an amended complaint.  
8           Plaintiff was ordered to file a proposed Fourth Amended Complaint in conformity with  
9           the Court’s Order and the Federal and Local Rules of Civil Procedure no later than July  
10          6, 2017 (Doc. 24 at 2). He has not done so.

11          “A district court has discretion to adopt local rules. . . . Those rules have ‘the  
12          force of law.’” *Hollingsworth v. Perry*, 558 U.S. 183 (2010) (citation omitted). Hence,  
13          both the parties and the Court are bound by the local rules. LRCiv. 83.3(c) (1) (“Anyone  
14          appearing before the court is bound by these Local Rules.”); *Professional Programs*  
15          *Group v. Department of Commerce*, 29 F.3d 1349, 1353 (9th Cir. 1994). A district  
16          court’s departure from its local rules is justified only if the effect is “so slight and  
17          unimportant that the sensible treatment is to overlook [it].” *Id.* (internal quotation marks  
18          and citation omitted).

19          LRCiv 15.1(a) provides that:

20                 A party who moves for leave to amend a pleading must attach  
21                 a copy of the proposed amended pleading as an exhibit to the  
22                 motion, **which must indicate in what respect it differs from**  
23                 **the pleading which it amends, by bracketing or striking**  
24                 **through the text to be deleted and underlining the text to**  
25                 **be added.** The proposed amended pleading must not  
26                 incorporate by reference any part of the preceding pleading,  
27                 including exhibits.

28          (emphasis added).

          Nor has Plaintiff shown good cause for failing to timely file his motions for leave  
to amend.

1 Under Fed. R. Civ. P. 16(b), a district court has the authority to establish a  
2 schedule that sets pretrial deadlines, including a deadline for motions to amend pleadings.  
3 A Rule 16 scheduling order may be “modified only for good cause and with the judge’s  
4 consent.” Fed. R. Civ. P. 16(b)(4). This is because “[a] scheduling order is not a  
5 frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel  
6 without peril.” *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 610 (9th Cir. 1992)  
7 (citation and internal quotations marks omitted). “Disregard of the order would  
8 undermine the court’s ability to control its docket, disrupt the agreed-upon course of the  
9 litigation, and reward the indolent and the cavalier.” *Id.*

10 Once a district court has filed a Rule 16 scheduling order setting a deadline for  
11 amending pleadings, a motion seeking to amend pleadings is governed first by Rule 16(b)  
12 and only secondarily by Rule 15(a). *Johnson*, 975 F.2d at 607-09 (“A court’s evaluation  
13 of good cause is not coextensive with an inquiry into the propriety of the amendment  
14 under . . . Rule 15.”); *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1294 (9th Cir. 2000).  
15 “If [the court] considered only Rule 15(a) without regard to Rule 16(b), [it] would render  
16 scheduling orders meaningless and effectively would read Rule 16(b) and its good cause  
17 requirement out of the Federal Rules of Civil Procedure.” *Sosa v. Airprint Systems, Inc.*,  
18 133 F.3d 1417, 1419 (11th Cir. 1998). In addition, Ninth Circuit case law supports a  
19 district court’s denial of a motion filed after the applicable scheduling order deadline on  
20 the ground that the movant did not request to modify the deadline. *Johnson*, 975 F.2d at  
21 608 (“Johnson did *not* specifically request that the court modify its scheduling order; he  
22 merely moved to amend his complaint. He points out that some courts have considered a  
23 motion to amend the complaint as a motion to amend the scheduling order and the court’s  
24 denial of that motion a denial of a motion to amend the scheduling order. . . . We have  
25 suggested the contrary.”); *U.S. Dominator, Inc. v. Factory Ship Robert E. Resoff*, 768  
26 F.2d 1099, 1104 (9th Cir. 1985) (holding that a district court properly denied a motion as  
27 untimely where it was filed after the applicable scheduling order deadline and the movant  
28 “never requested a modification” of the scheduling order), *superseded by statute on other*

1 grounds as recognized in *Simpson v. Lear Astronics Corp.*, 77 F.3d 1170 (9th Cir. 1996);  
2 *Dedge v. Kendrick*, 849 F.2d 1398, 1398 (11th Cir. 1988) (holding that a district court  
3 properly denied a motion as untimely where the motion was filed after the deadline set  
4 forth in the scheduling order and the movant did not request a modification of the  
5 scheduling order).

6 The standards of review under Rules 15 and 16 are markedly different. “Unlike  
7 Rule 15(a)’s liberal amendment policy which focuses on the bad faith of the party  
8 seeking to interpose an amendment and the prejudice to the opposing party, Rule 16(b)’s  
9 ‘good cause’ standard primarily considers the diligence of the party seeking the  
10 amendment.” *Johnson*, 975 F.2d. at 609. Although prejudice to the opposing party can be  
11 an additional reason to deny a motion to amend under Rule 16, the focus of the inquiry is  
12 on the movant’s reasons for seeking modification. *Id.* If the movant “was not diligent,  
13 the inquiry should end.” *Id.*

14 As noted, on June 6, 2017, the Court ordered the Plaintiff to file his proposed  
15 Fourth Amended Complaint by July 6, 2017 (Doc. 24 at 2). He did not do so. Nor did  
16 Plaintiff ask for an extension of time prior to the July 6, 2017 deadline. On July 25,  
17 2017, the Court issued its Scheduling Order (Doc. 36). The Court’s Scheduling Order  
18 required that all motions to amend the complaint and to join additional parties be filed no  
19 later than September 21, 2017 (Doc. 36 at 4). On August 4, 2017, Plaintiff filed a second  
20 request to file a Fourth Amended Complaint without lodging a proposed Fourth Amended  
21 Complaint as required by the Local Rules of Civil Procedure (Doc. 42). The Court will  
22 strike Plaintiff’s “To the Court” document (Doc. 42) for failure to comply with LRCiv  
23 15.1.

24 Finally, on September 28, 2017, Plaintiff untimely filed a third “Motion to File a  
25 4<sup>th</sup> Amended Complaint (Doc. 61) which does not contain a proposed Fourth Amended  
26 Complaint as required by LRCiv 15.1, nor does it show good cause for the late request.  
27 The Court will strike Plaintiff’s “Motion to File a 4<sup>th</sup> Amended Complaint” for failure to  
28 comply with LRCiv 15.1 and Fed. R. Civ. P. 16(b).

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**II. CONCLUSION**

For the reasons set forth above,


**IT IS ORDERED** striking Plaintiff’s “Request for Discovery” (Doc. 43).

**IT IS FURTHER ORDERED** denying Plaintiff’s Motion to Appoint Counsel (Doc. 45).

**IT IS FURTHER ORDERED** striking Plaintiff’s “To the Court” (Doc. 42) and “Plaintiff’s Motion to File a 4<sup>th</sup> Amended Complaint” (Doc. 61).

**IT IS FURTHER ORDERED** that the Clerk of Court send to Plaintiff two additional blank complaint forms.

Dated this 27th day of October, 2017.

  
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Eileen S. Willett  
United States Magistrate Judge