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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Anthony L. Rodrigues,

10 Plaintiff,

11 v.

12 Charles L. Ryan, et al.,

13 Defendants.  
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No. CV-14-08141-PCT-DGC (ESW)

**ORDER**

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16 Plaintiff Anthony L. Rodrigues is a pro se prisoner currently confined in the  
17 Arizona State Prison Complex-Corrections Corporation of America's ("CCA") Red Rock  
18 Correctional Center ("RRCC") in Eloy, Arizona. On April 20, 2015, Plaintiff filed a  
19 Second Amended Complaint alleging a violation of his civil rights pursuant to 42 U.S.C.  
20 § 1983. (Doc. 15). Plaintiff's Second Amended Complaint involves his incarceration at  
21 Arizona State Prison Complex-Kingman. The Court ordered Defendants to answer Count  
22 Two and dismissed all other claims. (Doc. 16 at 7). All Defendants have timely  
23 answered or responded and all issues are joined. (Docs. 27, 29, 66).

24 Plaintiff also filed a Motion for Preliminary Injunction and Emergency Temporary  
25 Restraining Order (Docs. 21, 22) to which Defendants filed their Opposition to Plaintiff's  
26 Request for Preliminary Injunction and Temporary Restraining Order (Doc. 26).  
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1 Plaintiff's Request for Preliminary Injunction and Temporary Restraining Order involves  
2 his incarceration at RRCC.

3 Several motions are deemed ripe for consideration and are discussed below.

### 4 DISCUSSION

#### 5 **I. "Defendants Ryan and Diaz's Motion to Permit Supplemental Briefing on** 6 **Defendants' Opposition to Plaintiff's Request for Preliminary Injunction and** 7 **Temporary Restraining Order [Docs. 21, 22, 26]." (Doc. 31)**

8 Defendants Ryan and Diaz request the opportunity to supplement their responsive  
9 briefing to specifically address the conditions of confinement at RRCC, the facility in  
10 which Plaintiff is currently housed. In his Motion for Preliminary Injunction and  
11 Emergency Temporary Restraining Order (Docs. 21 and 22), Plaintiff alleges that his  
12 conditions of confinement at RRCC violate his Eighth Amendment protection against  
13 cruel and unusual punishment due to Plaintiff's exposure to second-hand smoke.  
14 Plaintiff also alleges a Fourteenth Amendment due process violation, stating that RRCC  
15 is denying Plaintiff access to legal materials and the Courts. Information concerning the  
16 conditions of Plaintiff's confinement at RRCC is clearly relevant to a full consideration  
17 of the injunctive relief requested. Rule 26(b)(1), Fed. R. Civ. P. ("Parties may obtain  
18 discovery regarding any nonprivileged matter that is relevant to any party's claim or  
19 defense."); *see also Amor v. Arizona*, No. CV-06-499-TUC-CKJ, 2010 WL 960379 at  
20 \*15 (D. Ariz. March 15, 2010) ("Defendants have the right to defend against allegations  
21 in a court of law."). However, Plaintiff objects to the request to supplement because (i)  
22 he did not receive a copy of Defendants' Motion (Doc. 31) and (ii) the Motion is "overly  
23 broad and generalized." (Doc. 34 at 2).

24 The Court finds that Defendants mailed Plaintiff a copy of the Defendants' request  
25 to supplement at Plaintiff's address of record. *See* Defendants' Notice of Mailing (Doc.  
26 36). More than sufficient time has passed to allow Plaintiff to review the document. In  
27 addition, supplemental briefing will assist the Court in deciding the issues raised by  
28 Plaintiff.

1           Therefore, for good cause shown, the Court will grant Defendants Ryan and  
2 Diaz’s Motion to Permit Supplemental Briefing (Doc. 31).

3           **II. “Plaintiffs’ [sic] Motion to Strike Defendant(s) Opposition to Request for**  
4 **Preliminary Injunction and TRO” (Doc. 41)**

5           Plaintiff asks the Court to strike Defendants’ Opposition to Plaintiff’s Request for  
6 Preliminary Injunction and Temporary Restraining Order (Doc. 26) because Plaintiff did  
7 not receive the document until October 28, 2015. Defendants’ Opposition (Doc. 26) was  
8 filed on October 5, 2015. Plaintiff argues that he received Defendants’ Opposition (Doc.  
9 26) after response time pursuant to Rule 6, Fed. R. Civ. P., had run, precluding Plaintiff  
10 from filing a response.

11           As Defendants’ Notice of Mailing (Doc. 36) reflects, Defendants mailed Plaintiff a  
12 copy of Defendants’ Opposition to Request for Preliminary Injunction and Temporary  
13 Restraining Order (Doc. 26). Plaintiff, in fact, received Defendants’ Opposition.  
14 Delayed receipt of Defendants’ Opposition is not a basis to strike Defendants’  
15 Opposition. Pursuant to Rule 65, Fed. R. Civ. P., Plaintiff has filed a Motion for  
16 Preliminary Injunction and Temporary Restraining Order (Docs. 21, 22). Defendants  
17 have responded. Rule 6, Fed. R. Civ. P., does not provide Plaintiff with the opportunity  
18 to respond to a response. If Plaintiff wanted to file a reply, he certainly could have done  
19 so after service of Defendants’ Opposition as reflected in Defendants’ Notice of Mailing  
20 (Doc. 36). *See* LRCiv 7.2(d) (“The moving party . . . shall have seven (7) days after  
21 service of the responsive memorandum to file a reply memorandum if that party so  
22 desires.”) Instead, Plaintiff chose to file a Motion to Strike. “[A] motion to strike may be  
23 filed only if it is authorized by statute or rule, such as Federal Rules of Civil Procedure  
24 12(f), 26(g)(2), or 37(b)(2)(A)(iii), or if it seeks to strike any part of a filing or  
25 submission on the ground that it is prohibited (or not authorized) by a statute, rule, or  
26 court order.” LRCiv 7.2(m). Plaintiff cites the Court to no rule or statute which  
27 authorizes his Motion to Strike. Nor does the Court find such relief appropriate in this  
28 case.

1 No prejudice has inured to Plaintiff. Plaintiff has filed “Supplemental Exhibits in  
2 Support of Motion for Preliminary Injunction and Temporary Restraining Order” (Doc.  
3 32). He has had the opportunity to brief his position (Docs. 21, 22, 32). In addition, the  
4 Court will grant Defendants the opportunity to supplement their Opposition. When  
5 Defendants file the supplement to their Opposition, Plaintiff may file a reply pursuant to  
6 LRCiv 7.2(d). Therefore, Plaintiff’s Motion to Strike (Doc. 41) will be denied.

7 **III. “Plaintiff’s Notice of Default Service By Mail of Defendant Ryan and**  
8 **Diaz Motion to Dismiss” (Doc. 39)**

9 Plaintiff alerts the Court in his “Notice of Default Service by Mail” that Plaintiff  
10 had not been served with Defendants Ryan and Diaz’s Motion to Dismiss (Doc. 29) at the  
11 time Plaintiff received the Court’s Order (Doc. 33) setting a date by which Plaintiff must  
12 file his response to Defendants’ Motion to Dismiss. The Plaintiff’s document is not a  
13 proper motion. Plaintiff cannot request relief from the Court through the filing of a  
14 “Notice.” *See* Rule 7(b)(1), Fed. R. Civ. P. (“A request for a court order must be made  
15 by motion.”). Nor can Plaintiff supplement a pleading or motion through the filing of a  
16 “Notice.”

17 In addition, the information Plaintiff seeks to convey is now moot. Plaintiff  
18 received Defendants’ Motion to Dismiss (Doc. 29) and filed a response (Doc. 43).

19 The Court will take no action regarding Plaintiff’s “Notice of Default Service by  
20 Mail of Defendant Ryan and Diaz Motion to Dismiss” (Doc. 39).

21 **IV. “Plaintiff’s Notice of Siezure [sic] of Trial Preparation Material” (Doc.**  
22 **38)**

23 Plaintiff informs the Court in his “Notice of Siezure [sic] of Trial Preparation  
24 Material” that RRCC on October 17, 2015 “seized as contraband a package of documents  
25 containing trial preparation and discovery material.” (Doc. 38 at 1-2). Plaintiff  
26 references his Motion for Preliminary Injunction and Emergency Temporary Restraining  
27 Order (Docs. 21, 22) filed on September 21, 2015. If Plaintiff intends to supplement his  
28 Motion for Preliminary Injunction and Emergency Temporary Order or to raise additional

1 grounds for relief, he must do so by a proper motion. *See* Rule 7(b)(1), Fed. R. Civ. P.  
2 Plaintiff has not requested any relief from the Court. If Plaintiff seeks injunctive relief,  
3 he cannot do so by filing a “Notice.” *See* Rule 65, Fed. R. Civ. P. The Court takes no  
4 action on Plaintiff’s “Notice of Seizure [sic] of Trial Preparation Material.” (Doc. 38).

5 **V. Plaintiff’s Motion for Appointment of Counsel (Docs. 47 and 48)**

6 Plaintiff requests the appointment of counsel because (i) the issues in his case are  
7 factually and legally complex and involve constitutional law and the Americans with  
8 Disability Act in a correctional setting; (ii) Plaintiff’s access to case law, local rules of  
9 procedure, and legal manuals is limited by his incarceration; and (iii) the discovery  
10 process is complicated and contentious involving the credibility of witnesses who include  
11 senior staff and corrections officials. In the alternative, Plaintiff requests the appointment  
12 of a private investigator to assist Plaintiff with discovery. Plaintiff asserts that his claims  
13 are meritorious as they survived screening pursuant to 28 U.S.C. § 1915(A)(a).<sup>1</sup>

14 There is no constitutional right to the appointment of counsel in a civil case. *See*  
15 *Johnson v. U.S. Dep’t of Treasury*, 939 F.2d 820, 824 (9th Cir. 1991); *Ivey v. Bd of*  
16 *Regents of the Univ. of Alaska*, 673 F.2d 266, 269 (9th Cir. 1982). “However, a court  
17 may under ‘exceptional circumstances’ appoint counsel for indigent civil litigants  
18 pursuant to 28 U.S.C. § 1915(e)(1).” *Palmer v. Valdez*, 560 F.3d 965, 970 (9th Cir.  
19 2009) (quoting *Agyeman v. Coors. Corp. of Am.*, 390 F.3d 1101, 1103 (9th Cir. 2004)).  
20 “When determining whether ‘exceptional circumstances’ exist, a court must consider ‘the  
21 likelihood of success on the merits as well as the ability of the [plaintiff] to articulate his  
22 claims *pro se* in light of the complexity of the legal issues involved.’” *Palmer*, 560 F.3d  
23 at 970 (quoting *Weygandt v. Look*, 718 F.2d 952, 954 (9th Cir. 1983)); *see also Terrell v.*  
24 *Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991). “Neither of these considerations is  
25 dispositive and instead must be viewed together.” *Palmer*, 560 F.3d at 970 (citing  
26 *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986)).

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28 <sup>1</sup> The Court ordered Defendants to file a responsive pleading to Count Two of Plaintiff’s  
Second Amended Complaint only as to Plaintiff’s Eighth Amendment and ADA claim. (Doc. 16  
at 67).

1           Having considered both elements, the Court finds that Plaintiff has not shown that  
2 exceptional circumstances are present that would require the appointment of counsel in  
3 this case. Plaintiff has not demonstrated a likelihood of success on the merits, nor has he  
4 shown that he is experiencing difficulty in litigating this case because of the complexity  
5 of the issues involved. The issues presented to the Court are not legally complex. *See*  
6 *Wilborn*, 789 F.2d at 1331 (“If all that was required to establish successfully the  
7 complexity of the relevant issues was a demonstration of the need for development of  
8 further facts, practically all cases would involve complex legal issues.”) In addition,  
9 Plaintiff’s filings with the Court, as well as his briefed Motion for Appointment of  
10 Counsel, demonstrate the Plaintiff is quite capable of navigating his proceedings,  
11 articulating his position, and presenting organized arguments to the Court. Plaintiff  
12 remains in a position no different than many pro se prisoner litigants. Having failed to  
13 show that any exceptional circumstances are present, Plaintiff’s Motion for Appointment  
14 of Counsel will be denied.

15           Regarding Plaintiff’s alternative request that the Court “appoint a private  
16 investigator to aid and assist the Plaintiff in pre-trial discovery to issue subpoenas, inspect  
17 premises to locate and conduct interviews of potential witnesses” (Doc. 47 at 2), the  
18 Court will deny the request. Congress has not authorized the expenditure of public funds  
19 for the Court appointment of an investigator for a plaintiff proceeding *in forma pauperis*  
20 under 28 U.S.C. § 1915. *See Tedder v. Odel*, 890 F.2d 210, 211-12 (9<sup>th</sup> Cir. 1989) (citing  
21 *United States v. MacCollom*, 426 U.S. 317, 321 (1976)). There is no legal basis to  
22 support Plaintiff’s request. Nor are there public funds budgeted to subsidize it.

23           **VI. Plaintiff’s Motion for Court Appointed Expert (Docs, 49, 50)**

24           Plaintiff requests that the Court appoint an “occupational health and safety or  
25 equivalent heating, ventlation [sic] and cooling enviromental [sic] engineer to give  
26 expert testimony pertaining to the enviromental [sic] conditions that exist in Plaintiff’s  
27 former and current prison housing areas.” (Doc. 49 at 1). Plaintiff also requests that the  
28 Court appoint “a medical expert qualified to give testimony pertaining to the adverse

1 health risk associated with exposure to secondhand enviromental [sic] tobacco smoke  
2 (ETS).” (*Id.*) Plaintiff cites the Court to Fed. R. Evid. 706 as well as case law in support  
3 of his Motion.

4 The Court finds that Plaintiff has failed to demonstrate that his case is of such  
5 complexity that the judicial appointment of experts is necessary at this stage of the  
6 litigation. *See McKinney v. Anderson*, 924 F.2d 1500 (9<sup>th</sup> Cir.) *vacated on other grounds*  
7 *sub nom. Helling v. McKinney*, 502 U.S. 903 (1991) (district court may exercise its  
8 discretion to appoint an expert under Rule 706). Rule 706, Fed. R. Evid., does not  
9 authorize the Court to finance for the Plaintiff the expenditure of expert witness fees.  
10 Federal Courts are not authorized or required to subsidize a civil action for a plaintiff  
11 proceeding *in forma pauperis*. *See* 28 U.S.C. § 1915; *Tedder v. Odel*, 890 F.2d 210, 211  
12 (9<sup>th</sup> Cir. 1989); *United States v. MacCollom*, 426 U.S. 317, 321 (1976). Extraordinary  
13 circumstances have not been shown to require Defendants to bear such an expense or to  
14 authorize the use of non-appropriated funds at this time. *See Gerald v. Prebula*, No.  
15 CIV-S-01-211LKK/EFB, 2012 WL 1355739 (E.D. CA April 18, 2012). Plaintiff’s  
16 Motion for Court Appointed Expert (Docs. 49 and 50) will be denied.

17 **VII. Plaintiff’s Motion for Reconsideration of Order Denying Service of**  
18 **Subpoenas (Doc. 62)**

19 On September 21, 2015, Plaintiff filed a Motion for U.S. Marshal to Effect Service  
20 of Subpoenas (Doc. 23). The Court by Order of November 25, 2015 deemed the Motion  
21 moot as the U.S. Marshals Service executed service as to all Defendants. (Doc. 54).  
22 Plaintiff requests reconsideration of the Court’s Order so that Plaintiff may serve  
23 subpoenas on prison personnel. Plaintiff does indicate to whom his subpoenas are  
24 directed or what information he seeks. No specific factual support is presented. All  
25 Defendants have been served.

26 Motions for reconsideration should be granted only in rare circumstances. *See*  
27 *Carroll v. Nakatani*, 342 F.3d 934, 945 (9<sup>th</sup> Cir. 2003). “Reconsideration is appropriate if  
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1 the district court (1) is presented with newly discovered evidence, (2) committed clear  
2 error or the initial decision was manifestly unjust, or (3) if there is an intervening change  
3 in controlling law.” *School Dist. No. 1J, Multnomah County v. ACandS, Inc.*, 5 F.3d  
4 1255, 1263 (9<sup>th</sup> Cir. 1993). See also LRCiv 7.2(g)(1) (“The Court will ordinarily deny a  
5 motion for reconsideration of an Order absent a showing of manifest error or a showing  
6 of new facts or legal authority that could not have been brought to its attention earlier  
7 with reasonable diligence”).

8 Plaintiff has not presented any basis which warrants reconsideration of the Court’s  
9 prior Order. Plaintiff has not presented newly discovered evidence, a change in the law,  
10 clear error, or manifest injustice. Plaintiff has failed to meet his burden of proof.  
11 Therefore, his Motion for Reconsideration (Doc. 62) will be denied.

#### 12 **CONCLUSION**

13 For all the reasons stated above,

14 **IT IS ORDERED** granting Defendants Ryan and Diaz’s Motion to Permit  
15 Supplemental Briefing on Defendants’ Opposition to Plaintiff’s Request for Preliminary  
16 Injunction and Temporary Restraining Order (Doc. 31). Defendants Ryan and Diaz shall  
17 file their supplemental briefing no later than January 25, 2016. Plaintiff may file a reply  
18 in accordance with LRCiv 7.2(d).

19 **IT IS FURTHER ORDERED** denying “Plaintiffs’ [sic] Motion to Strike  
20 Defendant(s) Opposition to Request for Preliminary Injunction and TRO” (Doc. 41).

21 **IT IS FURTHER ORDERED** taking no action on “Plaintiff’s Notice of Default  
22 Service by Mail of Defendant Ryan and Diaz Motion to Dismiss” (Doc. 39) and  
23 “Plaintiff’s Notice of Seizure [sic] of Trial Preparation Material” (Doc. 38).

24 **IT IS FURTHER ORDERED** denying Plaintiff’s Motion for Appointment of  
25 Counsel (Docs. 47, 48).

26 **IT IS FURTHER ORDERED** denying Plaintiff’s Motion for Court Appointed  
27 Expert (Docs. 49, 50).

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**IT IS FURTHER ORDERED** denying Plaintiff's Motion for Reconsideration  
(Doc. 62).

Dated this 13th day of January, 2016.



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Honorable Eileen S. Willett  
United States Magistrate Judge