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**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA**

LAWRENCE A. MARTIN,  
  
Plaintiff,  
  
vs.  
  
JAMES A. YATES, et al.,  
  
Defendants.

) No. CV 1-08-01401-CKJ  
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) **ORDER**  
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Pending before this Court is Plaintiff’s Motion for Appointment of Counsel [Doc. 32] and Reply to Defendant’s Answer and Motion for a More Definitive Statement Pursuant to Fed. R. Civ. P. 12(e) [Doc. 33].

**I. APPOINTMENT OF COUNSEL**

Plaintiff seeks appointment of counsel [Doc. 32]. Appointment of counsel under 28 U.S.C. § 1915(e)(1) is required only when “exceptional circumstances” are present. *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9<sup>th</sup> Cir. 1991). A court must consider both the likelihood of success on the merits and the ability of the petitioner to articulate his claims *pro se* given the complexity of his case. *Id.* Neither factor is dispositive, and both must be viewed together before a finding of exceptional circumstances can be made. *Id.*

Plaintiff cites his “permanent[] mobility impair[ment]” as grounds requiring appointment of counsel. He further notes his lack of legal training as a hindrance to

1 prosecuting this case. There is no evidence before this Court to suggest the presence of  
2 “exceptional circumstances” warranting appointment of counsel. The Court finds that  
3 Plaintiff’s difficulty in presenting his claims *pro se* is not based on the complexity of the  
4 legal issues involved but rather on the general difficulty of litigating *pro se*. *See*  
5 *generally Wilborn v. Escalderon*, 789 F.2d 1328 (9th Cir. 1986). Thus far, Plaintiff has  
6 been able to adequately articulate his claims. Moreover, there are only two remaining  
7 Defendants, and the matters before this Court are not complex. As such, the Court will  
8 not appoint counsel at this time. Plaintiff’s Motion for Appointment of Counsel [Doc. 32]  
9 is denied without prejudice.

## 11 **II. REPLY TO ANSWER AND MORE DEFINITE STATEMENT**

12 Plaintiff filed a Reply to Defendant’s Answer and Motion for a More Definitive  
13 Statement Pursuant to Fed. R. Civ. P. 12(e) [Doc. 33]. Rule 7(a), Federal Rules of Civil  
14 Procedure, only allows specific pleadings to be filed. These are:

- 15 (1) a complaint;
- 16 (2) an answer to a complaint;
- 17 (3) an answer to a counterclaim designated as a counterclaim;
- 18 (4) an answer to a crossclaim;
- 19 (5) a third-party complaint;
- 20 (6) an answer to a third-party complaint; and
- 21 (7) *if the court orders one*, a reply to an answer.

22 Fed. R. Civ. P. 7(a) (emphasis added). This Court has not ordered a reply to Defendants’  
23 Answer [Doc. 31], nor did Defendants allege a counterclaim in their Answer. As such,  
24 Plaintiff’s Reply to Defendant’s Answer [Doc. 33] is improper.

25 Plaintiff further moves for a more definitive statement pursuant to Rule 12(e),  
26 Federal Rules of Civil Procedure. Rule 12(e) provides in relevant part: “A party may  
27 move for a more definite statement of a pleading *to which a responsive pleading is*  
28 *allowed.*” Fed. R. Civ. P. 12(e) (emphasis added). A responsive pleading to an answer is  
not allowed without leave of court. Fed. R. C. P. 7(a). This Court has not ordered a reply  
to Defendants’ Answer [Doc. 31], nor did Defendants allege a counterclaim in their

1 Answer. As such, Plaintiff's Motion for a More Definitive Statement [Doc. 33] is also  
2 improper.

3 Accordingly, IT IS HEREBY ORDERED that:

4 1) Plaintiff's Motion for Appointment of Counsel [Doc. 32] is DENIED  
5 WITHOUT PREJUDICE; and

6 2) Plaintiff's Reply to Defendant's Answer and Motion for a More Definitive  
7 Statement Pursuant to Fed. R. Civ. P. 12(e) [Doc. 33] is STRICKEN.

8 IT IS FURTHER ORDERED that:

9 A. If they so choose, counsel for Defendants shall depose Plaintiff, at  
10 Defendant's expense, on or before **September 1, 2011**.

11 B. All parties are granted until **August 1, 2011**, to move to **join** additional  
12 parties or to **amend** their pleadings.

13 C. Parties shall disclose a **witness list** on or before **October 3, 2011**. On or  
14 before that date, the parties are directed to exchange their complete list of witnesses.

15 D. All **discovery**, including depositions of parties (other than the plaintiff),  
16 witnesses and experts shall be completed by **November 1, 2011**. No discovery shall take  
17 place after that date without leave of Court upon good cause shown.

18 E. **Dispositive motions** shall be filed on or before **December 1, 2011**.

19 1. Motions shall be submitted upon the record and without oral  
20 argument unless otherwise ordered by this Court, pursuant to Local Rules of Practice for  
21 the United States District Court, Eastern District of California ("L.R.") 78-230(m).

22 2. Pursuant to L.R.78-230(m) and L.R. 56-260, parties may file a  
23 motion, response, and reply. No additional briefing on a motion is allowed unless leave  
24 of Court is granted. Failure to file a response may be deemed a consent to a granting of  
25 the motion. A response must be served and filed within eighteen (18) days of service on  
26 the motion; the moving party has five (5) court days from service to serve and file a reply.  
27 Rule 56 motions for summary judgment and Rule 12(b)(1) motions to dismiss for lack of  
28 subject matter jurisdiction provide an exception to the above time limits: the time for a

1 response is 30 days and the time for a reply is 15 days. Unless otherwise permitted by the  
2 Court, a motion or response, inclusive of supporting memorandum but exclusive of  
3 attachments and statement of facts, shall not exceed 17 pages; a reply shall not exceed 11  
4 pages.

5           3. Any pleading which is submitted with more than one exhibit must be  
6 accompanied by a Table of Contents. The exhibits must be indexed with tabs that  
7 correspond to the Table of Contents. Absent exigent circumstances, the Court will not  
8 consider pleadings which do not conform to these requirements.

9           E. The parties are directed to submit a jointly prepared letter regarding the  
10 status of settlement by **January 4, 2010**. The letter shall contain no specific terms of  
11 settlement proposals.

12           F. Parties and counsel shall file a **Joint Proposed Pretrial Order** within  
13 **thirty (30) days after resolution of the dispositive motions** filed after the end of  
14 discovery. If no such motions are filed, a Joint Proposed Pretrial Order will be due on or  
15 before **January 9, 2012**. The content of the proposed pretrial order shall include, but not  
16 be limited to, that prescribed in the **Form of Pretrial Order** attached hereto. If the  
17 parties and counsel are unable to prepare a joint proposed pretrial order, a separate  
18 proposed pretrial order shall be submitted to the Court accompanied by a statement why  
19 the preparation of the joint proposed pretrial order could not be completed through  
20 written correspondence.

21           1. Pursuant to Federal Rule 37(c), the Court will not allow the parties to  
22 offer any exhibits, witnesses or other information that were not previously disclosed in  
23 accordance with the provisions of this Order and the Federal Rules of Civil Procedure or  
24 not listed in the Proposed Pretrial Order, except for good cause.

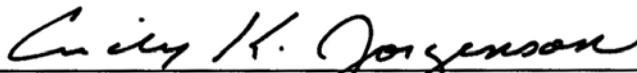
25           G. Motions for extensions of any of the deadlines set forth above shall be  
26 governed by Fed.R.Civ.P. 16, L.R. 6-144. A motion for continuance shall be filed prior  
27 to the expiration of the deadline. The schedule set forth in this Order may only be  
28 modified with leave of Court and upon a showing of good cause. *See* Fed.R.Civ.P. 16(b);

1 *Johnson v. Mammoth Recreation, Inc.*, 975 F.2d 604 (9<sup>th</sup> Cir. 1992) (requiring a showing  
2 of good cause under Rule 16 to amend complaint beyond scheduling order deadline).  
3 Additionally, any motion for continuance of a discovery deadline, including a stipulation,  
4 shall set forth specifically what discovery has been conducted to date, the discovery to be  
5 completed, and the reasons why discovery has not been completed within the deadline.

6 This order contemplates that each party will conduct discovery in such a manner to  
7 complete, within the deadline, any and all discovery. "Last minute or eleventh hour"  
8 discovery which results in insufficient time to undertake additional discovery and which  
9 requires an extension of the discovery deadline will be met with disfavor, and could result  
10 in denial of an extension, exclusion of evidence, or the imposition of other sanctions.

11 The parties should note that willful failure to comply with *any* of the terms of this  
12 Order, the Federal Rules of Civil Procedure or other applicable rules may result in  
13 dismissal of this action without further notice to Plaintiff, or sanctions upon Defendant.  
14 *Ferdik v. Bonzelet*, 963 F.2d 1258 (9<sup>th</sup> Cir. 1992), *cert. denied*, 506 U.S. 915 (1992).  
15 Plaintiff is cautioned to comply with all applicable rules of civil procedure; his *pro se*  
16 status will not excuse his noncompliance. *King v. Atiyeh*, 814 F.2d 565 (9<sup>th</sup> Cir. 1987).

17 DATED this 2nd day of June, 2011.

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20 Cindy K. Jorgenson  
21 United States District Judge  
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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

, ) No. CV- -CKJ  
Plaintiff, )  
vs. ) **PROPOSED JOINT PRETRIAL ORDER**  
, )  
Defendant. )

Pursuant to the Scheduling Order entered \_\_\_\_\_, 20\_\_, following is the  
Joint Proposed Final Pretrial Order to be considered at the pretrial conference.

**A. COUNSEL FOR THE PARTIES**

Plaintiff(s):  
Defendant(s):

**B. STATEMENT OF JURISDICTION**

Cite the statute(s) that gives the Court jurisdiction, and whether jurisdiction is  
disputed.  
(*E.g.*: Jurisdiction in this case is based on diversity of citizenship under Title 28  
U.S.C. § 1332. Jurisdiction is (not) disputed.)

**C. NATURE OF ACTION**

Provide a concise statement of the type of case, the cause of action, and the relief  
sought.

1 (E.g.: This is a products liability case wherein the plaintiff seeks damages for personal  
2 injuries sustained when he fell from the driver's seat of a forklift. The plaintiff  
3 contends that the forklift was defectively designed and manufactured by the defendant  
4 and that the defects were a producing cause of his injuries and damages.)

5 **D. CONTENTIONS OF THE PARTIES**

6 With respect to each count of the complaint, counterclaim or cross-claim, and to any  
7 defense, affirmative defense, or the rebuttal of a presumption where the burden of  
8 proof has shifted, the party having the burden of proof shall list the elements or  
9 standards that must be proved in order for the party to prevail on that claim or  
10 defense.

11 (E.g.: In order to prevail on this products liability case, the plaintiff must prove the  
12 following elements . . .)

13 (E.g.: In order to defeat this products liability claim based on the statute of repose, the  
14 defendant must prove the following elements . . .)

15 **E. STIPULATIONS AND UNCONTESTED FACTS**

16 **F. CONTESTED ISSUES OF FACT AND LAW**

17 **G. LISTS OF WITNESSES**

18 A jointly prepared list of witnesses, identifying each as either plaintiff's or  
19 defendant's and indicating whether a fact or expert witness, must accompany this  
20 proposed order.

21 A brief statement as to the testimony of each expert witness must be included.

22 **H. LIST OF EXHIBITS**

23 Each party must submit with this proposed order a list of numbered exhibits, with a  
24 description of each containing sufficient information to identify the exhibit, and  
25 indicating whether an objection to its admission is anticipated.

26 Exhibits should be marked according to instructions received from the court.

27 **I. MOTIONS IN LIMINE**

28 Motions in limine shall be filed and served upon each party with this proposed order.

1 Any opposition shall be filed and served within ten (10) days.

2 **J. LIST OF ANY PENDING MOTIONS**

3 **K. PROBABLE LENGTH OF TRIAL**

4 **L. FOR A BENCH TRIAL**

5 Proposed findings of fact and conclusions of law shall be served and filed on each  
6 party with this proposed order.

7 **M. FOR A JURY TRIAL**

8 Stipulated jury instructions shall be filed thirty (30) days before trial. Instructions  
9 which are not agreed upon, and a concise argument in support of the instruction, shall  
10 be filed and served upon each party thirty (30) days before trial. Objections to the  
11 non-agreed upon instructions shall be filed and served upon each party within ten (10)  
12 days.

13 **N. CERTIFICATION**

14 The undersigned counsel for each of the parties in this action do hereby certify and  
15 acknowledge the following:

- 16 1. All discovery has been completed.
- 17 2. The identity of each witness has been disclosed to opposing counsel.
- 18 3. Each exhibit listed herein: (a) is in existence; (b) is numbered; and (c) has been  
19 disclosed and shown to opposing counsel.

20 **O. ADOPTION**

21 The Court may adopt this proposed Joint Pretrial Order at the Pre-Trial Conference  
22 or subsequent hearing.

23 DATED this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

24 APPROVED AS TO FORM AND CONTENT

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\_\_\_\_\_  
Attorney for Plaintiff

\_\_\_\_\_  
Attorney for Defendant