1 2 3 4 5 6 7 UNITED STATES DISTRICT COURT 8 9 EASTERN DISTRICT OF CALIFORNIA 10 11 BRIAN ELLIS PORTER, Case No. 1:10-cv-01500-BAM (PC) 12 ORDER DENYING MOTION FOR Plaintiff. APPOINTMENT OF COUNSEL 13 v. (ECF No. 192) 14 C. WEGMAN, 15 Defendant. 16 Plaintiff Brian Ellis Porter ("Plaintiff") is a state prisoner proceeding pro se and in forma 17 pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. This matter is set for trial on 18 19 August 29, 2017. Currently before the Court is Plaintiff's motion for appointment of counsel, 20 filed August 16, 2017. (ECF No. 192.) Defendant has not yet responded to the request, but the Court finds no response necessary and that Defendant will not be prejudiced by the consideration 21 22 of the motion absent her response. Local Rule 230(1). Plaintiff states that he is unable to afford counsel, has written to many law firms, 23 attorneys, and prison rights advocates that have declined to take his case pro bono, and the 24 complexity of this case extends beyond Plaintiff's ability to litigate as a lay person with limited 25 26 access to a law library. Plaintiff contends that the expertise of an attorney is needed to address 27 the defense of qualified immunity, to cross examine Defendant's expert witnesses, and to

properly argue Plaintiff's position before a jury. Finally, Plaintiff seeks the appointment of

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counsel because Defendant has failed to produce requested discovery documents within Defendant's control. (<u>Id.</u>)

As Plaintiff was previously informed, he does not have a constitutional right to appointed counsel in this action, Rand v. Rowland, 113 F.3d 1520, 1525 (9th Cir. 1997), rev'd in part on other grounds, 154 F.3d 952, 954 n.1 (9th Cir. 1998), and the court cannot require an attorney to represent plaintiff pursuant to 28 U.S.C. § 1915(e)(1). Mallard v. U.S. Dist. Court for the S. Dist. of Iowa, 490 U.S. 296, 298 (1989). However, in certain exceptional circumstances the court may request the voluntary assistance of counsel pursuant to section 1915(e)(1). Rand, 113 F.3d at 1525.

Without a reasonable method of securing and compensating counsel, the Court will seek volunteer counsel only in the most serious and exceptional cases. In determining whether "exceptional circumstances exist, a district court must evaluate both the likelihood of success on the merits [and] the ability of the [plaintiff] to articulate his claims pro se in light of the complexity of the legal issues involved." <u>Id.</u> (internal quotation marks and citations omitted).

The Court has considered Plaintiff's renewed motion for the appointment of counsel, but does not find the required exceptional circumstances. Even if it is assumed that Plaintiff is not well versed in the law and that he has made serious allegations which, if proved, would entitle him to relief, his case is not exceptional. This Court is faced with similar cases involving claims of free exercise of religion filed by prisoners proceeding pro se and in forma pauperis almost daily. These prisoners also must conduct legal research and prosecute claims without the assistance of counsel.

Plaintiff's assertions regarding the complexity of the legal issues in this case have been taken into consideration. Although Plaintiff believes that he will be unable to articulate the merits of his case to a jury, the record indicates that Plaintiff has successfully prosecuted this action to date, through summary judgment, appeal, and up to the eve of trial. Plaintiff has filed numerous motions throughout this action, and his papers generally have been coherent and organized. Based on the record in this case, the Court does not find that Plaintiff is unable to articulate his claims.

To the extent Plaintiff seeks appointment of counsel to rectify discovery disputes with Defendant, these issues were more appropriately raised through motions to compel filed before the close of discovery, not on the eve of trial. Indeed, Plaintiff filed an articulate and timely motion to compel production of the Religious Diet Request form submitted in 2008. (ECF No 109.) Plaintiff was well aware of the proper method of seeking relief regarding other documents not produced in response to his discovery requests. The Court finds Plaintiff's argument that his failure to obtain such documents was a result of his lack of counsel, first raised at this late date, unpersuasive.

Finally, Plaintiff has offered no argument addressing the likelihood of his success on the merits, and the Court cannot find that he meets that prong. Although the Court has determined Plaintiff has stated some claims which may proceed to trial, it has not determined that those claims have a likelihood of ultimately being successful.

For the foregoing reasons, Plaintiff's motion for the appointment of counsel (ECF No. 192) is DENIED, without prejudice.

IT IS SO ORDERED.

Dated: August 19, 2017

/s/ Barbara A. McAuliff
UNITED STATES MAGISTRATE JUDGE