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**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA**

JAMISI JERMAINE CALLOWAY,	)	Case No.: 1:11-cv-01090-SAB (PC)
	)	
Plaintiff,	)	
	)	<b>ORDER DENYING PLAINTIFF’S MOTION TO</b>
v.	)	<b>SET ASIDE DISCOVERY ORDERS AS</b>
	)	<b>PREMATURE</b>
G. KELLEY, et al.,	)	
	)	[ECF No. 51]
Defendants.	)	
	)	
	)	

Plaintiff Jamisi Jermaine Calloway is appearing pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983.

Now pending before the Court is Plaintiff’s motion seeking to set aside the discovery order as premature, filed March 7, 2014.

This action is proceeding on Plaintiff’s first amended complaint filed May 16, 2013, against Defendants M. Bostanjian, Melissa Fritz, G. Kelley, Peter Mazuk, V. Schomer, Syed, Marc Talisman, C. Trinh, and Jeffrey Wang for retaliation in violation of the First Amendment.

On February 20, 2014, Defendants G. Kelley and Jeffrey Wang filed an answer to the first amended complaint. (ECF No. 34.)

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1 On February 24, 2014, the Court issued a discovery and scheduling order. (ECF No. 37.)

2 On February 25, 2014, Defendants M. Bostanjian and Syed filed an answer to the first  
3 amended complaint. (ECF No. 39.) On February 26, 2014, the Court issued an order extending the  
4 discovery and scheduling order of February 24, 2014, to these Defendants. (ECF No. 41.)

5 On February 27, 2014, Defendants Peter Mazuk and V. Schomer filed an answer to the first  
6 amended complaint. (ECF No. 45.) On March 5, 2014, the Court issued an order extending the  
7 discovery and scheduling order of February 24, 2014, to these Defendants. (ECF No. 49.)

8 **I. Motion to Set Aside Discovery Order**

9 Plaintiff seeks to set aside the discovery order as premature because he is not capable of  
10 prosecuting this action and he wishes to amend the complaint to add an Eighth Amendment claim of  
11 deliberate indifference. Plaintiff contends it is premature to begin discovery in this case when all the  
12 defendants have not yet made an appearance in this action. Plaintiff further contends he “will get  
13 confused going back and forth with the same medical issues and claims arriving from the same  
14 incidents.”

15 As Plaintiff was advised in the Court’s July 1, 2011, “[a]fter an answer is filed, the court will  
16 issue an order opening discovery and setting the deadlines for completing discovery, amending the  
17 pleadings, and filing pre-trial dispositive motions.” (ECF No. 3, at 4:21-23.) Because at least one of  
18 defendants has filed an answer in this action, the discovery phase of the action was initiated. It is  
19 immaterial that not all of the defendants have been served and filed an answer to the complaint, as the  
20 Court will extend and/or re-set the applicable deadlines as certain defendants file an appearance in the  
21 action.

22 Furthermore, Plaintiff’s claim that he seeks to set aside the discovery phase of the action  
23 because he intends to amend the complaint to proceed on a claim of deliberate indifference to his  
24 serious medical need, any such claim was dismissed from the action, at Plaintiff’s request. (ECF No.  
25 13.)

26 In the Court’s August 23, 2013, order, Plaintiff was advised that he failed to state a cognizable  
27 claim for deliberate indifference to a serious medical need against any of the named defendants, and

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1 Plaintiff was given the option of proceeding on the retaliation claim only or filing a second amended  
2 complaint. (ECF No. 13.)

3 On September 5, 2013, Plaintiff notified the Court of his intent to proceed on the retaliation  
4 claim only. (ECF No. 15.) Thereafter, Plaintiff completed and returned the service or process  
5 documents, and the United States Marshal was directed to serve the defendants on December 13, 2013.  
6 (ECF No. 31.) Accordingly, this action is proceeding on a claim of retaliation only, and there is no  
7 basis to stay discovery pending a claim of deliberate indifference to a serious medical need.

## 8 **II. Motion for Appointment of Counsel**

9 Plaintiff contends it would be unfair and biased to proceed with this action without the benefit  
10 of pro bono counsel to assist him with the litigation.

11 As Plaintiff was previously advised in the Court's May 23, 2013, order denying his request for  
12 appointment of counsel, Plaintiff does not have a constitutional right to the appointment of counsel in  
13 this action. Palmer v. Valdez, 560 F.3d 965, 970 (9th Cir. 2009); Storseth v. Spellman, 654 F.2d 1349,  
14 1353 (9th Cir. 1981). The Court may request the voluntary assistance of counsel pursuant to 28  
15 U.S.C. § 1915(e)(1), but it will do so only if exceptional circumstances exist. Palmer, 560 F.3d at 970;  
16 Wilborn v. Escalderon, 789 F.2d 1328, 1331 (9th Cir. 1986). In making this determination, the Court  
17 must evaluate the likelihood of success on the merits and the ability of Plaintiff to articulate his claims  
18 pro se in light of the complexity of the legal issues involved. Palmer at 970 (citation and quotation  
19 marks omitted); Wilborn, 789 F.2d at 1331. Neither consideration is dispositive and they must be  
20 viewed together. Palmer 560 F.3d at 970 (citation and quotation marks omitted); Wilborn, 789 F.2d at  
21 1331.

22 As with Plaintiff's prior motion, the Court does not find the required exceptional circumstances  
23 exist at this time. Even if it is assumed that Plaintiff is not well versed in the law and that he has made  
24 serious allegations which, if proved, would entitle him to relief, his case is not exceptional. The Court  
25 is faced with similar cases almost daily. Thus, Plaintiff's motion for appointment of counsel must be  
26 denied.

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Based on the foregoing,

IT IS HEREBY ORDERED that Plaintiff's motion requesting to set aside the discovery order as premature is DENIED.

IT IS SO ORDERED.

Dated: March 10, 2014

  
UNITED STATES MAGISTRATE JUDGE