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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LaKEITH McCOY,

 Plaintiff,

 v.

GARIKAPARTHI, et al,

 Defendants.

Case No. 1:13-cv-01495-DAD-BAM (PC)

ORDER DENYING MOTION FOR
APPOINTMENT OF COUNSEL
(ECF No. 52)

ORDER DENYING MOTION FOR
APPOINTMENT OF MEDICAL EXPERT
(ECF No. 53)

ORDER DENYING MOTION FOR
MODIFICATION OF DISCOVERY AND
SCHEDULING ORDER
(ECF No. 54)

Plaintiff LaKeith McCoy (“Plaintiff”) is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. This action currently proceeds against Defendants Garikaparathi, Steiber, Keeler, and Chavez (“Defendants”) for violation of Plaintiff’s Eighth Amendment rights arising from the alleged deprivation of adequate food.

On April 25, 2017, following the filing of Defendants’ answer, the Court issued a discovery and scheduling order. (ECF No. 51.) Pursuant to that order, the deadline for the completion of all discovery is December 25, 2017, and the deadline for all dispositive motions (other than a motion for summary judgment for failure to exhaust) is March 5, 2018. (Id.)

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1 Currently before the Court are Plaintiff's motions for appointment of counsel,
2 appointment of a medical expert, and modification of the discovery and scheduling order, all filed
3 on December 4, 2017. (ECF Nos. 52–54.) Defendants have not yet had an opportunity to file
4 responses to the motions, but the Court finds responses are unnecessary. The motions are deemed
5 submitted. Local Rule 230(1).

6 **I. Motion for Appointment of Counsel**

7 In his motion, Plaintiff states that this action proceeds on issues that are complex for
8 Plaintiff to litigate pro se, he is indigent with no means to retain counsel, and has limited access to
9 resources to effectively litigate his case. In addition, Plaintiff states that this case involves
10 medical issues which will require expert testimony, as well as discovery of numerous documents
11 and depositions of a number of witnesses. Finally, Plaintiff argues that he has limited knowledge
12 of the law with no legal education, and failure to appoint counsel in this matter will irreparably
13 harm Plaintiff. (ECF No. 52.)

14 Plaintiff does not have a constitutional right to appointed counsel in this action, Rand v.
15 Rowland, 113 F.3d 1520, 1525 (9th Cir. 1997), rev'd in part on other grounds, 154 F.3d 952, 954
16 n.1 (9th Cir. 1998), and the court cannot require an attorney to represent plaintiff pursuant to 28
17 U.S.C. § 1915(e)(1). Mallard v. U.S. Dist. Court for the S. Dist. of Iowa, 490 U.S. 296, 298
18 (1989). However, in certain exceptional circumstances the court may request the voluntary
19 assistance of counsel pursuant to section 1915(e)(1). Rand, 113 F.3d at 1525.

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

25 The Court has considered Plaintiff's motion for the appointment of counsel, but does not
26 find the required exceptional circumstances. Even if it is assumed that Plaintiff is not well versed
27 in the law and that he has made serious allegations which, if proved, would entitle him to relief,
28 his case is not exceptional. This Court is faced with similar cases involving Eighth Amendment

1 claims of deliberate indifference filed by prisoners proceeding pro se and in forma pauperis
2 almost daily. These prisoners also must conduct legal research and prosecute claims without the
3 assistance of counsel.

4 Furthermore, at this stage in the proceedings, the Court cannot make a determination that
5 Plaintiff is likely to succeed on the merits. Although the Court has determined Plaintiff has stated
6 some claims which may proceed in litigation, it has not determined that those claims have a
7 likelihood of ultimately being successful. Also, based on a review of the record in this case, the
8 Court does not find that Plaintiff cannot adequately articulate his claims.

9 **II. Motion for Appointment of Medical Expert**

10 Federal Rule of Evidence 706 authorizes courts, within their discretion, to appointment a
11 neutral, independent expert witness. Fed. R. Evid. 706(a); Walker v. Am. Home Shield Long
12 Term Disability Plan, 180 F.3d 1065, 1071 (9th Cir. 1999). The appointment of such an expert
13 witness may be appropriate when “scientific, technical, or other specialized knowledge will assist
14 the trier-of-fact to understand the evidence or decide a fact in issue.” Ledford v. Sullivan, 105
15 F.3d 354, 358-59 (7th Cir. 1997).

16 However, the statute authorizing a petitioner’s in forma pauperis status does not authorize
17 the expenditure of public funds for expert witnesses. See 28 U.S.C. § 1915; Tedder v. Odel, 890
18 F.2d 210, 211–12 (9th Cir. 1989) (per curiam) (expenditure of public funds on behalf of indigent
19 litigant is proper only when authorized by Congress); Boring v. Kozakiewicz, 833 F.2d 468, 474
20 (3d Cir. 1987) (no provision to pay fees for expert witnesses). An indigent prisoner litigant must
21 bear his or her own costs of litigation, including witnesses. See, e.g., Tedder, 890 F.2d at 211.

22 Furthermore, although a court may apportion costs for the expert witnesses among the
23 parties, including apportionment of costs to one side, Fed. R. Evid. 706; Ford ex rel. Ford v. Long
24 Beach Unified School Dist., 291 F.3d 1086, 1090 (9th Cir. 2002); Walker, 180 F.3d at 1071,
25 where the cost would likely be apportioned to the state, the court should exercise caution.

26 Plaintiff requests appointment of “a medical expert at Court expense to aid the Plaintiff.”
27 (ECF No. 53.) Plaintiff is clear that he requests an expert who will corroborate his testimony and
28 serve as an advocate, rather than assist the Court. Indeed, Plaintiff states that the services of the

1 medical expert must be on a confidential basis, because Plaintiff may need to discuss tactics and
2 transmit privileged information with the expert. (Id.)

3 Federal Rule of Evidence 706 does not contemplate court appointment and compensation
4 of an expert witness as an advocate for Plaintiff. Brooks v. Tate, 2013 WL 4049043, *1 (E.D.
5 Cal. Aug. 7, 2013) (denying appointment of medical expert on behalf of state prisoner in section
6 1983 action); Gorrell v. Sneath, 2013 WL 3357646, * 1 (E.D. Cal. Jul. 3, 2013) (purpose of court-
7 appointed expert is to assist the trier of fact, not to serve as an advocate for a particular party).
8 Moreover, Rule 706 is not a means to avoid the in forma pauperis statute and its prohibition
9 against using public funds to pay for the expenses of witnesses. Manriquez v. Huchins, 2012 WL
10 5880431, * 12 (E.D. Cal. 2012).

11 **III. Motion for Modification of Discovery and Scheduling Order**

12 In his motion, Plaintiff states that, to date, he has propounded only one document request
13 on Defendants, and Defendants have propounded one set of interrogatories on Plaintiff. Plaintiff
14 states that due to his limited resources, he will not be able to retain a lawyer or expert to support
15 and/or verify his claims, which are based on complex issues. Plaintiff argues that he will be
16 irreparably injured if the Court does not modify the current discovery and scheduling order, and a
17 modification will in no way prejudice Defendants. (ECF No. 54.)

18 Although Plaintiff has set forth his reasons for seeking a modification of the discovery and
19 scheduling order, Plaintiff fails to request any particular modification. Plaintiff has not stated
20 which deadline, if any, he seeks to modify, nor has he indicated what length of time is needed for
21 any extension. The Court cannot grant Plaintiff an unspecified modification of the discovery and
22 scheduling order.

23 Plaintiff also fails to state good cause for continuance of the discovery deadlines.
24 Discovery has been open since April 25, 2017, and Plaintiff offers no explanation why he was
25 unable to conduct further discovery during the discovery period.

26 **IV. Conclusion and Order**

27 Based on the foregoing, IT IS HEREBY ORDERED that:

- 28 1. Plaintiff's motion for appointment of counsel, (ECF No. 52), is DENIED, without

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prejudice;

- 2. Plaintiff’s motion for appointment of medical expert, (ECF No. 53), is DENIED, without prejudice; and
- 3. Plaintiff’s motion for modification of discovery and scheduling order, (ECF No. 54), is DENIED, without prejudice.

IT IS SO ORDERED.

Dated: December 6, 2017

/s/ Barbara A. McAuliffe
UNITED STATES MAGISTRATE JUDGE