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

STEWART MANAGO,
Plaintiff,

vs.

D. DAVEY, et al.,
Defendants.

1:16-cv-00399-LJO-GSA-PC

**ORDER DENYING MOTION FOR
APPOINTMENT OF COUNSEL, OR IN THE
ALTERNATIVE, FOR IMPOSITION OF
SANCTIONS
(ECF No. 129.)**

I. BACKGROUND

Stewart Manago (“Plaintiff”) is a prisoner proceeding *pro se* and *in forma pauperis* with this civil rights action filed pursuant to 42 U.S.C. § 1983. This case now proceeds with the First Amended Complaint filed by Plaintiff on April 18, 2016, against defendants J. Acevedo, D. Davey, A. Maxfield, E. Razo, M.V. Sexton, A. Valdez, and J. Vanderpoel (collectively, “Defendants”), on Plaintiff’s First Amendment retaliation claims. (ECF No. 13.)

On September 14, 2018, the court granted Plaintiff’s motion for a settlement conference and scheduled a settlement conference for November 6, 2018 at 10:30 a.m. before Magistrate Judge Stanley A. Boone, by video conference at Plaintiff’s place of detention, High Desert State Prison. (ECF No. 121.) On October 19, 2018, Plaintiff notified the court that he had

1 been transferred to West Valley Detention Center in Rancho Cucamonga, California. (ECF No.
2 125.)

3 On October 31, 2018, the court issued an order stating that the court had telephoned
4 defense counsel Annakarina De La Torre-Fennel and Michelle Angus, who indicated they
5 would inquire as to the availability of a videoconference at the San Bernardino County Jail.¹
6 On November 5, 2018, the court vacated the settlement conference after learning that video
7 conferencing was not available. (ECF No. 127.) Defense counsel was instructed to advise the
8 court if and when a settlement conference may be re-scheduled in this case. (Id.)

9 On November 20, 2018, Plaintiff filed a motion for appointment of counsel to represent
10 him at the next settlement conference, or in the alternative, for the court to impose sanctions on
11 Defendants and San Bernardino County Jail officials for misleading the court. (ECF No. 129.)
12 Plaintiff also requests an FBI investigation and personal compensation of \$1,000.00. (Id.)
13 Plaintiff also complains that the court engaged in inappropriate ex parte communication with
14 defense counsel. (Id.) Pursuant to Local Rule 230(*l*), this motion shall be submitted upon the
15 record without oral argument.

16 **II. MOTION FOR APPOINTMENT OF COUNSEL**

17 Plaintiff requests court-appointed counsel to represent him at the next settlement
18 conference. Plaintiff does not have a constitutional right to appointed counsel in this action,
19 Rand v. Rowland, 113 F.3d 1520, 1525 (9th Cir. 1997), and the court cannot require an
20 attorney to represent Plaintiff pursuant to 28 U.S.C. § 1915(e)(1). Mallard v. United States
21 District Court for the Southern District of Iowa, 490 U.S. 296, 298 (1989). However, in certain
22 exceptional circumstances the court may request the voluntary assistance of counsel pursuant to
23 section 1915(e)(1). Rand, 113 F.3d at 1525.

24 Without a reasonable method of securing and compensating counsel, the court will seek
25 volunteer counsel only in the most serious and exceptional cases. In determining whether
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27 ¹ The West Valley Detention Center, 9500 N. Etiwanda Ave., Rancho Cucamonga, CA 91739,
28 is a San Bernardino County Jail facility.

1 “exceptional circumstances exist, the district court must evaluate both the likelihood of success
2 of the merits [and] the ability of the [plaintiff] to articulate his claims *pro se* in light of the
3 complexity of the legal issues involved.” *Id.* (internal quotation marks and citations omitted).

4 In the present case, the court does not find the required exceptional circumstances. Plaintiff’s
5 case stems from allegations that the defendants retaliated against him by retaining him in the
6 SHU because of his grievances and civil litigation. The court does not find it likely that
7 Plaintiff will succeed on the merits of this case. While the court has found that “Plaintiff’s First
8 Amended Complaint states a cognizable claim . . . for retaliation in violation of the First
9 Amendment,” (ECF No. 16 at 8:6-8), this is not a finding that Plaintiff is likely to succeed on
10 the merits. From a review of the record, the court finds that Plaintiff is able to adequately
11 articulate his claims and respond to court orders, and Plaintiff’s retaliation claims are not
12 complex. Therefore, Plaintiff’s motion for appointment of counsel shall be denied, without
13 prejudice to renewal of the motion at a later stage of the proceedings.

14 **III. MOTION FOR SANCTIONS, INVESTIGATION, AND COMPENSATION**

15 Federal courts have inherent power to impose sanctions against both attorneys and
16 parties for “bad faith” conduct in litigation or for “willful disobedience” of a court order.
17 Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991); Roadway Express, Inc. v. Piper, 447 U.S.
18 752, 764-66 (1980). The court may assess attorney fees or other sanctions under its inherent
19 power for the “willful disobedience of a court order.” Chambers, 501 U.S. at 45; Alyeska
20 Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 258 (1975). A fee award under the
21 court’s inherent power is meant to vindicate judicial authority, rather than to provide a
22 substantive remedy to an aggrieved party: “The wrong done was to the court.” Mark
23 Industries, Ltd. v. Sea Captain’s Choice, Inc., 50 F.3d 730, 733 (9th Cir. 1995).

24 Plaintiff requests the imposition of sanctions on Defendants for their failure to comply
25 with the court’s order issued on September 14, 2018, which required the parties to appear at a
26 settlement conference on November 6, 2018. Plaintiff asserts that Defendants and the San
27 Bernardino County Jail (“Jail”) provided false information about the video conference
28 capabilities available at the Jail’s facilities. Plaintiff declares that San Bernardino County

1 represented that West Valley Detention Center has video conference capabilities, and Sergeant
2 J. Marshal told Plaintiff that the West Valley Detention Center has video conference
3 capabilities. (Decl. of Manago, ECF No. 129 at 3 ¶¶ 4, 6,) Plaintiff requests an investigation
4 by the FBI to determine whether Defendants and the Jail lied about the availability of video
5 conferencing at the Jail. Plaintiff contends that if a video conference was not available, the
6 settlement conference should have been held as a telephonic conference. Plaintiff also requests
7 personal compensation in the amount of \$1,000.00 for the time and effort he spent preparing
8 for the settlement conference and bringing this motion.

9 Defendants first argue that Plaintiff's motion should be denied because he failed to
10 comply with Federal Rule of Civil Procedure 11(c) when he failed to serve a copy of his
11 motion for sanctions on Defendants before filing the motion, making his motion improper.

12 Second, Defendants argue that sanctions should not be imposed for their failure to
13 attend the November 6, 2018 settlement conference because the settlement conference was
14 vacated by the court's order issued on November 5, 2018. (ECF No. 127.)

15 Third, Defendants argue that they did not lie to the court about West Valley Detention
16 Center's video conferencing capabilities, and they have never lied to the court. Defense
17 counsel declares that she was informed by staff at High Desert Detention Center, earlier in the
18 year, that West Valley Detention Center had video conferencing capabilities but later learned
19 that video conferencing was limited to an in-house circuit, and outside connections could not be
20 facilitated. (Decl. of A. De La Torre-Fennell, ECF No. 130 at 5 ¶¶3, 6.)

21 Finally, Defendants argue that Plaintiff has no basis for his request for relief in the
22 amount of \$1,000.00 for his time and research in preparing for the settlement conference
23 because Plaintiff is appearing in this case *pro se* and thus has not incurred attorney fees.
24 Defendants also assert that Plaintiff provides no basis or authority in law for the court to refer
25 defense counsel to the FBI for investigation.

26 **Discussion**

27 The court rejects Defendants' argument that Plaintiff's motion should be denied for his
28 failure to comply with Rule 11. *Pro se* litigants are afforded some leniency to compensate for

1 their lack of legal training. “In civil rights cases where the plaintiff appears *pro se*, the court
2 must construe the pleadings liberally and must afford plaintiff the benefit of any doubt.”
3 Jackson v. Carey, 353 F.3d 750, 757 (9th Cir. 2003) (internal citation omitted). This
4 requirement of liberality applies to motions. See Bernhardt v. Los Angeles County, 339 F.3d
5 920, 925 (9th Cir. 2003) (internal citations omitted). When a plaintiff proceeds *pro se* and
6 technically violates a rule, the court should act with leniency toward the *pro se* litigant. Draper
7 v. Coombs, 792 F.2d 915, 924 (9th Cir. 1986); Pembrook v. Wilson, 370 F.2d 37, 39–40 (9th
8 Cir. 1966).

9 Nevertheless, the court finds that sanctions against Defendants for failure to attend the
10 November 6, 2018, settlement conference are inappropriate because the settlement conference
11 was vacated by the court and Defendants were not required to attend. On November 5, 2018,
12 the court issued an order vacating the November 6, 2018, settlement conference due to the
13 unavailability of a video conference at any of the San Bernardino County Jail facilities.² (ECF
14 No. 127.) Thus Defendants were not required to attend the settlement conference on November
15 6, 2018. The court finds no “bad faith” conduct in litigation or “willful disobedience” of the
16 court’s September 14, 2018, order by Defendants. Therefore, Plaintiff’s motion for sanctions
17 based on Defendants’ failure to attend the settlement conference shall be denied.

18 Plaintiff’s request for personal compensation of \$1,000.00 shall also denied. As
19 correctly argued by Defendants, Plaintiff is not entitled to any compensation of attorney’s fees
20 as a *pro se* litigant for representing himself.³

23 ² Plaintiff was detained at the West Valley Detention Center, 9500 N. Etiwanda Ave., Rancho
24 Cucamonga, CA 91739, (ECF No. 124), in the custody of the San Bernardino County Sheriff.

25 ³ Plaintiff’s contention that he is entitled to attorney’s fees for preparing for a settlement
26 conference or bringing a motion is without merit. Plaintiff is representing himself in this action. Because Plaintiff
27 is not represented by an attorney, he is not entitled to recover attorney’s fees. See Friedman v. Arizona, 912 F.2d
28 328, 333 n.2 (9th Cir. 1990), superseded by statute as stated in Warsoldier v. Woodford, 418 F.3d 989 (9th Cir.
2005); Gonzalez v. Kangas, 814 F.2d 1411, 1412 (9th Cir. 1987); see also Rickley v. Cnty. of Los Angeles, 654
F.3d 950, 954 (9th Cir. 2011) (“The Court accordingly adopted a per se rule, categorically precluding an award of
attorney’s fees under § 1988 to a pro se attorney-plaintiff.”)

1 With respect to Plaintiff’s request for an FBI investigation, the court is not authorized to
2 direct or conduct investigations on Plaintiff’s behalf. “[T]he expenditure of public funds [on
3 behalf of an indigent litigant] is proper only when authorized by Congress” Tedder v.
4 Odel, 890 F.2d 210, 211-12 (9th Cir. 1989) (quoting United States v. MacCollum, 426 U.S.
5 317, 321, 96 S.Ct. 2086 (1976)). The *in forma pauperis* statute does not authorize the
6 expenditure of public funds for the court to direct or conduct investigations. 28 U.S.C. § 1915.
7 Accordingly, Plaintiff’s motion for an investigation shall also be denied.

8 **IV. EX PARTE COMMUNICATION**

9 Plaintiff argues that the court engaged in inappropriate ex parte communication with
10 defense counsel. In support of this argument, Plaintiff declares as follows:

11 It appears that Judge Boone has engaged in ex parte communication with
12 defense counsel De La Torre-Fennel, and Michelle Angus, supervising Deputy
13 Attorney General. Judges are not allowed to engage in ex parte communication
14 [with] Plaintiff or defense counsel in a criminal or civil case, and Plaintiff
15 objects to said ex parte communication because they [defense counsel] lied to a
16 federal judge about Plaintiff’s transfer and/or ability to appear via video
17 conference and the court did not allow Plaintiff to be heard prior to making its
18 ruling on October 31, 2018. On October 31, 2018, the court had a telephone
19 conversation with defense counsel Annakarina De La Torre-Fennel and
20 Michelle Angus who indicated that they would inquire as to the availability of a
21 video conference at the San Bernardino County Jail and advise the court whether
22 it is feasible. The court further stated that depending on the information
23 provided by defense counsel, the court will then determine whether to keep the
24 settlement conference on calendar as scheduled, to continue the settlement
25 conference, or to utilize some other alternative. This is not fair to Plaintiff,
26 because the court should have had a telephone conference with all parties, not
27 just with the defense team, who clearly misled the court and provided false
28 statements, in violation of 18 U.S.C. §§ 371, 1001, 1503, and 1512. On October

1 31, 2018, the court ordered that on or before November 4, 2018, defense counsel
2 shall contact courtroom deputy Mamie Hernandez as to the availability of a
3 video conference or some other alternative for the settlement conference to
4 remain on November 6, 2018 at 10:30 a.m. On November 2, 2018, the court had
5 been advised that no video conference is available at any of the San Bernardino
6 County Jail facilities and there are no other reasonable alternatives to
7 accommodate the settlement conference on November 6, 2018, [and] as [a]
8 result the court vacated [the settlement conference]. (ECF No. 127.)

9 (Decl. of Plaintiff, ECF No. 129 at 5 ¶ 27 - 6 ¶ 33.)⁴

10 Canon 3A(4)(b) of the Code of Conduct for United States Judges addresses ex parte
11 communications:

12 (4) A judge should accord to every person who has a legal interest in a proceeding,
13 and that person's lawyer, the full right to be heard according to law. Except as
14 set out below, a judge should not initiate, permit, or consider ex parte
15 communications or consider other communication concerning a pending or
16 impending matter that are made outside the presence of the parties or their
17 lawyers. If a judge receives an unauthorized ex parte communication bearing on
18 the substance of a matter, the judge should promptly notify the parties of the
19 subject matter of the communication and allow the parties an opportunity to
20 respond, if requested. A judge may:

21 (b) when circumstances require it, permit ex parte communication for
22 scheduling, administrative, or emergency purposes, but only if the ex
23 parte communication does not address substantive matters and the judge

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27 ⁴ All page numbers cited herein are those assigned by the court's CM/ECF system and not based
28 on the parties' pagination of their briefing materials.

1 reasonably believes that no party will gain a procedural, substantive, or
2 tactical advantage as a result of the ex parte communication.

3 Code of Conduct for United States Judges, Canon 3A(4)(b).⁵

4 **Discussion**

5 As Canon 3A(4)(b) explains, an ex parte communication is permissible for
6 administrative purposes that do not concern substantive matters, when the judge reasonably
7 believes no party will gain a procedural, substantive, or tactical advantage. Such is the case
8 here. The court's order issued on October 31, 2018, explains the circumstances of the
9 communication:

10 The Court was advised that due to Plaintiff's transfer he no longer has
11 the ability to appear via video conference. Further, based on a review of
12 Defendants' settlement statement, the Court could not determine whether a
13 settlement conference via telephone would be beneficial given the
14 circumstances. Therefore, on October 31, 2018, the Court had a telephone
15 conversation with defense counsel Annakarina De La Torre-Fennel and
16 Michelle Angus who indicated that they would inquire as to the availability of
17 videoconference at the San Bernardino County Jail and advise the Court whether
18 it is feasible. Depending on the information provided by defense counsel, the
19 Court will then determine whether to keep the settlement conference on calendar
20 as scheduled, to continue the settlement conference, or to utilize some other
21 alternative. Accordingly, it is **HEREBY ORDERED** that on or before
22 **November 4, 2018**, defense counsel shall contact Courtroom Deputy Mamie
23 Hernandez as to the availability of videoconference or some other alternative for
24 the settlement conference to remain on calendar for November 6, 2018, at 10:30
25 a.m. (emphasis in original).

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28 ⁵ The Code of Conduct for United States Judges is available at <http://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges> (last visited December 21, 2018).

1 There is no evidence that the judge spoke to defense counsel for other than purely
2 administrative purposes, or that there was any substantive discussion about the case at all.
3 Under the facts presented, defense counsel spoke to the judge and was directed to inquire as to
4 the availability of a video conference at the San Bernardino County Jail, and to contact the
5 judge's courtroom deputy to report whether it was feasible for the settlement conference to go
6 forward on November 6, 2018. On November 5, 2018, the court issued an order vacating the
7 settlement conference, based on information provided by defense counsel:

8 The Court has been advised that no video conference is available at any
9 of the San Bernardino County jail facilities and there are no other reasonable
10 alternatives to accommodate the settlement conference on November 6, 2018.
11 Accordingly, it is **HEREBY ORDERED** that the settlement conference set for
12 November 6, 2018, at 10:30 a.m. before the undersigned is **VACATED**. Defense
13 counsel shall advise the Court if and when a settlement conference may be re-
14 scheduled in this case.

15 (ECF No. 127.)

16 Based on the foregoing, the court concludes that the ex parte conversations between the
17 court and defense counsel were not impermissible.

18 **V. CONCLUSION**

19 Accordingly, **IT IS HEREBY ORDERED** that:

- 20 1. Plaintiff's motion for imposition of sanctions, an FBI investigation, and
21 compensation to Plaintiff, filed on November 20, 2018, is **DENIED**; and
22 2. Plaintiff's motion for appointment of counsel is **DENIED**, without prejudice.

23 **IT IS SO ORDERED.**

24 Dated: **December 21, 2018**

25 **/s/ Gary S. Austin**
26 **UNITED STATES MAGISTRATE JUDGE**