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8 **UNITED STATES DISTRICT COURT**
9 EASTERN DISTRICT OF CALIFORNIA
10

11 TIMOTHY CLEVELAND,

12 Plaintiff,

13 v.

14 THOMAS C. HUNTON, et al.,

15 Defendants.

Case No. 1:16-cv-01732-AWI-SAB

ORDER DENYING OBJECTION
CONSTRUED AS MOTION FOR
RECONSIDERATION OF DENIAL OF
APPOINTMENT OF COUNSEL

(ECF No. 17)

JUNE 15, 2017 DEADLINE

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17 **I.**

18 **BACKGROUND**

19 On November 16, 2016, Plaintiff Timothy Cleveland (“Plaintiff”), proceeding pro se and
20 in forma pauperis, filed this civil rights action pursuant to Bivens v. Six Unknown Named
21 Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), which provides a remedy for
22 violation of civil rights by federal actors. Plaintiff filed a second amended complaint on March
23 14, 2017, which the magistrate judge screened and found stated a claim against Defendant
24 Hunton in his official capacity for declaratory relief on Plaintiff’s Administrative Procedures Act
25 claim regarding the decision to accelerate a loan he received in 2014. (ECF No. 13.) The
26 findings and recommendations recommended dismissing all other defendants and claims from
27 this action. (Id.)

28 Plaintiff filed objections to the findings and recommendations on April 17, 2017. (ECF

1 No. 14.) In his objections, Plaintiff sought appointment of counsel in this action. (Id.) On April
2 26, 2017, this Court issued an order adopting the findings and recommendations and denying the
3 motion for appointment of counsel. (ECF No. 15.) On April 28, 2017, an order issued directing
4 the Clerk of the Court to forward the necessary service documents to Plaintiff and for him to
5 return them within thirty days. (ECF No. 16.) On May 25, 2017, Plaintiff filed objections to the
6 order adopting the findings and recommendations. (ECF No. 17.) Plaintiff objects to the order
7 denying his request for appointment of counsel and seeks an order compelling discovery. The
8 Court shall construe Plaintiff’s objection as a motion for reconsideration of the denial of
9 appointment of counsel in this action.

10 **II.**

11 **LEGAL STANDARD**

12 Under Rule 60(b) of the Federal Rules of Civil Procedure, a district court “may relieve a
13 party or its legal representative from a final judgment, order, or proceeding for the following
14 reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered
15 evidence that, with reasonable diligence, could not have been discovered in time to move for a
16 new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic),
17 misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the
18 judgment has been satisfied, released or discharged; it is based on an earlier judgment that has
19 been reversed or vacated; or applying it prospectively is no longer equitable; or 6) any other
20 reason that justifies relief. “A motion for reconsideration should not be granted, absent highly
21 unusual circumstances, unless the district court is presented with newly discovered evidence,
22 committed clear error, or if there is an intervening change in the controlling law.” Marlyn
23 Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co., 571 F.3d 873, 880 (9th Cir. 2009) (internal
24 punctuation and citations omitted).

25 Requests for reconsideration are also governed by Local Rule 230(j) which provides that
26 a party seeking reconsideration must set forth the material facts and circumstances surrounding
27 the motion for reconsideration, including “what new or different facts or circumstances are
28 claimed to exist which did not exist or were not shown upon such prior motion, or what other

1 grounds exist for the motion;” and “why the facts or circumstances were not shown at the time of
2 the prior motion.”

3 **III.**
4 **DISCUSSION**

5 **A. Appointment of Counsel**

6 In his objection, Plaintiff states that the magistrate judge found that he failed to state a
7 claim under the Equal Credit Opportunity Act and the Tucker Act and that his claim against the
8 agencies and employees of the United States were not cognizable under 42 U.S.C. § 2000d.
9 Plaintiff contends that in denying Plaintiff’s motion for appointment of counsel, the Court found
10 that Plaintiff appears to be quite capable of pursuing this action pro se and his complaint
11 demonstrates his ability to conduct legal research and articulate his claims. Plaintiff argues that
12 the undersigned acted in error and contradictory to the opinions of the magistrate judge in
13 denying his motion for appointment of counsel.

14 The fact that Plaintiff failed to state a cognizable claim does not demonstrate that Plaintiff
15 is unable to pursue this action pro se or is not capable of adequately conducting legal research or
16 articulating his claims. Plaintiff’s pleadings demonstrate his ability to conduct research and
17 apply such research to the facts in this action. That Plaintiff incorrectly applies or argues the law
18 is not demonstrative of a lack of ability to proceed pro se. The Court frequently deals with cases
19 in which counsel incorrectly argues or applies the law to the facts of a particular case. Review of
20 the pleadings in this instance shows that Plaintiff has the ability to articulate his claims, conduct
21 legal research, and make legal arguments. The fact that Plaintiff failed to state a cognizable
22 claim does not contradict these findings.

23 Plaintiff contends that on March 16, 2016, the Office of Adjudication, Program
24 Investigation Division received his complaint against the Farm Services Agency which contained
25 prima facie evidence that Defendant Hunton violated California Penal Code 597 and since there
26 is a criminal element to his complaint it would violate Plaintiff’s rights to due process if he is
27 denied counsel. Even if criminal charges were brought against Defendant Hunton, it would not
28 affect Plaintiff’s constitutional right to counsel in this action. This is a civil action, not a

1 criminal action, therefore, Plaintiff does not have a constitutional right to appointed counsel.
2 Hernandez v. Whiting, 881 F.2d 768, 770-71 (9th Cir. 1989). Further, if criminal charges were
3 brought against Defendant Hunton based on the same allegations that have brought in this action
4 it would provide no right of counsel for Plaintiff.

5 Plaintiff also argues that he is employed out of state, his requests for information from
6 Government attorneys has been denied as the information he seeks has been deemed
7 confidential, and his use of a public library computer is time sensitive. However, even accepted
8 as true these issues do not demonstrate that exceptional circumstances exist in this action to
9 necessitate the appointment of counsel in this action. Terrell v. Brewer, 935 F.2d 1015, 1017
10 (9th Cir. 1991). Plaintiff's circumstance is similar to numerous other litigants which the Court
11 encounters every day. Plaintiff is adequately able to articulate his claims and as discussed in the
12 April 26, 2017 order, at this stage in the proceedings, the Court cannot conclude that Plaintiff is
13 likely to proceed on the merits of his claim.

14 Plaintiff has failed to demonstrate that any grounds exist to grant his request for
15 reconsideration of the order denying appointment of counsel in this action. Plaintiff's motion for
16 reconsideration of the denial of appointment of counsel is denied.

17 **B. Motion to Compel Discovery**

18 Plaintiff also requests discovery¹ and seeks an order directing OASCR investigator
19 Paulette Keefer, U.S. Department of Agriculture, Office of the Assistant Secretary for Civil
20 Rights, Program Compliance to provide an agency position statement from the Farm Services
21 Agency and chronological OASCR details of the actions taken since an investigator was
22 assigned to his case.

23 Discovery in this action, to the extent that it is relevant and allowed, will be governed by
24 the Federal Rules of Civil Procedure. In this action, after the defendant is served and files an
25 answer, a scheduling order will issue establishing the dates by which all discovery must be
26 completed. At this time, Defendant has not been served and discovery is not open. See Fed. R.

27 ¹ Plaintiff seeks discovery under Rule 56(f). Rule 56 of the Federal Rules of Civil Procedure applies to motions for
28 summary judgment. The Court assumes that this is a typographical error and that Plaintiff is seeking discovery
under Rule 26(f).

1 Civ. P. 26(f). Further, prior to moving for an order compelling discovery, Plaintiff will be
2 required to attempt to obtain discovery in this action from the defendant. Only where a party has
3 requested discovery and the responding party fails to adequately respond will the Court consider
4 a motion to compel.

5 **IV.**

6 **ORDER**

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

- 8 1. Plaintiff's objections to the order adopting which is construed as a motion for
9 reconsideration is DENIED;
- 10 2. Plaintiff shall submit service documents as required by the April 28, 2017 order
11 on or before June 15, 2017; and
- 12 3. If Plaintiff fails to submit service documents in compliance with this order, this
13 action may be dismissed for failure to prosecute.

14 IT IS SO ORDERED.

15 Dated: May 30, 2017

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17 SENIOR DISTRICT JUDGE