

1 Defendant's supplemental responses, (ECF No. 63), and Defendant filed a supplemental reply,
2 (ECF No. 64). Defendant's motion for summary judgment is now fully briefed and pending
3 before the Court.

4 On May 28, 2024, Plaintiff filed motions for appointment of expert witnesses,
5 appointment of counsel, and for arbitration or mediation, together with a notice regarding
6 pleading conditions precedent pursuant to Federal Rule of Civil Procedure 9(c). (ECF Nos. 65–
7 68.) Defendant has not yet had an opportunity to file responses to the motions, but the Court
8 finds responses are unnecessary. The motions are deemed submitted. Local Rule 230(l).

9 **I. Motion for Appointment of Expert Witnesses**

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 the following expert witnesses: (1) Erin Tracy Ostby,
27 M.D., ENT (Resident), Riverside University Hospital (“RUH”); (2) Helen Xiao-Ou Xu, operating
28 surgeon, RUH; (3) Benjamin Daniel Bradford, M.D., RUH, 1st assistant to Dr. Xu; and (4) Phillip

1 LeClair Garth, Au. D., CCC Au 2166, RUH. (ECF No. 65.) Plaintiff argues that these expert
2 witnesses are necessary to speak to their individual experiences in this particular medical field, as
3 it relates to the initial procedure performed by the Defendant, and would be questioned on issues
4 limited to Interrogatories Nos. 6 and 16. Defendant's expert witness, Dr. Kaplan, has his own
5 opinion, which can and should be rebutted with the admissible expert testimony of the above
6 expert witnesses who performed and/or assessed the necessity for Plaintiff's subsequent
7 tympanoplasty. (*Id.*)

8 Federal Rule of Evidence 706 does not contemplate court appointment and compensation
9 of an expert witness as an advocate for Plaintiff. *Brooks v. Tate*, 2013 WL 4049043, *1 (E.D.
10 Cal. Aug. 7, 2013) (denying appointment of medical expert on behalf of state prisoner in section
11 1983 action); *Gorrell v. Sneath*, 2013 WL 3357646, * 1 (E.D. Cal. Jul. 3, 2013) (purpose of court-
12 appointed expert is to assist the trier of fact, not to serve as an advocate for a particular party).
13 Moreover, Rule 706 is not a means to avoid the *in forma pauperis* statute and its prohibition
14 against using public funds to pay for the expenses of witnesses. *Manriquez v. Huchins*, 2012 WL
15 5880431, * 12 (E.D. Cal. 2012).

16 The requested expert witnesses are not neutral or independent. Plaintiff requests that the
17 Court appoint as expert witnesses individuals who were directly involved in Plaintiff's medical
18 care following his treatment by Defendant in this action. Federal Rule of Evidence 706 does not
19 permit the Court to appoint experts to "rebut" Defendant's expert witness. Thus, Plaintiff is not
20 entitled to appointment of these expert witnesses on his behalf.

21 Finally, there is no indication that a neutral expert will be required to assist the trier of fact
22 in this matter. Plaintiff's allegations are not so complicated as to require the appointment of an
23 expert witness to assist the court and/or a jury.

24 **II. Motion for Appointment of Counsel**

25 Plaintiff requests appointment of counsel pursuant to the Seventh Amendment, which
26 provides for the right to a jury trial in federal civil actions where the amount in controversy
27 exceeds twenty dollars. (ECF No. 66.) Plaintiff argues that appointment of counsel is necessary
28 to fairly and fully litigate this case, because Plaintiff is indigent and cannot afford or find and

1 retain counsel on his own, expert witness testimony is needed, and/or arbitration or mediation
2 between the parties would possibly dispose of this case in a cost-effective manner. Plaintiff's
3 right eardrum was damaged, affecting his ability to litigate the case at trial, and without the
4 appointment of counsel Plaintiff would not be able to fully and fairly litigate this case before the
5 trier of fact. (*Id.*)

6 Plaintiff does not have a constitutional right to appointed counsel in this action, *Rand v.*
7 *Rowland*, 113 F.3d 1520, 1525 (9th Cir. 1997), *rev'd in part on other grounds*, 154 F.3d 952, 954
8 n.1 (9th Cir. 1998), and the court cannot require an attorney to represent plaintiff pursuant to 28
9 U.S.C. § 1915(e)(1). *Mallard v. U.S. Dist. Court for the S. Dist. of Iowa*, 490 U.S. 296, 298
10 (1989). However, in certain exceptional circumstances the court may request the voluntary
11 assistance of counsel pursuant to section 1915(e)(1). *Rand*, 113 F.3d at 1525.

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

17 The Court has considered Plaintiff's motion for the appointment of counsel, but does not
18 find the required exceptional circumstances. Even if it is assumed that Plaintiff is not well versed
19 in the law and that he has made serious allegations which, if proved, would entitle him to relief,
20 his case is not exceptional. This Court is faced with similar cases filed by prisoners proceeding
21 *pro se* and *in forma pauperis* almost daily. These prisoners also must prepare lay and expert
22 witness testimony, attend settlement conferences, and prosecute claims without the assistance of
23 counsel.

24 Furthermore, at this stage in the proceedings, the Court cannot make a determination that
25 Plaintiff is likely to succeed on the merits. Although Plaintiff is proceeding on a cognizable
26 claim, the Court cannot say that this claim has a likelihood of ultimately being successful in the
27 face of Defendant's pending motion for summary judgment. Also, based on a review of the
28 record in this case, the Court does not find that Plaintiff cannot adequately articulate his claims in

1 writing or at a trial, even taking into account the damage to Plaintiff's right eardrum.

2 **III. Motion for Arbitration and/or Mediation**

3 Plaintiff requests that a mediator be appointed or this case set for arbitration, to possibly
4 dispose of this case, in lieu of a trial. (ECF No. 67.)

5 Without a clear indication from all parties to the action that they are willing to discuss
6 settlement, the Court does not find that it would be an efficient use of judicial resources to set this
7 case for a settlement conference at this time. The parties are reminded that they are free to settle
8 this matter without judicial involvement at any time by communicating among themselves. If in
9 the future the parties jointly decide that this action would benefit from a Court-facilitated
10 settlement conference, or if they are able to reach an independent settlement agreement, they may
11 so inform the Court.

12 **IV. Plaintiff's Notice Regarding Conditions Precedent**

13 Plaintiff also filed a notice titled "Conditions Precedent Federal Rule of Civil Procedure,
14 Rule 9(c)." (ECF No. 68.) Plaintiff appears to argue that in denying that the first unsuccessful
15 tympanoplasty caused Plaintiff's injury, or that Defendant was not the cause of Plaintiff's injury,
16 Defendant must plead the denial with particularity pursuant to Rule 9(c). (*Id.*)

17 To the extent Plaintiff is attempting to raise a challenge to Defendant's pleadings pursuant
18 to Rule 9(c), Plaintiff is reminded that the deadline to file motions to amend the pleadings expired
19 on November 5, 2020. To the extent Plaintiff is attempting to challenge Defendant's motion for
20 summary judgment pursuant to Rule 9(c), Plaintiff is informed that Rule 9(c) imposes a
21 requirement for the pleading stage, and does not provide a basis for opposing a motion for
22 summary judgment.

23 **V. Conclusion and Order**

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

- 25 1. Plaintiff's motion for appointment of expert witnesses, (ECF No. 65), is DENIED;
26 2. Plaintiff's motion for appointment of counsel, (ECF No. 66), is DENIED, without
27 prejudice; and

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3. Plaintiff's motion for arbitration or mediation, (ECF No. 67), is DENIED, without prejudice.

IT IS SO ORDERED.

Dated: June 3, 2024

/s/ Barbara A. McAuliffe
UNITED STATES MAGISTRATE JUDGE