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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

MICHAEL BAKER,  
Plaintiff,  
v.  
PEREZ, et al.,  
Defendants.

No. 2: 09-cv-2757 MCE KJN P

PRETRIAL ORDER

Plaintiff is a state prisoner, proceeding without counsel, with a civil rights action pursuant to 42 U.S.C. § 1983. Following resolution of summary judgment motions, the following claims remain: whether defendant Medina violated the Eighth Amendment and state law by failing to prescribe Tramadol to plaintiff upon plaintiff's return to High Desert State Prison ("HDSP") in November 2008.

The parties submitted pretrial statements. Upon review of the statements and the remainder of the file, and good cause appearing, this court makes the following findings and orders:

JURISDICTION/VENUE

Jurisdiction is predicated upon 28 U.S.C. § 1331 arising under 42 U.S.C. § 1983. Venue is proper. There is no dispute over either jurisdiction or venue.

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1 JURY/NON-JURY

2 Both parties timely requested trial by jury.

3 UNDISPUTED FACTS

- 4 1. At all relevant times, defendant Medina worked as a physician's assistant at HDSP.
- 5 2. In July 2008, plaintiff was transferred from HDSP to California State Prison-Corcoran  
6 ("Corcoran"); on November 3, 2008, plaintiff transferred back to HDSP from  
7 Corcoran.
- 8 3. Prior to plaintiff's return to HDSP on November 3, 2008, plaintiff had been prescribed  
9 Tramadol for gastro-intestinal pain, later diagnosed as being caused by Irritable Bowel  
10 Syndrome, by doctors at HDSP and Corcoran.
- 11 4. Prior to plaintiff's return to HDSP on November 3, 2008, plaintiff had been prescribed  
12 Gabapentin for back pain; plaintiff received Gabapentin following his return to HDSP  
13 in November 2008;
- 14 5. On November 10, 2008, defendant Medina discontinued plaintiff's Tramadol  
15 prescription.
- 16 6. On November 14, 2008, defendant Medina reinstated plaintiff's Tramadol prescription  
17 at a dose of 50 mg. twice a day; on December 3, 2008, defendant Medina increased  
18 plaintiff's Tramadol dosage to three times a day.

19 DISPUTED FACTUAL ISSUES

- 20 1. Whether defendant Medina acted with deliberate indifference to plaintiff when he  
21 discontinued plaintiff's Tramadol prescription on November 10, 2008.
- 22 2. Whether defendant Medina acted negligently or with gross negligence, in violation of  
23 state law, when he discontinued plaintiff's Tramadol prescription on November 10,  
24 2008.

25 DISPUTED EVIDENTIARY ISSUES

26 Defendant will oppose plaintiff's proposed exhibits that are irrelevant. Plaintiff will  
27 dispute evidence regarding the past misconduct and bias of defendant and the introduction of  
28 hearsay documents.

1 SPECIAL FACTUAL INFORMATION

2 None applicable.

3 RELIEF SOUGHT

4 1. In the amended complaint (ECF No. 14), plaintiff seeks an unidentified amount of  
5 compensatory damages.

6 2. In addition, plaintiff seeks an unidentified amount of punitive damages.

7 POINTS OF LAW

8 The parties shall brief the elements, standards and burden of proof of the claims herein  
9 presented by plaintiff under the applicable constitutional amendment, statutes and regulations.  
10 Trial briefs shall be filed with this court no later than fourteen days prior to the date of trial in  
11 accordance with Local Rule 285.

12 ABANDONED ISSUES

13 No issues have been abandoned.

14 WITNESSES

15 Plaintiff anticipates calling, either in person or by deposition the following unincarcerated  
16 witnesses: Dorothy Swingle, Roxanne Miller, SPT St. Laurent, T. Bowers, defendant Medina,  
17 G.W. James, J. Nepomuceno, S. Wrigley, M. Miller, John Clark, Nurse Barton, Nurse Hardeman,  
18 Sergeant Wright, Sergeant Beasley, Captain Cochrane, Officer McGuire, Officer Kirkland, Dr.  
19 Leppla, Dr. Harrison, Dr. Clark, Dr. Wong, Health Records Technician Pena, Debbie Arizmendi.  
20 Plaintiff also states that he intends to call himself as a witness.

21 Plaintiff shall refer to the November 6, 2013 further scheduling order for the procedures  
22 for obtaining the attendance of unincarcerated witnesses. (ECF No. 149.)

23 Plaintiff has separately filed a motion requesting the attendance of incarcerated witness  
24 Norman Humphreys. (ECF No. 156.) Plaintiff alleges that inmate Humphreys was his cellmate  
25 from November 2008 to February 2009. Plaintiff alleges that inmate Humphreys witnessed  
26 plaintiff suffering as a result of not receiving Tramadol. Plaintiff alleges that inmate Humphreys  
27 can testify as to plaintiff's suffering.

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1 Plaintiff himself can testify as to the pain he suffered as a result of not receiving  
2 Tramadol. Plaintiff does not require inmate Humphreys to testify regarding this matter. For this  
3 reason, plaintiff's motion to call inmate Humphreys as a witness is denied.

4 Defendant anticipates calling, either in person or by deposition: defendant Medina,  
5 Dorothy Swingle, C. Amrein, John Nepomuceno, John Clark, C. Nason Brown, J. Bondoc, Mary  
6 Kimbrell, L. St. Laurent, Bruce Barnett, James Williamson, Correctional Officer Ramirez,  
7 Litigation Coordinator Herrera.

8 Each party may call any witnesses designated by the other.

9 A. No other witness will be permitted to testify unless:

10 (1) The party offering the witness demonstrates that the witness is for the purpose  
11 of rebutting evidence which could not be reasonably anticipated at the pretrial conference, or

12 (2) The witness was discovered after the pretrial conference and the proffering  
13 party makes the showing required in "B," below.

14 B. Upon the post pretrial discovery of witnesses, the party shall promptly inform the  
15 court and opposing parties of the existence of the unlisted witnesses so that the court may  
16 consider at trial whether the witnesses shall be permitted to testify. The witnesses will not be  
17 permitted unless:

18 (1) The witnesses could not reasonably have been discovered prior to pretrial;

19 (2) The court and the opposing party were promptly notified upon discovery of the  
20 witnesses;

21 (3) If time permitted, the party proffered the witnesses for deposition;

22 (4) If time did not permit, a reasonable summary of the witnesses' testimony was  
23 provided to the opposing party.

#### 24 EXHIBITS, SCHEDULES AND SUMMARIES

25 Plaintiff's exhibits are listed at pages 24-27 of his pretrial statement. (ECF No. 155 at 24-  
26 27.) In addition, on January 30, 2014, plaintiff filed a motion to supplemental his pretrial  
27 statement with three exhibits, i.e. three 602 appeal logs. (ECF No. 159.) Good cause appearing,  
28 plaintiff's motion to supplemental his pretrial statement to include these exhibits is granted.

1 Defendant's exhibits are listed at pages 7-11 of his pretrial statement. (ECF No. 160 at 7-  
2 11.)

3 Sixty days prior to trial, the parties shall serve their exhibits on opposing counsel.

4 Each party will file any objections to exhibits fourteen days before trial. Each exhibit not  
5 previously objected to will be forthwith received into evidence. Plaintiff will use numbers to  
6 mark exhibits; defendant will use letters.

7 A. No other exhibits will be permitted to be introduced unless:

8 1. The party proffering the exhibit demonstrates that the exhibit is for the purpose  
9 of rebutting evidence which could not have been reasonably anticipated, or

10 2. The exhibit was discovered after the issuance of this order and the proffering  
11 party makes the showing required in Paragraph "B," below.

12 B. Upon the post pretrial discovery of exhibits, the parties shall promptly inform the court  
13 and opposing party of the existence of such exhibits so that the court may consider at trial their  
14 admissibility. The exhibits will not be received unless the proffering party demonstrates:

15 1. The exhibits could not reasonably have been discovered earlier;

16 2. The court and the opposing party were promptly informed of their existence;

17 3. The proffering party forwarded a copy of the exhibit(s) (if physically possible)  
18 to the opposing party. If the exhibit(s) may not be copied the proffering party must show that he  
19 has made the exhibit(s) reasonably available for inspection by the opposing party.

20 The parties are directed to bring an original and one copy of each exhibit to trial. The original  
21 exhibit becomes the property of the court for purposes of trial. The copy is for bench use during  
22 trial.

### 23 DISCOVERY DOCUMENTS

24 Plaintiff anticipates the use of interrogatories, sets one and two; requests for admission,  
25 sets one, two and three; request for production of documents, sets one and two.

26 Defendant anticipates the use of plaintiff's deposition transcript.

### 27 FURTHER DISCOVERY OR MOTIONS

28 Discovery is closed.

1 Defendant anticipates filing motions in limine. Motions in limine must be filed seven  
2 days prior to the trial.

### 3 STIPULATIONS

4 At this time the parties have reached no stipulations.

### 5 AMENDMENTS/DISMISSALS

6 Defendant requests that plaintiff's request for punitive damages be dismissed as there is  
7 insufficient evidence for this issue to go to the jury. Defendant shall address this request to the  
8 trial judge.

9 Plaintiff requests that five changes be made to his amended complaint. Plaintiff may not  
10 amend his complaint by way of his pretrial statement.

11 Plaintiff requests that defendant's affirmative defenses not applicable to the claims against  
12 defendant be dismissed. Plaintiff shall address this request to the trial judge.

### 13 SETTLEMENT NEGOTIATIONS

14 It appears that a settlement conference is not warranted in this case.

### 15 AGREED STATEMENTS

16 None.

### 17 SEPARATE TRIAL OF ISSUES

18 Defendant states that the bifurcation of liability and damages may assist the fact finder  
19 and promote judicial economy.

### 20 IMPARTIAL EXPERTS/LIMITATION OF EXPERTS

21 Plaintiff has filed a motion requesting appointment of a neutral medical expert pursuant to  
22 Federal Rule of Evidence 706. Plaintiff requests that the medical expert review statements in  
23 defendant Medina's declaration submitted in support of his summary judgment motion. In  
24 particular, plaintiff cites defendant Medina's statements that Tramadol could obscure other  
25 gastro-intestinal symptoms, Gabapentin was sufficient pain medication for plaintiff, and his  
26 concern regarding additional and potential side effects.

27 Federal Rule of Evidence 702 defines as expert witness as one "who is qualified as an  
28 expert by knowledge, skill, experience, training or education[.]" Fed. R. Evid. 702. Appointment

1 of an expert witness is proper when “scientific, technical, or other specialized knowledge will  
2 help the trier of fact to understand the evidence or to determine a fact in issue[.]” Fed. R. Evid.  
3 702(a). Federal Rule of Evidence 706, which is the basis for plaintiff’s request, permits a court to  
4 appoint an expert, define the expert’s duties and set compensation.

5 Rule 706 only allows the court to appoint a neutral expert. Ellsworth v. Prison Health  
6 Services, Inc., 2013 WL 6587876, at \*7 (D.Ariz. Dec. 12, 2013). “District ‘[c]ourts do not  
7 commonly appoint an expert pursuant to Rule 706 and usually do so only in “exceptional cases in  
8 which the ordinary adversary process does not suffice or when a case presents compelling  
9 circumstances warranting appointment of an expert.”” Womack v. GEO Group, Inc., 2013 WL  
10 2422691, at \*2 (D. Ariz. June 3, 2013) (quoting Hart v. Agnos, 2008 WL 2008966, at \*5 (D.  
11 Ariz. April 25, 2008) (citations omitted)).

12 Compelling circumstances do not exist warranting appointment of an expert by the court.  
13 Based on the facts of this case, the ordinary adversary process will suffice. Plaintiff may testify  
14 regarding the circumstances of the discontinuation of his Tramadol and the pain he allegedly  
15 suffered. Accordingly, plaintiff’s request for appointment of an expert is denied.

#### 16 ATTORNEYS’ FEES

17 Plaintiff is not entitled to attorneys’ fees because he is not represented by counsel.  
18 Defendant intends to seek attorneys’ fees.

#### 19 ESTIMATED TIME OF TRIAL/TRIAL DATE

20 Jury trial is set for January 5, 2015, at 9:00 a.m., in Courtroom 7 before the Honorable  
21 Morrison C. England, Jr.

#### 22 PROPOSED JURY VOIR DIRE AND PROPOSED JURY INSTRUCTIONS

23 The parties are directed to Local Rule 162.1(a) and Local Rule 163(a) for procedures and  
24 time limits regarding proposed voir dire and proposed jury instructions, respectively. The  
25 provisions of such local rules notwithstanding, the parties shall file proposed voir dire and  
26 proposed jury instructions, if any, not later than seven days before the date set for trial.

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1 MISCELLANEOUS

2 Plaintiff's present custodian shall provide for plaintiff's presence at trial pursuant to the  
3 writ of habeas corpus ad testificandum to be issued. All parties shall take any steps  
4 necessary to facilitate execution of such writ. The parties and plaintiff's custodian are cautioned  
5 that sanctions will be imposed for failure to comply with court orders.

6 Counsel are directed to Local Rule 285 regarding the contents and the deadline for filing  
7 trial briefs.

8 Plaintiff requests that counsel be appointed to represent him at trial.

9 District courts lack authority to require counsel to represent indigent prisoners in section  
10 1983 cases. Mallard v. United States Dist. Court, 490 U.S. 296, 298 (1989). In exceptional  
11 circumstances, the court may request an attorney to voluntarily to represent such a plaintiff. See  
12 28 U.S.C. § 1915(e)(1). Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991); Wood v.  
13 Housewright, 900 F.2d 1332, 1335-36 (9th Cir. 1990). When determining whether "exceptional  
14 circumstances" exist, the court must consider plaintiff's likelihood of success on the merits as  
15 well as the ability of the plaintiff to articulate his claims pro se in light of the complexity of the  
16 legal issues involved. Palmer v. Valdez, 560 F.3d 965, 970 (9th Cir. 2009) (district court did not  
17 abuse discretion in declining to appoint counsel). The burden of demonstrating exceptional  
18 circumstances is on the plaintiff. Id. Circumstances common to most prisoners, such as lack of  
19 legal education and limited law library access, do not establish exceptional circumstances that  
20 warrant a request for voluntary assistance of counsel.

21 The remaining issues in this action are relatively straight forward. Plaintiff has  
22 represented himself competently in this action. Having considered the factors under Palmer, the  
23 court finds that plaintiff has failed to meet his burden of demonstrating exceptional circumstances  
24 warranting the appointment of counsel at this time.

25 OBJECTIONS TO PRETRIAL ORDER

26 Each party is granted fourteen days from the date of this order to file objections to same.  
27 L.R. 283. If no objections are filed, the order will become final without further order of this  
28 court.



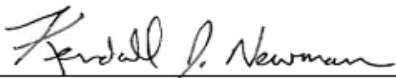
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Accordingly, IT IS HEREBY ORDERED that:

1. Plaintiff's request for appointment of counsel contained in his pretrial statement is denied;
2. Plaintiff's motion for the attendance of an incarcerated witness (ECF No. 156) is denied;
3. Plaintiff's motion to supplement his pretrial statement (ECF No. 159) is granted; and
4. Plaintiff's motion for appointment of a neutral medical expert (ECF No. 157) is denied.

Dated: April 16, 2014

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KENDALL J. NEWMAN  
UNITED STATES MAGISTRATE JUDGE