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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

PATRICK BUMPUS,  
Plaintiff,  
v.  
A. NANGALAMA, et al.,  
Defendants.

No. 2:12-cv-1102 GEB DAD P

ORDER

Plaintiff Patrick Bumpus is a state prisoner proceeding pro se and in forma pauperis in this civil rights action filed pursuant to 42 U.S.C. § 1983. In his complaint plaintiff contends that defendants Dr. Nangalama, Dr. Dhillon, Dr. Sahota, LVN Cox, LVN Teachow, and A. Deem were deliberately indifferent to his serious medical needs, in violation of the Eighth Amendment’s prohibition against cruel and unusual punishment.

Now pending before the court are (i) plaintiff’s motion for appointment of counsel and (ii) defendants’ motion to compel plaintiff’s deposition and responses to interrogatories, or in the alternative, for terminating sanctions. For the reasons set forth below, the court will order that counsel be appointed to represent plaintiff in this action, grant defendants’ motion to compel in part and deny it in part, and deny defendants’ motion for terminating sanctions.

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1 I. Background

2 A. Factual Background

3 In his complaint, plaintiff alleges that the following events occurred while he was  
4 incarcerated at California State Prison-Sacramento (“CSP-SAC”). (ECF No. 1.) Between June 7,  
5 2010 and August of 2010, plaintiff repeatedly informed defendant Sahota that he was suffering  
6 from pain and either a cyst or lump on his back, but defendant Sahota refused to provide plaintiff  
7 with pain medication. (Id. at 11-12.) Only after several months’ delay, caused by defendants  
8 Nangalama, Sahota, Dhillan, and Deem, did plaintiff finally undergo surgery for the condition.  
9 (Id. at 12.)

10 From April 7, 2011 to June of 2011, plaintiff was denied adequate post-surgical medical  
11 care. (Id. at 6.) As a result of this lack of care, plaintiff was twice taken to the emergency room  
12 outside the prison. (Id. at 7.) Defendants Nangalama, Cox, Deem, Dhillan, and Teachow denied  
13 plaintiff daily bandage changes. (Id. at 7.) Defendants also failed to provide post-operative care  
14 for plaintiff’s “continued excessive bleeding and increased pain.” (Id.) San Joaquin General  
15 Hospital ordered that, thirty minutes prior to dressing changes, plaintiff receive Vicodin;  
16 defendants Nangalama and Dhillan interfered with this ordered treatment by denying plaintiff the  
17 prescribed pain medication. (Id.) According to plaintiff, he suffered extreme pain during his  
18 dressing changes because he was denied Vicodin. (Id.) The surgical wound on plaintiff’s back  
19 did not heal correctly because of the inadequate medical care he received from the defendants.  
20 (Id. at 8.) Defendant Nangalama ordered various medicines for plaintiff, which exposed plaintiff  
21 to a risk of cancer. (Id. at 8.) Plaintiff continued to bleed and suffer pain around the surgery site  
22 until August of 2011. (Id.)

23 B. Procedural Background

24 On April 25, 2012, this action commenced with the filing of plaintiff’s complaint. (ECF  
25 No. 1.) On March 21, 2013, the court screened that complaint, and deemed service appropriate  
26 on defendants Nangalama, Cox, Deem, Dhillan, and Teachow, as well as subsequently-dismissed  
27 defendant Y. Fields. (ECF No. 10.) On July 19, 2013, defendants filed a motion to dismiss.  
28 (ECF No. 20.) On January 6, 2014, the undersigned issued findings and recommendations

1 recommending that the motion to dismiss be granted in part and denied in part. (ECF No. 31.)  
2 On February 12, 2014, those findings and recommendations were adopted in full by the assigned  
3 District Judge. (ECF No. 34.) A discovery and scheduling order then issued, which was  
4 subsequently amended to set deadlines of December 15, 2014 for conducting discovery and filing  
5 motions to compel discovery and March 5, 2015 for filing pretrial motions. (ECF Nos. 35, 39.)

6 On May 23, 2014, plaintiff filed a motion for the appointment of counsel. (ECF No. 40.)  
7 On July 14, 2014, the undersigned denied the motion without prejudice. (ECF No. 41.)

8 On November 10, 2014, defendants filed the motion to compel plaintiff's deposition and  
9 interrogatory responses, or in the alternative, for terminating sanctions which is presently before  
10 the court. (ECF No. 42.) On January 20, 2015, defendants filed a notice regarding plaintiff's  
11 failure to file an opposition to the motion with the court; as part of this notice, defendants  
12 requested (in the event that the undersigned compels discovery responses and denies terminating  
13 sanctions) an extension of the deadline for filing pre-trial motions. (ECF No. 45.)

14 On February 23, 2015, plaintiff filed a motion to stay the case, and renewed his motion for  
15 appointment of counsel. (ECF No. 46.) On August 14, 2015, the court denied the motion for stay  
16 as moot. (ECF No. 50.) The court now turns to plaintiff's motion for appointment of counsel,  
17 and to defendants' motion to compel.

## 18 II. Analysis

### 19 A. Plaintiff's motion for appointment of counsel

20 On May 23, 2014, plaintiff moved for appointment of counsel on the grounds, first, that  
21 the action presents complex legal issues beyond his capabilities to address, and second, that he "is  
22 in a (E.O.P.)<sup>1</sup> program, and suffer from many of mental disorder's, as while as take many  
23 psychotropic medication's." (sic) (ECF No. 40 at 2.)

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24  
25 <sup>1</sup> The "Enhanced Outpatient Program (EOP) provides care to mentally disordered inmate-patients  
26 who would benefit from the structure of a therapeutic environment that is less restrictive than  
27 inpatient settings. This may include response to crisis symptoms which require extensive  
28 treatment, but can be managed as outpatient therapy with several psychotherapy sessions or  
medication adjustment with follow-up visits." Mental Health Program Guide 8, California  
Department of California Department of Corrections and Rehabilitation,  
<http://www.cdcr.ca.gov/dchcs/docs/mental%20health%20program%20guide.pdf>.

1 On July 14, 2014, the court issued an order which provided in pertinent part:

2 [P]laintiff's asserted psychological diagnoses and treatment may  
3 demonstrate exceptional circumstances justifying the appointment  
4 of counsel in this case, provided plaintiff can support his assertions  
5 with appropriate documentation and demonstrate how his specific  
6 limitations impact his ability to proceed pro se in this action.  
7 Accordingly, plaintiff may file another motion for appointment of  
8 counsel that includes this information.

9 (ECF No. 41.) Plaintiff's motion was denied without prejudice at that time. (Id.)

10 As the court previously advised plaintiff, the United States Supreme Court has ruled that  
11 district courts lack authority to require counsel to represent indigent prisoners in § 1983 cases.  
12 Mallard v. United States Dist. Court, 490 U.S. 296, 298 (1989). In certain exceptional  
13 circumstances, the district court may request the voluntary assistance of counsel pursuant to 28  
14 U.S.C. § 1915(e)(1). Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991); Wood v.  
15 Housewright, 900 F.2d 1332, 1335-36 (9th Cir. 1990).

16 The test for exceptional circumstances requires the court to evaluate the plaintiff's  
17 likelihood of success on the merits and the ability of the plaintiff to articulate his claims pro se in  
18 light of the complexity of the legal issues involved. See Wilborn v. Escalderon, 789 F.2d 1328,  
19 1331 (9th Cir. 1986); Weygandt v. Look, 718 F.2d 952, 954 (9th Cir. 1983). Circumstances  
20 common to most prisoners, such as lack of legal education and limited law library access, do not  
21 establish exceptional circumstances that would warrant a request for voluntary assistance of  
22 counsel.

23 On February 23, 2015, plaintiff filed a motion to stay the proceedings, coupled with a  
24 renewed motion for appointment of counsel. (ECF No. 46.) Plaintiff's moving papers provide  
25 that he was admitted to the Mule Creek State Prison mental health crisis ward on January 22,  
26 2015, and that he anticipates his imminent transfer to a facility operated by the California  
27 Department of State Hospitals. Plaintiff also wrote:

28 Also because of my severe mental illness, and subsequent admission into The Department (of Mental Health) State Hospital I respectfully request that I be reconsidered for the appointment of an attorney. I have been receiving a lot of paperwork of the Attorney Generals Office of Motions being filed. This Plaintiff does not understand what I am suppose to do. I think I am missing something they want, or need. Until now, I did not know that I was

1 (am) suppose to file an oppositional motion to every motion filed  
2 by the defendants. [. . .] I am not disregarding the rules of this  
3 court, or F.R.C.P. on purpose, but from my lack of knowledge of  
4 the rules. Please accept my apology, and consider my request for  
5 help from a attorney. Also please send me a notice of what I need  
6 to do, how, and when?

7 (sic) (Id. at 2.)

8 The court has also reviewed the transcript of an aborted deposition of plaintiff, attached as  
9 an exhibit to defendants' motion to compel. (ECF No. 42-3 at 8-20.) In response to defendants'  
10 counsel's repeated attempts to explain what is happening at the deposition, plaintiff makes  
11 statements such as:

- 12 • "Because I don't want to say something that's gonna – like I'm not going to  
13 remember. I forget a lot. That's why I bring a pencil and paper, because I forget. I  
14 don't remember a lot of stuff, but I have a bunch of papers from all my files, from the  
15 prison. So I mean, I don't want to, like – I don't know what I'm doing here." (Id. at  
16 14.)
- 17 • "There's no way I can put this off until I can speak to somebody? I don't know what's  
18 going on. I mean, it kind of hard for me to say, okay, I'm going to do something, and  
19 I'm not really like . . ." (sic) (Id. at 15.)
- 20 • "Is my staff assistant here? [. . .] Tyler. Our EOP – we have our own. [. . .] I usually  
21 get a staff assistant to go over everything with me, and talk to me, make sure I  
22 understand what's going on, because I don't want to sign something like I did before,  
23 or admit to something – be sure, because this is important. I don't want to rush it just  
24 because I want to answer questions. I want to give truthful answers, but I want to  
25 make sure I do the right thing, too." (Id. at 16.)
- 26 • "Half the stuff you're saying to me I'm not going to remember anyway. So I just can't  
27 do it." (Id. at 19.)

28 Shortly after making this latter statement, plaintiff declined to continue with his  
deposition.

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1 Defendants oppose appointment of counsel on the grounds that plaintiff “has not shown  
2 that he is unable to adequately represent himself in this lawsuit without a lawyer,” that the  
3 complaint presents “allegations [that] do not invoke complex medical issues,” and because  
4 plaintiff failed to comply with the court’s previous order directing him to provide documentation  
5 of his mental health diagnoses and to explain how his condition limits his ability to proceed pro se  
6 in this action. (ECF No. 47 at 1-2.)

7 It would appear likely that defendants likely lack standing to oppose plaintiff’s request for  
8 appointment of counsel, particularly under the circumstances of this case. Even assuming that  
9 they do have standing to object, the undersigned finds defense counsel’s arguments largely  
10 unpersuasive. While plaintiff was partially successful in opposing defendants’ motion to dismiss,  
11 his filings to date evince a very limited ability to articulate his claims and arguments. If the court  
12 credits defendants’ assertion that the underlying medical issues presented in this action are not  
13 complex, then plaintiff’s difficulties in articulating his medical history make his limitations even  
14 more apparent. The transcript of the aborted deposition raises similar concerns about plaintiff’s  
15 capacity to recall and articulate salient events underlying his claims.

16 As for plaintiff’s failure to file documentation of his mental health condition and to  
17 explain the accompanying impairments that he suffers, the undersigned notes that, according to  
18 plaintiff, he was placed in the Mule Creek State Prison mental health crisis ward on January 22,  
19 2015. (ECF No. 46 at 1.) On March 23, 2015, plaintiff filed a notice a change of address with  
20 the court indicating that he had been transferred to California Medical Facility in Vacaville,  
21 California. (ECF No. 48.) On August 6, 2015, plaintiff filed a notice of change of address with  
22 the court indicating that he had been transferred to High Desert State Prison in Susanville,  
23 California. (ECF No. 49.) From the dates and content of these filings, the undersigned infers that  
24 plaintiff’s mental illness was serious enough to justify between four and six months of ongoing  
25 inpatient mental health treatment. It is the undersigned’s view that such a significant course of  
26 mental health treatment, particularly so recently in the past, constitutes exceptional circumstances  
27 justifying appointment of counsel in this matter. The court will therefore order appointment of  
28 counsel on plaintiff’s behalf pursuant to 28 U.S.C. § 1915(e)(1).

1 The court now turns to defendants' discovery-related motions.

2 B. Defendants' motion to compel

3 On November 10, 2014, defendants filed a motion to compel plaintiff's deposition and  
4 responses to interrogatories. (ECF No. 42.) Plaintiff has not filed an opposition to the motion.

5 1. Deposition

6 Defendants represent that they were unable to take plaintiff's deposition, writing:

7 Defendants also noticed Plaintiff's deposition for May 15, 2014,  
8 and on that date attempted to take his deposition at Mule Creek  
9 State Prison. No objection to the deposition was received  
10 beforehand. The deposition lasted approximately 20 minutes,  
11 during which time counsel for Defendants attempted to initiate the  
12 proceeding and Plaintiff repeatedly refused to proceed, citing the  
13 fact that he had no representation (through an attorney or  
14 counselor). Defense counsel explained that Plaintiff had no right to  
15 counsel unless the Court appoints one, and that Plaintiff's refusal to  
16 proceed would result in Defendants bringing a motion to compel  
17 and for sanctions to reimburse the costs of deposition. Plaintiff  
18 continued to refuse to proceed and the deposition was terminated.

14 (ECF No. 42-1 at 2-3) (internal citations omitted).

15 Any party may move for an order compelling the other party's participation in a  
16 deposition. Fed. R. Civ. P. 37(a). The undersigned possesses the authority to compel such  
17 participation. See 28 U.S.C. § 636(b)(1)(A); Local Rule 302(c)(1). As plaintiff refused to  
18 participate in the taking of his deposition, and failed to provide the court with any justification for  
19 his refusal, the court will grant defendants' motion and order plaintiff to submit to deposition.  
20 However, as set forth in greater detail below, defendants will be permitted to schedule plaintiff's  
21 deposition only after counsel has been appointed for plaintiff and has had an adequate period of  
22 time to become acquainted with the facts of the case.

23 2. Interrogatories

24 Defendants also state that they have not received responses to interrogatories previously  
25 served on plaintiff, writing:

26 On April 10, 2014, Defendants Nangalama and Deem each served a  
27 set of Special Interrogatories on Plaintiff. To date, Plaintiff has  
28 served no responses to these Interrogatories and no extension to  
respond was requested or given.

1 (ECF No. 42-1 at 2.)

2 Defendants have failed to reproduce or include a copy of the special interrogatories which  
3 they served on plaintiff. Defendants' counsel has included a supporting declaration, which also  
4 does not reproduce, or include as an attachment, the interrogatories in question. The court cannot  
5 rely solely on defendants' representations regarding the nature of the interrogatories. Federal  
6 Rule of Civil Procedure 26 provides that "[f]or good cause, the court may order discovery of any  
7 matter relevant to the subject matter involved in the action." Fed. R. Civ. P. 26(b)(1). Without  
8 being able to examine the discovery requests at issue, the court cannot make a determination as to  
9 whether this relevancy standard has been satisfied. Accordingly, the court will also deny  
10 defendants' motion to compel plaintiff's responses to the interrogatories served upon him.<sup>2</sup>

11 C. Defendants' motion for discovery sanctions

12 As an alternative to an order compelling plaintiff's participation in his deposition,  
13 defendants move for terminating sanctions. Because defendants' motion to compel deposition  
14 has been granted, the motion for terminating sanctions will be denied. Moreover, the court notes  
15 that the Ninth Circuit has strictly construed the language of Federal Rule of Civil Procedure 37 to  
16 hold that, so long as a prisoner attends a deposition (as plaintiff did here), his refusal to give  
17 deposition testimony does not constitute a "failure to appear" under Rule 37(d)(1)(A)(i) meriting  
18 dismissal as a sanction. Rather, in such situations, "the proper remedy is a court order to testify  
19 under Rule 37(a)." Estrada v. Rowland, 69 F.3d 405, 406 (9th Cir. 1995).

20 Defendants also seek the imposition of sanctions against plaintiff in the amount of  
21 "\$1,052.85 associated with the fees and costs of attempting to take Plaintiff's deposition and for  
22 the filing of this Motion for sanctions." (ECF No. 42-1 at 5.) Given that plaintiff is proceeding in  
23 forma pauperis, the court declines to impose the requested monetary sanctions. See, e.g., Sanchez  
24 v. Rodriguez, 298 F.R.D. 460, 466 (C.D. Cal. 2014) ("The Magistrate is also right to conclude  
25 that because plaintiff is proceeding in forma pauperis due to documented indigency, plaintiff

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26 <sup>2</sup> That order is without prejudice to the renewal of a properly supported motion to compel after  
27 plaintiff's appointed counsel has had sufficient time to become acquainted with the facts of the  
28 case and the lawyers have met and conferred in an attempt to resolve any remaining dispute over  
answers to interrogatories.



1 would be unable to pay a monetary sanction and the imposition of such a sanction would be futile  
2 as a means of inducing him to comply with this Court’s discovery orders.”); Morrow v.  
3 Sacramento D.E.A., No. 2:13-cv-2188 GEB KJN, 2014 WL 907349 at \*3 (E.D. Cal. Mar. 7,  
4 2014) (“[I]n light of plaintiff’s in forma pauperis status, the court has little confidence that  
5 plaintiff would pay monetary sanctions if they were imposed . . . .”); Jackson v. Cates, No. CIV  
6 S-10-2070 GEB EFB, 2011 WL 5436316 at \*2 (E.D. Cal. Nov. 7, 2011) (“Due to plaintiff’s in  
7 forma pauperis status, the court declines to issue an award of monetary sanctions at this time.”);  
8 Redmond v. San Francisco Police Dep’t, No. C 07-04276 CW (PR), 2010 WL 2573978 at \*4  
9 (N.D. Cal. Jun. 25, 2010) (“Monetary sanctions are inappropriate due to Plaintiff’s *in forma*  
10 *pauperis* status.”).

### 11 III. Conclusion

12 For all of the reasons set forth above, IT IS HEREBY ORDERED that:

- 13 1. Plaintiff’s motion for the appointment of counsel (ECF No. 46) is granted.
- 14 2. Alternative Dispute Resolution and Pro Bono Program Director Sujean Park is directed to  
15 locate an attorney, admitted to practice in this court, who is willing to accept this  
16 appointment and represent plaintiff for the purposes of trial.
- 17 3. Defendants’ Motion for Terminating Sanctions and Alternate Motion to Compel and  
18 for Monetary Sanctions (ECF No. 42) is granted in part and denied in part, as follows:
  - 19 a. Defendants’ motion for an order compelling plaintiff to participate in a  
20 deposition is granted;
  - 21 b. Defendants’ motion to compel interrogatory responses is denied;
  - 22 c. Defendants’ motion for terminating sanctions is denied; and
  - 23 d. Defendants’ motion for monetary sanctions is denied.
- 24 4. At such time as counsel is appointed for plaintiff, counsel for both parties are directed  
25 to meet and confer in order to agree upon a date and time for defendants to take  
26 plaintiff’s deposition that provides plaintiff’s counsel with sufficient time to review  
27 this case and prepare his client for deposition. Counsel shall also attempt to resolve  
28 any then remaining dispute as to interrogatories posed by defendants to plaintiff. The

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parties may apply to the court for an order and writ of habeas corpus ad testificandum if one is required to produce plaintiff outside the facility where he is currently incarcerated.

- 5. Because counsel is being appointed to represent plaintiff, counsel for both parties are directed to meet and confer in order to agree upon proposed modifications to the discovery and motion deadlines set forth in the February 20, 2014 Discovery and Scheduling Order, as modified by subsequent order. The parties are directed to then submit a stipulation and proposed order to the court regarding new, mutually-agreeable deadlines.

Dated: September 14, 2015

  
\_\_\_\_\_  
DALE A. DROZD  
UNITED STATES MAGISTRATE JUDGE

DAD:10  
bump1102.mtc