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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOHN GRESCHNER,

Plaintiff,

v.

CALIFORNIA DEPARTMENT OF
CORRECTIONS AND
REHABILITATION, et al.,

Defendants.

No. 2:15-cv-1663 MCE AC P

ORDER

Plaintiff is a former California state prisoner currently incarcerated in a Colorado state prison. Plaintiff proceeds pro se and in forma pauperis with this civil rights action challenging his medical care at High Desert State Prison (HDSP), under the authority of the California Department of Corrections and Rehabilitation (CDCR). This action proceeds against Banner Lassen Medical Center and two of its physicians, Dr. Dale Syverson and Dr. Arthur Schwartz, and CDCR physician Dr. Jeffrey Roling. Plaintiff claims (1) that when he obtained hernia repair surgery, the Banner defendants were negligent in promoting and implanting a defective Davol-Bard hernia plug and mesh into his abdomen; and (2) that, upon his return to HDSP, defendant Roling was deliberately indifferent in treating plaintiff's infection. Currently pending is plaintiff's request for appointment of counsel.

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1 District courts do not have authority to require an attorney to represent an indigent
2 prisoner in a civil rights case. Mallard v. United States District Court, 490 U.S. 296, 298 (1989)
3 Although the district court may request the voluntary assistance of counsel pursuant to 28 U.S.C.
4 § 1915(e)(1), this is appropriate only in certain “exceptional circumstances.” Terrell v. Brewer,
5 935 F.2d 1015, 1017 (9th Cir. 1991); Wood v. Housewright, 900 F.2d 1332, 1335-36 (9th Cir.
6 1990). When determining whether “exceptional circumstances” exist, the court must consider
7 plaintiff’s likelihood of success on the merits as well as his ability to articulate his claims pro se
8 in light of the complexity of the legal issues involved. Palmer v. Valdez, 560 F.3d 965, 970 (9th
9 Cir. 2009). The burden of demonstrating exceptional circumstances is on the plaintiff. Id.
10 Circumstances common to most prisoners, such as lack of legal education and limited law library
11 access, do not establish exceptional circumstances supporting appointment of counsel. Id.

12 Plaintiff requests appointment of counsel on the grounds that this litigation and the
13 necessary discovery is complex; that due to the current COVID-19 medical quarantine plaintiff
14 has no access to the prison law library (while he can request copies of cases, he is unable to
15 access legal research tools to identify the cases he needs); and that he is unable to pursue
16 settlement negotiations with defense counsel on his own.

17 Although this case has a more complex history than most prisoner civil rights actions,¹
18 the court finds that current circumstances do not support the appointment of counsel. Service of
19 process remains outstanding for defendant Dr. Syverson, and Dr. Schwartz has waived service but
20 not yet responded to the complaint. Defendant Dr. Rohlfing answered the complaint, while

21 ¹ This case was transferred on August 6, 2018 to the U.S. District Court for the Southern District
22 of Ohio, along with several other cases throughout the United States for consolidation in
23 Multidistrict Litigation Case No. 2846 (“In re: Davol, Inc. / C.R. Bard, Inc., Polypropylene
24 Hernia Mesh Products Liability Litigation”). See ECF No. 11. By order filed March 13, 2019,
25 the Multidistrict Panel severed plaintiff’s product liability claims against Davol and Bard from his
26 other claims, as set forth in his original complaint, and remanded the latter claims back to this
27 court. See ECF No. 12 at 1. Specifically, the Panel found “[i]t appears that plaintiff has asserted
28 two sets of claims in this action: (1) product liability claims against defendants C.R. Bard, Inc.,
and Davol, Inc., for defective surgical hernia mesh; and (2) claims against other defendants,
including constitutional law violations pursuant to 42 U.S.C. § 1983, negligence under California
Civil Code § 1714(a), and medical malpractice pursuant to California Civil Code § 1714(a).” Id.
Accordingly, the Panel ordered that “all claims filed against any defendant other than C.R. Bard,
Inc., and Davol, Inc., are separated and remanded to the transferor court.” Id.

1 defendant Bannon Lassen Medical Center has filed a motion to dismiss for which this court has
2 stayed further briefing pending the appearance of all defendants. The court has not yet issued a
3 discovery and scheduling order. Because discovery has not yet formally commenced in this
4 action, it is premature to request the assistance of counsel to conduct discovery.

5 Additionally, the court finds persuasive the additional facts provided by defendant
6 Rohlring in opposition to the motion. Plaintiff has identified six categories of discovery that he
7 wishes to pursue, and for which he seeks the assistance of counsel. The first three areas involve
8 the Banner defendants' knowledge of the risks associated with the Bard-Davol device. The
9 second three topics involve Dr. Rohlring; plaintiff seeks documents related to the prior
10 suspension of his employment with CDCR, medical records demonstrating Rohlring's alleged
11 "forced psychiatric evaluation," and the reasons for his reinstatement at CDCR. ECF No. 38 at 1.
12 Rohlring responds that "Plaintiff already propounded to Dr. Rohlring a discovery request seeking
13 the same categories of documents named in his motion, so attorney assistance obviously is not
14 required." ECF No. 39 at 1-2. Defense counsel has provided a copy of "Plaintiff's First
15 Discovery Request to Defendant Jeffrey Rohlring," which supports this representation. Id. at 5
16 (Ex. A). Rohlring also argues that his Answer to the complaint provides the information plaintiff
17 seeks; the point is well taken.² At least for present purposes, it is apparent that plaintiff's need for
18 the assistance of counsel is not as urgent as he asserts. He has demonstrated his ability to

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21 ² As set forth in response, ECF No. 39 at 2, counsel for defendant Rohlring "respectfully calls the
22 Court's attention to the following factual information in Defendant's Answer (Docket No. 27), ¶
6:

23 Defendant admits that, following an employment dispute with
24 CDCR in the mid-2000s that was unrelated to the facts of this case,
25 the State Personnel Board ordered Defendant's privileges at CDCR
26 reinstated in approximately 2008 and 2009. As of the alleged date
27 of Plaintiff's hernia surgery (October 9, 2013), Defendant's medical
28 license was, and for several years had been, in good standing with
the Division of Medical Quality of the Medical Board of California.
Docket 27, 2:22-27. Defendant's Answer also asserts that he was not
disciplined in any way relating to his alleged care for Plaintiff in
2013. Docket 27, 2:20-22. Respectfully, these admissions show that
Defendant's employment action with CDCR resolved years before
Plaintiff's surgery.

1 represent himself at the discovery stage. In any event, the current circumstances are not
2 exceptional.

3 Accordingly, for these reasons, IT IS HEREBY ORDERED that plaintiff's motion for
4 appointment of counsel, ECF No. 38, is denied without prejudice.

5 DATED: May 26, 2020

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7 ALLISON CLAIRE
8 UNITED STATES MAGISTRATE JUDGE
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