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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

G. DANIEL WALKER,  
Plaintiff,  
v.  
SCOTT KERNAN, et al.,  
Defendants.

No. 2:17-cv-1764 KJM DB P

ORDER

Plaintiff is a state prisoner proceeding pro se with a civil rights action seeking relief under 42 U.S.C. § 1983. Plaintiff claims that defendants conspired to retaliate against him because he named them as defendants in prior lawsuits. Presently before the court is plaintiff’s fully briefed motion for sanctions. (ECF Nos. 52, 55, 58.) For the reasons set forth below, the court will deny plaintiff’s motion for sanctions without prejudice.

**I. Background**

This action proceeds on plaintiff’s second amended complaint. (ECF No. 22.) Therein, plaintiff argues defendants retaliated against him because he has filed lawsuits against them. The court found service was appropriate for defendants Green, Kumar, Martello, and Muniz. (ECF No. 23.) Thereafter, this action was referred to the court’s Alternative Dispute Resolution Program. (ECF No. 36.) Before the settlement conference was held, plaintiff filed two motions seeking the release of his legal files. (ECF Nos. 38, 40.) Defendants filed an opposition to

1 plaintiff's first motion to compel production of his legal files. (ECF No. 41) Therein, defendants  
2 provided a statement from prison officials indicating that plaintiff did not have any property in  
3 storage. (ECF No. 41 at 7.) The motion was denied (ECF No. 44), and a settlement conference  
4 was held on November 3, 2020. (ECF No. 49.) The case did not settle. Thereafter, plaintiff filed  
5 the instant motion seeking sanctions. (ECF No. 52.)

#### 6 **A. Plaintiff's Motion**

7 Plaintiff's motion alleges that sanctions should be imposed because defendants knowingly  
8 deceived the court. (ECF No. 52.) Specifically, plaintiff alleges that in defendants' opposition to  
9 plaintiff's motion to compel release of plaintiff's legal files, defendants falsely stated California  
10 Health Care Facility (CHCF) does not have any of plaintiff's personal or legal property in  
11 storage. (Id. at 2.) He claims various other documents show that he has at least 15, and perhaps  
12 as many as 22, boxes of property in storage. (Id. at 3.) Plaintiff argues that because of  
13 defendants' actions the court should appoint counsel to represent him in this action. (ECF No. 52  
14 at 6.)

#### 15 **B. Defendants' Opposition**

16 Defendants argue in their opposition that their representation to the court indicating  
17 plaintiff had no property in storage was based on Officer's Nelson's belief that plaintiff was  
18 seeking his personal, rather than legal property. (ECF No. 55 at 2.) They further argue that the  
19 motion should be denied because any misstatement to the court was "an inadvertent error based  
20 on miscommunication." (ECF No. 55 at 2.) They further state that plaintiff failed to comply with  
21 the 21-day safe harbor to correct any error before seeking sanctions. (ECF No. 55 at 2.)

#### 22 **C. Plaintiff's Reply**

23 Plaintiff concludes defendants acted in bad faith. (ECF No. 58.) In his reply he ponders  
24 whether counsel's opposition constituted a new violation. He claims that he has asked prison  
25 officials for materials and assistance in proceeding with other cases, but his requests have not  
26 been answered.

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1           **II.     Legal Standards**

2           Federal courts possess broad powers to impose sanctions against parties or counsel for  
3 improper conduct during litigation. The court derives the power to impose sanctions on parties or  
4 their counsel from three sources, (1) Federal Rule of Civil Procedure 11, (2) 28 U.S.C. § 1927,<sup>1</sup>  
5 and (3) the court’s inherent power. Fink v. Gomez, 239 F.3d 989, 991 (9th Cir. 2001).

6           Under Federal Rule of Civil Procedure 11, sanctions may be imposed if a party or their  
7 attorney submits a pleading to the court which is submitted for an improper purpose, is frivolous,  
8 has no evidentiary support, or is not warranted by the evidence. A party moving for Rule 11  
9 sanctions bears the burden to show why sanctions are justified. See Tom Growney Equip., v.  
10 Shelley Irr. Dev., Inc., 834 F.2d 833, 837 (9th Cir. 1987). The Ninth Circuit has stated that Rule  
11 11 sanctions are “an extraordinary remedy, one to be exercised with extreme caution.” Operating  
12 Eng’rs Pension Trust v. A-C Co., 859 F.2d 1336, 1345 (9th Cir. 1988).

13           When evaluating the imposition of sanctions, Rule 11 requires the court to consider not  
14 whether the party demonstrated subjective good faith in filing the document, but whether the  
15 party acted objectively reasonably in doing so. G.C. K.B. Investments v. Wilson, 326 F.3d 1096,  
16 1109 (9th Cir. 2003). “An order imposing a sanction must describe the sanctioned conduct and  
17 explain the basis for the sanction.” Fed. R. Civ. P. 11(c)(6).

18           Rule 11(c)(2) provides in part that a motion for sanctions “must not be filed or be  
19 presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn  
20 or appropriately corrected within 21 days after service or within another time the court sets.”  
21 This is referred to as the “safe harbor” provision of Rule 11. See Fed. R. Civ. P. 11; Adv. Comm.  
22 Notes, 1992 Amend.

23           Federal courts also have the inherent power to sanction parties or their attorneys for  
24 improper conduct. Chambers v. NASCO, Inc., 501 U.S. 32, 43-46 (1991). In order to impose  
25 sanctions pursuant to its inherent power, “the court must make an express finding that the  
26 sanctioned party’s behavior ‘constituted or was tantamount to bad faith.’” Leon v. IDX Sys.

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28 <sup>1</sup> This section is aimed at penalizing conduct that unreasonably and vexatiously multiplies the  
proceedings which his not applicable here.

1 Corp., 464 F.3d 951, 961 (9th Cir. 2006). “Because of their very potency, inherent powers to  
2 sanction must be exercised with restraint and discretion.” Chambers, 501 U.S. at 44.

3 When evaluating whether sanctions should be imposed under Rule 11, courts conduct “a  
4 two-prong inquiry to determine (1) whether the [pleading] is legally or factually baseless from an  
5 objective perspective, and (2) the attorney has conducted a reasonable and competent inquiry  
6 before signing and filing it.” Holgate v. Baldwin, 425 F.3d 671, 676 (9th Cir. 2005) (internal  
7 citation omitted). The standard is not a high one and an allegation that has “some plausible basis,  
8 [even] a weak one,” is sufficient to avoid sanctions under Rule 11. United Nat. Ins. Co. v. R&D  
9 Latex Corp., 242 F.3d 1102, 1117 (9th Cir. 2001).

### 10 **III. Analysis**

#### 11 **A. Safe Harbor Provision**

12 Rule 11 contains a “safe harbor” provision, whose purpose is to give the non-moving  
13 party the opportunity to withdraw the offending pleading. See Barber v. Miller, 146 F.3d 707,  
14 711 (9th Cir. 1998). This provision requires that a motion for sanctions be served on the  
15 opposing party 21 days before it is filed in court. Radcliffe v. Rainbow Const. Co., 254 F.3d 772,  
16 789 (9th Cir. 2001).

17 Defendants allege plaintiff sent a letter regarding defendants’ statement that plaintiff had  
18 no property in storage on October 23, 2020 and that his motion for sanctions is dated November  
19 4, 2020.<sup>2</sup> (ECF No. 55 at 3.) Thus, they argue that plaintiff failed to comply with Rule 11’s safe  
20 harbor provision. Plaintiff claims his letter to defendants was dated October 19, 2020. (ECF No.  
21 58 at 3, 37.)

22 Plaintiff’s October 19, 2020 letter fails to comply with the safe harbor provision because it  
23 was sent, at the earliest, sixteen days prior to his filing the instant motion for sanctions.  
24 Accordingly, the court finds that plaintiff has failed to comply with the safe harbor provision and  
25 thus the court cannot impose sanctions pursuant to Federal Rule of Civil Procedure 11.

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27 <sup>2</sup> Court records show that plaintiff’s motion for sanctions was filed on the court’s docket on  
28 November 12, 2020. However, prisoner filings are deemed filed on the date that the prisoner  
signs the document and gives it to prison officials for mailing. See Houston v. Lack, 487 U.S.  
266, 276 (1988).

1                   **B. Bad Faith**

2                   Plaintiff alleges that counsel for defendants should have conducted further investigation  
3 before informing the court that plaintiff did not have any property in storage. He claims counsel  
4 acted improperly in relying on the statements provided and that the court should find that such  
5 actions were in bad faith because the statement was not corrected.

6                   “Before awarding sanctions under its inherent powers . . . the court must make an explicit  
7 finding that the conduct ‘constituted or was tantamount to bad faith.’” Primus Automotive  
8 Financial Services, Inc. v. Batarse, 115 F.3d 644, 648 (9th Cir. 1997) (quoting Roadway Express,  
9 Inc. v. Piper, 447 U.S. 752, 767 (1980)). The term bad faith “includes a broad range of willful  
10 improper conduct.” See Fink, 239 F.3d at 992. Sanctions are therefore “available for a variety of  
11 types of willful actions, including recklessness when combined with an additional factor such as  
12 frivolousness, harassment, or an improper purpose. Id. at 994. “Willful misconduct” or “conduct  
13 tantamount to bad faith” is “something more egregious than mere negligence or recklessness.” In  
14 re Lehtinen, 564 F.3d 1052, 1058 (9th Cir. 2009) (internal quotation marks and citations omitted)  
15 abrogated on other grounds by Bullard v. Blue Hills Bank, 575 U.S. 496 (2015). Sanctions  
16 should be reserved for “serious breaches,” Zambrano v. City of Tustin, 885 F.2d 1473, 1485 (9th  
17 Cir. 1989), “[b]ecause of their very potency, inherent powers must be exercised with restraint and  
18 discretion.” Chambers, 501 U.S. at 44.

19                   Examples of bad faith include “knowingly or recklessly rais[ing] a frivolous argument, or  
20 argu[ing] a meritorious claim for the purpose of harassing an opponent.” In re Keegan  
21 Management, 78 F.3d 431, 436 (9th Cir. 1996). A party may also demonstrate bad faith by  
22 “delaying or disrupting the litigation or hampering enforcement of a court order.” Hutto v.  
23 Finney, 437 U.S. 678, 689 n.14 (1978). Recklessness, when combined with an additional factor  
24 such as frivolousness, harassment, or an improper purpose, may support sanctions, Gomez v.  
25 Vernon, 255 F.3d 1118, 1134 (9th Cir. 2001); Fink, 239 F.3d at 994, but mere negligence or  
26 recklessness will not suffice, In re Lehtinen, 564 F.3d at 1058.

27                   Plaintiff concludes that defendants have acted in bad faith. In support of this allegation he  
28 cites his history of litigation against California Department of Corrections and Rehabilitation

1 (CDCR) and CDCR officials. However, that plaintiff has brought cases against CDCR officials  
2 on previous occasions does not necessarily show that counsel for defendants acted in bad faith by  
3 relying on the statements of prison officials in this action. See Zambrano, 885 F.2d at 1483 (The  
4 imposition of sanctions is not warranted where the record indicated that the conduct was nothing  
5 “more than an oversight or ordinary negligence.”). Reliance on statements from prison officials  
6 describes at most reckless or negligent conduct. In re Lehtinen, 564 F.3d at 1058.

7 Moreover, he has not alleged that the deprivation of legal property prejudiced him during  
8 the settlement conference. Nor has plaintiff identified specific documents or items that are in  
9 storage that he needs to litigate this action. In any renewed motion or future request, plaintiff  
10 should state clearly what items are necessary for him in pursuit of this action. However, the court  
11 is troubled by defendants’ representation that plaintiff “had no personal or legal property” in  
12 storage when records indicate that plaintiff has as many as 15 or 22 boxes of property in storage.  
13 While the court does not find that sanctions should be imposed at this time, moving forward the  
14 court expects that all representation to the court be accurate.

15 Additionally, counsel for defendants will be required to contact the plaintiff to determine  
16 if there are any specific items plaintiff needs to litigate this case, subject to California Code of  
17 Regulations, title 15, section 3161.<sup>3</sup> Defendants shall file a statement reflecting whether plaintiff  
18 has requested and/or been provided any legal property needed to litigate this action. To the extent  
19 plaintiff seeks access for his other cases, he is advised that this court will not address his requests  
20 for access to legal materials for cases pending in other jurisdictions.

### 21 **C. Appointment of Counsel**

22 Plaintiff has asked that he be appointed counsel as a sanction. (ECF No. 52 at 6.)  
23 However, the United States Supreme Court has ruled that district courts lack authority to require  
24 counsel to represent indigent prisoners in § 1983 cases. Mallard v. United States Dist. Court, 490  
25 U.S. 296, 298 (1989). In certain exceptional circumstances, the district court may request the

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28 <sup>3</sup> Section 3161 states that inmates may “possess up to one cubic foot of legal materials/documents  
related to their active cases, in excess of the six cubic feet of allowable property in their assigned  
quarters/living area.”

1 voluntary assistance of counsel pursuant to 28 U.S.C. § 1915(e)(1). Terrell v. Brewer, 935 F.2d  
2 1015, 1017 (9th Cir. 1991); Wood v. Housewright, 900 F.2d 1332, 1335-36 (9th Cir. 1990).

3 The test for exceptional circumstances requires the court to evaluate the plaintiff's  
4 likelihood of success on the merits and the ability of the plaintiff to articulate his claims pro se in  
5 light of the complexity of the legal issues involved. See Wilborn v. Escalderon, 789 F.2d 1328,  
6 1331 (9th Cir. 1986); Weygandt v. Look, 718 F.2d 952, 954 (9th Cir. 1983). Circumstances  
7 common to most prisoners, such as lack of legal education and limited law library access, do not  
8 establish exceptional circumstances that would warrant a request for voluntary assistance of  
9 counsel.

10 As set forth above, the court does not find that sanctions are warranted. Nor does the  
11 court does not find the required exceptional circumstances exist to warrant the appointment of  
12 counsel. Plaintiff's filings in this action have been responsive to court orders, cite relevant legal  
13 authority, and clearly state his allegations against defendants. Thus, he has shown he can  
14 articulate his claims pro se. Accordingly, the court will deny his request for the appointment of  
15 counsel.

#### 16 **IV. Conclusion**

17 For the foregoing reasons, IT IS HEREBY ORDERED that:

- 18 1. Plaintiff's motion for sanctions (ECF No. 52) is denied without prejudice.
- 19 2. Within forty-five days of the date of this order counsel for defendants shall inform the  
20 court regarding the status of plaintiff's access to legal materials including any  
21 necessary declarations.

22 Dated: February 1, 2021

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25 DEBORAH BARNES  
26 UNITED STATES MAGISTRATE JUDGE  
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