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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

GARY PAUL SMITH,  
  
                                Plaintiff,  
  
                                v.  
  
MUNICIPALITY OF FRESNO COUNTY,  
et al.,  
  
                                Defendants.

No. 2:21-cv-1992 KJM AC P  
  
ORDER AND FINDINGS AND  
RECOMMENDATIONS

Plaintiff has submitted a letter requesting that the court rule on his motions and requesting that he be appointed counsel. ECF No. 116. Another letter has been docketed as a motion for deposition; it contains letter that contains a “second request for production of documents” as well as a “subvertive motion for deposition.”<sup>1</sup> ECF No. 117. Most recently, plaintiff has filed a motion for the disqualification of judges. ECF No. 118. For the reasons stated below, these various requests and motions will be denied.

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<sup>1</sup> These motions are rambling and largely unintelligible. Plaintiff appears to raise numerous issues that are unrelated to the relief requested in his captions. Plaintiff has previously been told that discrete requests for relief must be presented as separate motions, and that documents not complying with this directive will be disregarded. ECF No. 112 at 6. Here the court will address only those arguments that clearly relate to the titles plaintiff has provided for each document, identifying the relief he seeks.

1 I. REQUEST FOR RULING AND APPOINTMENT OF COUNSEL (ECF No. 116)

2 Plaintiff 's request for a ruling in outstanding motions, ECF No. 116 at 1-6, was docketed  
3 on October 11, 2022. At that time, there were no outstanding motions. The request for a ruling  
4 will therefore be denied as moot.

5 Plaintiff's motion for appointment of counsel states that plaintiff is unable to afford  
6 counsel; his imprisonment limits his ability to litigate; the issues in this matter are complex and  
7 require significant research and investigation; and he has limited access to the law library due to  
8 COVID-19 and lockdowns. ECF No. 116 at 6.

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 represent such a plaintiff. See 28  
12 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 Having considered the factors specified in Palmer, the court finds that plaintiff has failed  
22 to meet his burden of demonstrating exceptional circumstances warranting the appointment of  
23 counsel at this time. Accordingly, his motion for the appointment of counsel will also be denied.

24 II. MOTION REGARDING DISCOVERY (ECF No. 117)

25 As far as the court can discern, plaintiff is contending that he will only allow himself to  
26 be deposed if the Office of the Attorney General sends him "any and all documents of relevance"  
27 which plaintiff has been unable to obtain to date. ECF No. 117 at 3. Citing to Federal Rule of

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1 Civil Procedure 26(b), plaintiff argues that he “has a legal right to anything which is in any way  
2 relevant” to his claims or defenses. Id.

3 The parties’ obligations to produce relevant documents in discovery is independent of the  
4 obligation to comply with a noticed deposition. Plaintiff has identified no defect in the noticing  
5 of his deposition, and no legal basis for the court to interfere in that deposition. See Fed. R. Civ.  
6 P. 30(a)(1), (b)(1) (permitting defendants to depose plaintiff if all parties are timely served with  
7 proper notice); see also ECF No. 88 at 5 (requiring fourteen days’ notice to parties prior to  
8 deposition).

9 Insofar as plaintiff seeks to compel the production of documents,<sup>2</sup> see ECF No. 117 at 8-  
10 11, discovery closed on July 8, 2022. See ECF No. 88 at 6 (discovery and scheduling order  
11 stating motions to compel must be filed by July 8, 2022). The sole exception is defendants’  
12 continued deposition of plaintiff, which plaintiff has been ordered to attend and which is to take  
13 place no later than October 19, 2022. See ECF No. 114.

14 Plaintiff has previously been informed of the process for obtaining discovery and bringing  
15 motions to compel. See ECF No. 95. He has filed several prior discovery related motions, all of  
16 which have been denied for non-compliance with the rules and the court’s instructions. ECF Nos.  
17 95, 103, 112 (orders denying motions). Plaintiff did not timely seek an extension of the discovery  
18 deadline for the purposes of seeking documents, nor has he demonstrated good cause for the  
19 same. Accordingly, the discovery motion will be denied as untimely.

20 III. MOTION FOR RECUSAL (ECF No. 118)

21 Plaintiff seeks the disqualification of the undersigned magistrate judge and U.S. District  
22 Judge Kimberly J. Mueller. ECF No. 118. Plaintiff alleges that the undersigned has colluded  
23 with the “sister court” and the California Office of the Attorney General ever since plaintiff  
24 withdrew his consent to magistrate judge jurisdiction. He alleges that the district judge has also

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27 <sup>2</sup> To the extent this filing is intended as a request for production directed to defendants, it should  
28 not have been filed with the court. See Fed. R. Civ. P. 34(a) (production requests are to be served  
directly on parties).

1 engaged in “illegal shenanigans.” Id. There are no supporting facts that identify the alleged acts  
2 of collusion or illegal shenanigans. Id.

3 Recusal is governed by 28 U.S.C. §§ 144 and 455. The Ninth Circuit has “held repeatedly  
4 that the challenged judge h[er]self should rule on the legal sufficiency of a recusal motion in the  
5 first instance.” United States v. Studley, 783 F.2d 934, 940 (9th Cir. 1986) (citing United States  
6 v. Azhocar, 581 F.2d 735, 738 (9th Cir. 1978) (collecting cases)). “Whenever a party to any  
7 proceeding in a district court makes and files a timely and sufficient affidavit that the judge  
8 before whom the matter is pending has a personal bias or prejudice either against him or in favor  
9 of any adverse party, such judge shall proceed no further therein.” 28 U.S.C. § 144. “Any  
10 justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding  
11 in which his impartiality might reasonably be questioned.” 28 U.S.C. § 455(a). Under both  
12 recusal statutes, the substantive standard is “whether a reasonable person with knowledge of all  
13 the facts would conclude that the judge’s impartiality might reasonably be questioned.” Studley,  
14 783 F.2d at 939 (quoting Mayes v. Leipziger, 729 F.2d 605, 607 (9th Cir. 1984) (internal  
15 quotations omitted)).

16 “[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality  
17 motion.” Liteky v. U.S., 510 U.S. 540, 555 (1994). Moreover, “[t]he alleged bias and prejudice  
18 to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits  
19 on some basis other than what the judge learned from [her] participation in the case.” United  
20 States v. Grinnell Corp., 384 U.S. 563, 583 (1966) (citation omitted); see also Liteky, 510 U.S. at  
21 551 (“Also not subject to deprecatory characterization as ‘bias’ or ‘prejudice’ are opinions held  
22 by judges as a result of what they learned in earlier proceedings.”).

23 It appears that plaintiff’s accusations of bias and collusion arise exclusively from the  
24 court’s rulings and management of the case. This is insufficient as a matter of law to support  
25 recusal. Plaintiff has not identified any facts that would cause a reasonable person to challenge  
26 the impartiality of either judge assigned to this case. Accordingly, the undersigned will deny the  
27 motion as to herself and recommend that it also be denied as to the district judge.

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1 CONCLUSION

2 For the reasons explained above, IT IS HEREBY ORDERED as follows:

- 3 1. Plaintiff's request for a ruling and for the appointment of counsel, ECF No. 116, is  
4 DENIED;
- 5 2. Plaintiff's motion regarding discovery, ECF No. 117, is DENIED; and
- 6 3. Plaintiff's motion for disqualification, ECF No. 118, is DENIED as to the undersigned  
7 United States Magistrate Judge.

8 IT IS FURTHER RECOMMENDED that plaintiff's motion for disqualification, ECF No.  
9 118, be DENIED as to the assigned United States District Judge.

10 These findings and recommendations are submitted to the United States District Judge  
11 assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one (21)  
12 days after being served with these findings and recommendations, plaintiff may file written  
13 objections with the court. Such document should be captioned "Objections to Magistrate Judge's  
14 Findings and Recommendations." Local Rule 304(d). Plaintiff is advised that failure to file  
15 objections within the specified time may waive the right to appeal the District Court's order.  
16 Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

17 DATED: October 19, 2022

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19 ALLISON CLAIRE  
20 UNITED STATES MAGISTRATE JUDGE  
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