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4 UNITED STATES DISTRICT COURT  
5 NORTHERN DISTRICT OF CALIFORNIA  
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7 ERICKSON PRODUCTIONS INC, et al.,

8 Plaintiffs,

9 v.

10 KRAIG RUDINGER KAST, et al.,

11 Defendants.

Case No. [13-cv-05472-DMR](#)

**ORDER DENYING DEFENDANT'S  
MOTION FOR APPOINTMENT OF  
COUNSEL**

Re: Dkt. No. 360

12 On July 3, 2019, the court held a case management conference at which Defendant Kraig  
13 Kast made a request for appointment of pro bono counsel. The court ordered Kast to file an  
14 administrative motion for appointment of counsel by July 8, 2019, with any opposition by  
15 Plaintiffs Erickson Productions Inc. and Jim Erickson due by July 12, 2019. [Docket No. 358.]  
16 Kast timely filed his motion, which Plaintiffs oppose. [Docket Nos. 360, 364.]<sup>1</sup>

17 Kast is not an indigent litigant who may lose his physical liberty if he does not prevail in  
18 this lawsuit. Therefore he does not have a right to counsel. See *Lassiter v. Dept of Soc. Servs*, 452  
19 U.S. 18, 25 (1981). Kast moves for appointment of counsel pursuant to this district's General  
20 Order No. 25, which sets forth four criteria which a pro se litigant must satisfy in order to be found  
21 eligible for appointment of pro bono counsel through the district's Federal Pro Bono Project:

- 22 1. The unrepresented litigant must be in propria persona;  
23 2. The unrepresented litigant must not have the financial resources to  
24 retain counsel;  
25 3. The unrepresented litigant must have used reasonable efforts to

26 \_\_\_\_\_  
27 <sup>1</sup> The court notes that Kast filed a reply to Plaintiffs' opposition, to which Plaintiffs objected.  
28 [Docket Nos. 366, 368.] The court declines to consider the reply. Local Rule 7-11, which  
governs Kast's motion, provides that "[a] Motion for Administrative Relief is deemed submitted  
for immediate determination without hearing on the day after the opposition is due." Civ. L.R. 7-  
11(c). It does not authorize the filing of a reply brief.

1 retain private counsel such as through a California State Bar-approved  
2 lawyer referral service or have demonstrated that such efforts would  
3 be futile; and

4 4. The referring judge must determine the case merits pro bono  
5 representation (this does not mean determining that the litigant is  
6 likely to prevail on the merits, but that the litigant's claims are  
7 cognizable and the factual and legal issues warrant proper  
8 presentation to the Court with the assistance of an attorney).

9 Gen. Order 25(I)(A).

10 Kast asserts that he satisfies all four criteria for appointment of pro bono counsel under  
11 General Order 25. He also notes that the Ninth Circuit appointed pro bono counsel to represent  
12 him in the prior appeal and argues that the "factual and technical legal issues before this Court, are  
13 derived from the same technical legal issues already decided by the panel in [his] appeal." Mot. 3.

14 Plaintiffs oppose the motion. In particular, they vigorously dispute whether Kast has the  
15 financial resources to retain counsel and argue that Kast has not made a sufficient showing that he  
16 made reasonable efforts to obtain counsel on his own.

17 The court need not resolve the parties' disputes about Kast's financial resources or his  
18 efforts to obtain counsel, because it finds that the case does not merit pro bono representation  
19 under the fourth criterion. The court determines that the factual and legal issues presented on  
20 remand are straightforward, and Kast can present them properly without appointment of pro bono  
21 counsel.

22 Kast points to the fact that the Ninth Circuit appointed pro bono counsel to represent him  
23 on appeal. However, the Court of Appeals issued its appointment order because it determined that  
24 appointment of counsel would benefit the court's review of two specific legal issues: (1) Whether  
25 the avoidance of licensing fees constitutes a direct financial benefit for purposes of imposing  
26 vicarious liability; and (2) Whether a "should have known" willfulness instruction is proper under  
27 17 U.S.C. § 504(c). Case No. 15-16801, Docket No. 54 (9th Cir. May 7, 2018). The Ninth Circuit  
28 decided both of those legal issues in its April 16, 2019 opinion. See *Erickson Prods., Inc. v. Kast*,  
921 F.3d 822 (9th Cir. 2019). The reason for appointment of counsel before the appellate court no  
longer exists.

On remand the only issues before this court are (1) whether the current evidentiary record  
supports a finding of willful infringement under the legal standard announced by the Ninth

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Circuit; and (2) the amount of statutory damages to be awarded if the evidence does not support such a finding. See *id.* at 833-34. These issues are not particularly complex. Moreover, Kast’s filings in this case demonstrate that he is fully capable of articulating his positions without the assistance of an attorney. Accordingly, Kast’s motion for the appointment of pro bono counsel is denied. The briefing schedule set by the court at the initial case management conference remains unchanged. [See Docket No. 358.]

**IT IS SO ORDERED.**

Dated: July 18, 2019

