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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 KEITH WAYNE SEKERKE,
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13 Plaintiff,
14 v.
15 JOSE GONZALEZ, *et al.*,
16 Defendants.

Case No.: 15-CV-00573-JLS-WVG

**ORDER DENYING WITHOUT
PREJUDICE PLAINTIFF'S MOTION
TO APPOINT COUNSEL AND
EXPERT WITNESS**

[ECF No. 64]

17 Plaintiff Keith Sekerke, proceeding *pro se*, brings this action under 42 U.S.C. § 1983
18 alleging violations of his rights under the Eighth and Fourteenth Amendments. Plaintiff
19 now moves for appointment of counsel and expert witness. For the reasons set forth below,
20 the Court **DENIES** both motions without prejudice.

21 **BACKGROUND**

22 The Court has recited the facts and allegations of this case in two recent orders. (*See*
23 ECF Nos. 73, 78.) Thus, the Court will simply note at this point that there has been
24 extensive litigation since Plaintiff filed his Complaint. In the present motions, Plaintiff
25 moves the Court to appoint counsel and an expert witness on his behalf, claiming
26 exceptional circumstances exist to warrant the appointment of counsel. (ECF No. 64 at
27 6:22-26.) However, Plaintiff does not articulate the legal or factual basis for the
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1 appointment of an expert witness on his behalf. Defendants timely filed a Response in
2 Opposition. (ECF No. 71.)

3 MOTION TO APPOINT COUNSEL

4 Plaintiff argues that good cause exists for the appointment of counsel. Plaintiff
5 claims that exceptional circumstance exist because “disabilities” prevent him from
6 understanding the courts orders. (ECF No. 64 at 6:22-27.) Additionally, Plaintiff claims
7 the action is complex such that it creates an exceptional circumstance because Plaintiff will
8 need to “investigate and adequately litigate” the state of mind of Defendants including the
9 taking of depositions. (ECF No. 64 at 10:4-7.) Further, Plaintiff is claiming documents are
10 being withheld by the San Diego County Sheriff’s Department because an attorney needs
11 to make the request. (ECF No. 64 at 9:13-16.)

12 “There is no constitutional right to appointed counsel in a § 1983 action.” *Rand v.*
13 *Rowland*, 113 F.3d 1520, 1525 (9th Cir. 1997) (partially overruled *en banc* on other
14 grounds). Thus, federal courts do not have the authority “to make coercive appointments
15 of counsel.” *Mallard v. U.S. Dist. Ct.*, 490 U.S. 296, 310 (1989); *see also United States v.*
16 *\$292,888.04 in U.S. Currency*, 54 F.3d 564, 569 (9th Cir. 1995). Districts courts do have
17 discretion, however, pursuant to 28 U.S.C. section 1915(e)(1), to request that an attorney
18 represent indigent civil litigants upon a showing of exceptional circumstances. *See*
19 *Agyeman v. Corrections Corp. of America*, 390 F.3d 1101, 1103 (9th Cir. 2004). “A finding
20 of the exceptional circumstances of the plaintiff seeking assistance requires at least an
21 evaluation of the likelihood of the plaintiff’s success on the merits and an evaluation of the
22 plaintiff’s ability to articulate his claims ‘in light of the complexity of the legal issues
23 involved.’” *Agyeman*, 390 F.3d at 1103 (quoting *Wilborn v. Escalderon*, 789 F.2d 1328,
24 1331 (9th Cir. 1986)); *see also Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991).

25 Plaintiff’s arguments are not persuasive. At the outset, the Court notes that Plaintiff
26 has filed a First Amended Complaint, (ECF No. 42,) which Defendants have Answered,
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1 (ECF No. 45.)¹ At this stage in the litigation, the Court is unable to determine whether
2 Plaintiff will succeed on the merits.

3 Plaintiff fails to elaborate as to what disability prevents him from understanding
4 court orders. The record indicates Plaintiff indeed understands, and complies with, court
5 orders. (*See, e.g.*, ECF No. 80, 68, 61, 58, and 56.) Additionally, factual disputes and
6 anticipated examinations of witnesses do not warrant the finding of exceptional
7 circumstances nor does it warrant the finding that a case is complex. *See Wilborn*, 789 F.2d
8 at 1331 (“If all that was required to establish successfully the complexity of the relevant
9 issues was a demonstration of the need for development of further facts, practically all
10 cases would involve complex legal issues.”); *see also Meeks v. Nunez*, 2017 WL 117300
11 *2 (finding that exceptional circumstances do not exist where a *pro se* plaintiff needs
12 assistance with the investigation and discovery of the case). Moreover, Plaintiff’s
13 attachments to the motion demonstrate that he is able to investigate and develop an
14 evidentiary record. Plaintiff attached a document labeled ‘Exhibit G’ that appears to be an
15 affidavit of a witness to the events in question supporting Plaintiff’s claims. (See ECF No.
16 64 at 91.) This exhibit, along with Plaintiff’s numerous filings, demonstrates to the Court
17 that Plaintiff is able to investigate and litigate the matter.

18 Plaintiff’s claim that he needs an attorney to retrieve documents from the San Diego
19 County Sheriff’s Department is equally without merit as the exhibit attached by Plaintiff
20 shows this to be a misstatement of the requirement. The San Diego County Sheriff’s
21 Department response to the medical records request shows Plaintiff needed to sign a release
22 and pay a fee, and that access to Plaintiff’s records was not denied on the basis he is not an
23 attorney. (*See* ECF No. 64 at 20.)

24 For these reasons, the Court **DENIES** Plaintiff’s motion to appoint counsel without
25 prejudice.

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28 ¹ While there have been numerous filings in the matter, these are the only filings to date that relate directly to the merits of the claim.

1 **MOTION TO APPOINT EXPERT WITNESS**

2 Plaintiff also moves the Court for the appointment of an expert witness. However,
3 Plaintiff has not articulated what field of expertise is needed to litigate the matter. Further,
4 Plaintiff offers no factual or legal basis for such an appointment. Assuming, *arguendo*, the
5 Court applies all of Plaintiff’s reasoning for the appointment of counsel to the argument
6 for the appointment of an expert witness, the request similarly fails.

7 The Federal Rules of Evidence allow a District Court to appoint an expert on its own
8 motion or on the motion of a party. Fed. R. Evid. 706(a); *see also McKinney v. Anderson*,
9 924 F.2d 1500, 1510 (9th Cir.1991), *cert. granted, judgment vacated sub nom. Helling v.*
10 *McKinney*, 502 U.S. 903, 112 S.Ct. 291, 116 L.Ed.2d 236 (1991) *and judgment reinstated*,
11 959 F.2d 853 (9th Cir.1992), *aff’d sub nom. Helling v. McKinney*, 509 U.S. 25, 113 S.Ct.
12 2475, 125 L.Ed.2d 22 (1993). While the court has the discretion to appoint an expert and
13 to apportion costs, including the appointment of costs to one side, Fed. R. Evid. 706; *Ford*
14 *ex rel. Ford v. Long Beach Unified School Dist.*, 291 F.3d 1086, 1090 (9th Cir.2002);
15 *Walker v. American Home Shield Long Term Disability Plan*, 180 F.3d 1065, 1071, where
16 the cost would likely be apportioned to the government, the court should exercise caution.
17 Moreover, Rule 706 is not a means to avoid the *in forma pauperis* statute and its prohibition
18 against using public funds to pay for the expenses of witnesses, *Dixon v. Ylst*, 990 F.2d
19 478, 480 (9th Cir. 1993); *Manriquez v. Huchins*, 2012 WL 5880431, * 12 (E.D. Cal. 2012),
20 nor does Rule 706 contemplate court appointment and compensation of an expert witness
21 as an advocate for Plaintiff, *Faletogo v. Moya*, 2013 WL 524037, *2 (S.D. Cal. 2013).
22 When addressing whether the Court should appoint an expert, the Court should examine
23 whether there exists complex scientific, technical, or other specialized trial issues.
24 *Compare McKinney v. Anderson, supra* at 1511 (recommending the district court appoint
25 counsel to pro se prisoner plaintiff considering the complexity of the scientific evidence
26 regarding the health effects of second hand smoke), *with Faletogo, supra* at *1 (finding
27 that an excessive force claim was not so complex as to require the testimony of expert
28 witnesses to assist the trier of fact).

1 The Court finds the issues involved in Plaintiff's excessive force claim are not so
2 complex as to require the testimony of expert witnesses to assist the trier of fact. *See, e.g.,*
3 *Faletago, supra* at *1-2 (in a civil rights action in which the plaintiff claimed law
4 enforcement assaulted him in violation of the Eighth Amendment, the court found an expert
5 witness was unnecessary for such a claim because there was no scientific, technical, or
6 specialized knowledge required to understand the evidence or determine a fact). Because
7 Plaintiff does not identify an issue that requires scientific, technical, or specialized
8 knowledge, the exceptional circumstances which might require the appointment of an
9 expert witness do not exist.

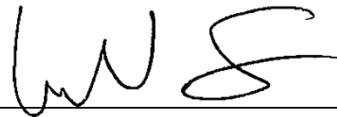
10 Accordingly, Plaintiff's request for appointment of counsel and expert witness is
11 **DENIED** without prejudice.

12 **CONCLUSION**

13 For the reasons set forth above, both Plaintiff's motion for appointment of counsel
14 and appointment of an expert witness are **DENIED** without prejudice.

15 **IT IS SO ORDERED.**

16 Dated: April 19, 2017

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19 Hon. William V. Gallo
20 United States Magistrate Judge
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