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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

KENDRICK BANGS KELLOGG,

Plaintiff,

v.

CHRISTINE V. OLSEN, *et al.*,

Defendants.

Case No. 16-cv-640-BAS(JLB)

ORDER:

- (1) GRANTING PLAINTIFF'S MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*; AND**
- (2) DENYING WITHOUT PREJUDICE PLAINTIFF'S MOTION FOR APPOINTMENT OF COUNSEL**

[ECF Nos. 2, 3]

22 On March 15, 2016, Plaintiff Kendrick Bangs Kellogg, proceeding *pro se*,
23 commenced this action against Christine V. Olsen, John Koskinen in his capacity as
24 Commissioner of the Internal Revenue Service, and the Tax Division of the U.S.
25 Department of Justice. On the same day, Plaintiff also filed a motion for appointment
26 of counsel and a motion seeking leave to proceed *in forma pauperis* (“IFP”). For the
27 reasons discussed below, the Court **GRANTS** Plaintiff’s motion to proceed IFP and
28 **DENIES WITHOUT PREJUDICE** his motion for appointment of counsel.

1 **I. MOTION FOR *IN FORMA PAUPERIS***

2 The determination of indigency falls within the district court’s discretion. *Cal.*
3 *Men’s Colony v. Rowland*, 939 F.2d 854, 858 (9th Cir. 1991), *rev’d on other grounds*,
4 506 U.S. 194 (1993) (holding that “Section 1915 typically requires the reviewing
5 court to exercise its sound discretion in determining whether the affiant has satisfied
6 the statute’s requirement of indigency”). It is well-settled that a party need not be
7 completely destitute to proceed *in forma pauperis*. *Adkins v. E.I. DuPont de Nemours*
8 *& Co.*, 335 U.S. 331, 339-40 (1948). To satisfy the requirements of 28 U.S.C. §
9 1915(a), “an affidavit [of poverty] is sufficient which states that one cannot because
10 of his poverty pay or give security for costs . . . and still be able to provide himself
11 and dependents with the necessities of life.” *Id.* at 339. At the same time, however,
12 “the same even-handed care must be employed to assure that federal funds are not
13 squandered to underwrite, at public expense, . . . the remonstrances of a suitor who
14 is financially able, in whole or in material part, to pull his own oar.” *Temple v.*
15 *Ellerthorpe*, 586 F. Supp. 848, 850 (D.R.I. 1984).

16 District courts, therefore, tend to reject IFP applications where the applicant
17 can pay the filing fee with acceptable sacrifice to other expenses. *See e.g., Stehouwer*
18 *v. Hennessey*, 841 F. Supp. 316, 321 (N.D. Cal. 1994), *vacated in part on other*
19 *grounds, Olivares v. Marshall*, 59 F.3d 109 (9th Cir. 1995) (finding that a district
20 court did not abuse its discretion in requiring a partial fee payment from a prisoner
21 who had a \$14.61 monthly salary and who received \$110 per month from family).
22 Moreover, “*in forma pauperis* status may be acquired and lost during the course of
23 litigation.” *Wilson v. Dir. of Div. of Adult Insts.*, No. CIV S-06-0791, 2009 WL
24 311150, at *2 (E.D. Cal. Feb. 9, 2009) (citing *Stehouwer*, 841 F. Supp. at 321); *see*
25 *also Allen v. Kelly*, 1995 WL 396860, at *2 (N.D. Cal. June 29, 1995) (holding that
26 a plaintiff who was initially permitted to proceed *in forma pauperis* should be
27 required to pay his \$120 filing fee out of a \$900 settlement). In addition, the facts as
28 to the affiant’s poverty must be stated “with some particularity, definiteness, and

1 certainty.” *United States v. McQuade*, 647 F.2d 938, 940 (9th Cir. 1981).

2 Having read and considered Plaintiff’s application, the Court finds that
3 Plaintiff meets the requirements in 28 U.S.C. § 1915 for IFP status. Plaintiff is an
4 unemployed 82-year-old on a fixed retirement income of \$1,100 per month. (IFP
5 Mot. ¶¶ 1-3, 11.) No other sources of income or assets are listed for him and his
6 spouse. (*Id.* ¶¶ 1, 4-6.) Though Plaintiff summarizes his monthly expenses as
7 “none,” the sum of expenses identified amounts to \$1,830 between Plaintiff and his
8 spouse. (*Id.* ¶ 8.) Plaintiff’s expenses and debt are clearly greater than his current
9 sources of income. Consequently, the Court finds that requiring Plaintiff to pay the
10 court filing fees would impair his ability to obtain the necessities of life. *See Adkins*,
11 335 U.S. at 339.

12 In light of the foregoing, the Court **GRANTS** Plaintiff’s application for leave
13 to proceed *in forma pauperis*. (ECF No. 2.) However, if it appears at any time in the
14 future that Plaintiff’s financial picture has improved for any reason, the Court will
15 direct Plaintiff to pay the filing fee to the Clerk of the Court. **This includes any**
16 **recovery Plaintiff may realize from this suit or others, and any assistance**
17 **Plaintiff may receive from family or the government.**

18 19 **II. MOTION FOR APPOINTMENT OF COUNSEL**

20 There is no constitutional right to the appointment of counsel in a civil case.
21 *See Johnson v. U.S. Dep’t of Treasury*, 939 F.2d 820, 824 (9th Cir. 1991); *Ivey v. Bd.*
22 *of Regents of the Univ. of Alaska*, 673 F.2d 266, 269 (9th Cir. 1982). “However, a
23 court may under ‘exceptional circumstances’ appoint counsel for indigent civil
24 litigants pursuant to 28 U.S.C. § 1915(e)(1).” *Palmer v. Valdez*, 560 F.3d 965, 970
25 (9th Cir. 2004) (citing *Agyeman v. Corr. Corp. of Am.*, 390 F.3d 1101, 1103 (9th Cir.
26 2004)). “When determining whether ‘exceptional circumstances’ exist, a court must
27 consider ‘the likelihood of success on the merits as well as the ability of the petitioner
28 to articulate his claims *pro se* in light of the complexity of the legal issues involved.”

1 *Id.* (quoting *Weygandt v. Look*, 718 F.2d 952, 954 (9th Cir. 1983). “Neither of these
2 considerations is dispositive and instead must be viewed together.” *Id.* (citing
3 *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986)).

4 The basis of Plaintiff’s motion for the appointment of counsel is that he has
5 not been able to obtain counsel because of his “poverty” despite his diligence.
6 (Counsel Mot. ¶ 2.) Plaintiff identifies at least two attorneys he has asked to take his
7 case, but both rejected him. (*Id.* ¶¶ 4-5.) He adds that counsel is needed because of
8 issues with his memory and the need for assistance in understanding and prosecuting
9 this action. (*Id.* ¶ 7.) However, the circumstances described fail to demonstrate
10 “exceptional circumstances” warranting the appointment of counsel. *See Palmer*,
11 560 F.3d at 965. Therefore, the Court **DENIES WITHOUT PREJUDICE**
12 Plaintiff’s motion for appointment of counsel. (ECF No. 3.)

13 14 **III. CONCLUSION & ORDER**

15 In light of the foregoing, the Court **GRANTS** Plaintiff’s motion to proceed
16 IFP and **DENIES WITHOUT PREJUDICE** Plaintiff’s motion for appointment of
17 counsel.

18 **IT IS SO ORDERED.**

19
20 **DATED: March 16, 2016**


21 **Hon. Cynthia Bashant**
22 **United States District Judge**