UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

BRADLEY PRICE BARBER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. CIV-15-78-C**
	)	
DR. DONALD SUTMILLER et al.,	)	
	)	
Defendants.	)	

ORDER

Plaintiff Bradley Price Barber, a state prisoner appearing pro se and appearing *in forma pauperis*, has filed three nondispositive motions. These motions (Doc. Nos. 128, 133, 135) are denied without prejudice for the reasons outlined below.

Third Motion to Modify the Scheduling Order

In this motion, Plaintiff asks the Court to "issue a[n] order telling Defendants to take [Plaintiff's] late discovery request." Pl.'s Third Mot. to Mod. Sched. Order (Doc. No. 135) at 1. On December 22, 2016, the Court issued a Scheduling Order instructing the parties to complete discovery by March 22, 2017. Sched. Order (Doc. No. 106) at 1-2. Plaintiff's pending motion, filed on July 21, 2017, is the first in which Plaintiff has specifically asked the Court to modify the final discovery deadline. *See* Order of Feb. 10, 2017 (Doc. No. 111) at 1-2; Order of Mar. 17, 2017 (Doc. No. 115) at 1-3 (denying Plaintiff's request to "restart" his deadline to produce initial disclosures and "to order a stay" of all unexpired deadlines). Plaintiff has already responded to Defendants' pending motion for summary

judgment, and he did not file his own motion for summary judgment before the March 8, 2017 deadline expired. *See* Pl.'s Resp. (Doc. No. 122) at 1-4.

A scheduling order "may be modified only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4). "Demonstrating good cause under th[is] rule requires the moving party to show that it has been diligent in attempting to meet the deadlines, which means it must provide an adequate explanation for any delay." *Strope v. Collins*, 315 F. App'x 57, 61 (10th Cir. 2009) (internal quotation marks omitted). Additionally, because Plaintiff filed his pending motion after the deadline to complete discovery expired, "he must also demonstrate excusable neglect for the delay" in requesting a modification. *Maddox v. Venezio*, No. 09-CV-01000, 2010 WL 2363555, at *1 (D. Colo. June 10, 2010) (citing Fed. R. Civ. P. 6(b)(1)(B), 16(b)(4)); *accord Carver v. KIA Motors Corp.*, No. 10-CV-642, 2012 WL 90090, at *3 (N.D. Okla. Jan. 11, 2012) (same). Excusable neglect "is an 'equitable' standard" that takes into account all of the relevant circumstances and probable consequences of the party's failure to act before time expired. *See Utah Republican Party v. Herbert*, 678 F. App'x 697, 701 n.2 (10th Cir. 2017) (quoting *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993)).

Plaintiff states that "he has been unable to perfect discovery due to reasons beyond his control, lock down most of the time at CCF, or unable to get approved to visit the law library or even consult with persons knowledgeable in the discovery process." Pl.'s Third Mot. to Mod. Sched. Order at 1. Plaintiff does not provide any details about these circumstances or explain what specific steps, if any, he took to prepare discovery requests before the deadline expired in late March 2017. *Id.* at 1-2.

The Court has twice rejected requests by Plaintiff to "restart" or "stay" deadlines set out in the Scheduling Order. Order of Mar. 17, 2017, at 1-3; Order of Apr. 21, 2017 (Doc. No. 123) at 1-2; *see also* Order of Feb. 10, 2017, at 1-2. As the Court explained in those Orders, Plaintiff has filed one amended complaint, multiple response briefs or objections, hundreds of pages of exhibits, and more than two dozen substantive or procedural motions since he filed this action in January 2015, all despite the fact that Plaintiff is an incarcerated person proceeding pro se. Order of Mar. 17, 2017, at 3; Order of Apr. 21, 2017, at 1. The circumstances Plaintiff describes in his third motion do not constitute excusable neglect for missing the expired discovery deadline or good cause for modifying the Scheduling Order generally. *See, e.g.*, *United States v. Williams*, 179 F. App'x 522, 525 (10th Cir. 2006) (noting that a prisoner's "pro se status does not excuse the obligation" to comply with filing deadlines). Accordingly, Plaintiff's Third Motion to Modify the Scheduling Order (Doc. No. 135) is DENIED without prejudice. Defendants are not required to respond to Plaintiff's late discovery requests. *See* Fed. R. Civ. P. 56(d).

Plaintiff's Motion to Appoint an Expert Witness

In this motion, Plaintiff asks the Court "to provide [Plaintiff] a doctor to examine him along with all his records and to testify." Pl.'s Mot. to Appt. Expert Witness (Doc. No. 128) at 1. "Plaintiff feels it is incumbent upon this Court to do this due to [Plaintiff] being incarcerated and unable to afford one and the Plaintiff believes it is imperative to his case due to the technical aspects and being unable to refute the other side[']s testimony." *Id.* (internal brackets omitted). The Court construes Plaintiff's motion as a request to appoint an expert witness under Rule 706 of the Federal Rules of Evidence.

"On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed" in a particular case and "may appoint any expert that the parties agree on and any of its own choosing." Fed. R. Evid. 706(a). The Tenth Circuit recently noted in a published decision that "courts rarely exercise the[ir] power" to appoint medical experts. *Rachel v. Troutt*, 820 F.3d 390, 397 (10th Cir. 2016). Indeed, "[s]ome courts treat this power as 'the exception and not the rule,' limiting appointment of experts to the 'truly extraordinary cases where the introduction of outside skills and expertise, not possessed by the judge, will hasten the just adjudication of a dispute without dislodging the delicate balance of the juristic role.'" *Id.* at 397-98 (quoting *Reilly v. United States*, 863 F.2d 149, 156 (1st Cir. 1988)).

The following Eighth Amendment deliberate-indifference claims remain for disposition in this § 1983 action: (1) Plaintiff's individual-capacity claims alleging that Defendants Donald Sutmiller, Beth Wagener, and Jody Jones prevented Plaintiff from receiving prescribed treatment for his diagnosed hepatitis C viral ("HCV") infection on or after January 26, 2013; and (2) Plaintiff's official-capacity claim seeking prospective injunctive relief against Defendant Joel McCurdy. *See* R. & R. of Mar. 9, 2017 (Doc. No. 113) at 1. Defendants have moved for summary judgment on several grounds, and Plaintiff has responded to that motion. *See generally* Defs.' Mot. Summ. J. (Doc. No. 112) at 7-24; Pl.'s Resp. at 1-4. Plaintiff's deliberate-indifference claims are not so complex that they require an independent medical expert before the Court resolves Defendants' motion for summary judgment. *See Rachel*, 820 F.3d at 397 (citing *Ledford v. Sullivan*, 105 F.3d 354,

359 (7th Cir. 1997)). Accordingly, Plaintiff's Motion to Appoint an Expert Witness (Doc. No. 128) is DENIED without prejudice.

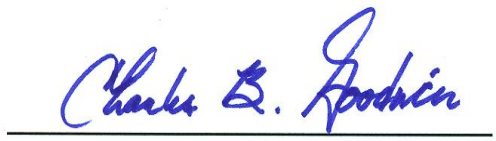
Plaintiff's Second Motion to Appoint Counsel

In this motion, Plaintiff asks the Court to "make his case available to be represented by an attorney . . . due to the multifa[c]eted issues that must be properly litigated to [e]nsure following of our great constitution now and into the future." Pl.'s Second Mot. to Appt. Counsel (Doc. No. 133) at 1. Generally, the Court may only "request," not "appoint," legal representation for a civil litigant, and such request is initially based on the litigant's indigent status. *See* 28 U.S.C. § 1915(e)(1). Before the Court will make such a request, "[t]he burden is upon the applicant to convince the court that there is sufficient merit to his claim to warrant the appointment of counsel." *McCarthy v. Weinberg*, 753 F.2d 836, 838 (10th Cir. 1985). In determining whether the appointment of counsel for an indigent prisoner is warranted, the court considers "the merits of a prisoner's claims, the nature and complexity of the factual and legal issues, and the prisoner's ability to investigate the facts and present his claims." *Hill v. SmithKline Beecham Corp.*, 393 F.3d 1111, 1115 (10th Cir. 2004).

Here, Plaintiff explains that he "is exhausted by trying to explain to the Court what[']s happened" in his case, that he "is no attorney and does not have the time to play these learn or die tactics," and that he "does not know how to conduct a proper discovery." Pl.'s Second Mot. to Appt. Counsel at 1, 4. The Court understands Plaintiff's concerns and frustrations as a lay prisoner representing himself. As the Court has already noted, however, Plaintiff has shown that he is sufficiently capable of litigating his Eighth

Amendment claims at this stage of the litigation. *See* Order of Mar. 17, 2017, at 3; Order of Apr. 21, 2017, at 1. Moreover, the time for Plaintiff to conduct discovery in this matter is presumptively closed. Sched. Order at 1-2; *see* Fed. R. Civ. P. 56(d). At this point, the Court is not persuaded that Plaintiff's case presents one of the rare instances in which the Court may properly request counsel. Accordingly, Plaintiff's Second Motion to Appoint Counsel (Doc. No. 133) is DENIED without prejudice.

IT IS SO ORDERED this 27th day of July, 2017.



CHARLES B. GOODWIN
UNITED STATES MAGISTRATE JUDGE