

KJAR, McKENNA & STOCKALPER LLP

James J. Kjar, Esq. (SBN: 94027)

kjar@kmslegal.com

Jon R. Schwalbach, Esq. (SBN: 281805)

jschwalbach@kmslegal.com

Gregory B. Emdee, Esq. (SBN: 315374)

gemdee@kmslegal.com

841 Apollo Street, Suite 100

El Segundo, California 90245

Telephone: (424) 217-3026

Facsimile: (424) 367-0400

Attorneys for Defendant,

MICHAEL WEINSTEIN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DARRYL COTTON, an individual

Plaintiff,

vs.

LARRY GERACI; REBECCA
BERRY; GINA AUSTIN; AUSTIN
LEGAL GROUP; MICHAEL
WEINSTEIN; SCOTT H.
TOOTHACRE; FERRIS & BRITTON;
CITY OF SAN DIEGO and DOES 1-
10, inclusive,

Defendants.

Case No.: 3:18-cv-00325-BAS-DEB

**DEFENDANT MICHAEL
WEINSTEIN'S OPPOSITION TO
PLAINTIFF'S EX PARTE
APPLICATION FOR
APPOINTMENT OF COUNSEL;
MEMORANDUM OF POINTS AND
AUTHORITIES**

Date: August 31, 2020

Time: Unknown

**NO ORAL ARGUMENT UNLESS
REQUESTED BY THE COURT**

District Judge: Cynthia A. Bashant

Magistrate Judge: Daniel E. Butcher

Courtroom: 4B (4th Floor)

Complaint Filed: February 19, 2018

Trial Date: None

MEMORANDUM OF POINTS AND AUTHORITIES

1.0 INTRODUCTION

Defendant, Michael Weinstein, (hereinafter “Weinstein”) submits this response in opposition to Plaintiff’s, Darryl Cotton (hereinafter “Plaintiff” or “Cotton”), ex parte motion for reconsideration to be appointed counsel. Plaintiff has already filed the same motion for appointment of counsel in this matter in the past and it was denied by the court. (Mtn. at 26:2; Dkt. Nos. 6, 7, 8, 13, 14). As such, the court should not entertain repetitive and unrelenting motions that have already been decided by this court.

2.0 LEGAL STANDARD

“[T]here is no absolute right to counsel in civil proceedings.” *Hedges v. Resolution Tr. Corp.* (In re Hedges), 32 F.3d 1360, 1363 (9th Cir. 1994). Thus, federal courts do not have the authority “to make coercive appointments of counsel.” *Mallard v. U.S. District Court*, 490 U.S. 296, 310 (1989); see also *United States v. \$292,888.04 in U.S. Currency*, 54 F.3d 564, 569 (9th Cir. 1995). However, the court *may* appoint counsel under section 1915(d) only under “exceptional circumstances.” “A finding of exceptional circumstances requires an evaluation of both ‘the likelihood of success on the merits and the ability of the petitioner to articulate his claims pro se in light of the complexity of the legal issues involved.’ Neither of these factors is dispositive and both must be viewed together before reaching a decision.” *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir.1986) (citations omitted) (section 1983 action); See *Smith–Bey v. Hospital Adm’r*, 841 F.2d 751, 760 (7th Cir.1988) (Bivens action) (citing *Maclin v. Freake*, 650 F.2d 885, 887–88 (7th Cir.1981)).

3.0 EXCEPTIONAL CIRCUMSTANCES DO NOT EXIST

In determining whether exceptional circumstances exist, the court reviews the pleadings to determine the complexity of the issues, the plaintiff’s ability to articulate his claims, and the likelihood of success on the merits. *Terrell v. Brewer*,

1 935 F.2d 1015, 1017 (9th Cir.1991).

2 First, the record is not sufficiently developed so that the Court can determine
3 the likelihood of success on the merits. No defendants have been served by
4 Plaintiff in the matter.

5 Second, a pro se plaintiff's inability to afford an attorney, standing alone, is
6 not enough to show exceptional circumstances. This and other hardships plaintiff
7 may claim "are difficulties which any litigant would have in proceeding pro se;
8 they do not indicate exceptional factors." *Wood v. Housewright*, 900 F.2d 1332,
9 1335–1336 (9th Cir. 1990).

10 Third, Plaintiff has shown the ability to draft lengthy and detailed
11 complaints and continues to provide elaborate and detailed statements in his ex
12 parte motion for appointment of counsel. (Dkt. 36). Additionally, Plaintiff has
13 drafted the present motion, has the assistance of a paralegal, and has responded to
14 multiple motions to dismiss. (Dkt. 27, 31).

15 **4.0 CONCLUSION**

16 Based on the forgoing, the circumstances fail to demonstrate "exceptional
17 circumstances" warranting the appointment of counsel. Plaintiff is entirely able to
18 proceed upon the matter on his own merit.

19 Dated: August 17, 2020

KJAR, McKENNA & STOCKALPER LLP

20 By: /s/ Gregory B. Emdee

21 JAMES J. KJAR

22 JON R. SCHWALBACH

23 GREGORY B. EMDEE

24 Attorneys for Defendant Michael
Weinstein

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CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2020, I electronically filed the foregoing **DEFENDANT MICHAEL WEINSTEIN'S OPPOSITION TO PLAINTIFF'S EX PARTE APPLICATION FOR APPOINTMENT OF COUNSEL; MEMORANDUM OF POINTS AND AUTHORITIES** with the Clerk of the Court for the United States District Court, Southern District of California by using the Southern District CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the USDC-Southern District of California CM/ECF system.

I am employed in the County of Los Angeles, State of California; I am over the age of eighteen years and not a party to the within action; my business address is 841 Apollo Street, Suite 100, El Segundo, California 90245. The envelope or package was placed in the mail at El Segundo, California. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully paid.

I further certify that participants in the case not registered as CM/ECF users have been mailed the above described documents by First Class Mail, postage pre-paid, or have dispatched it to a third party commercial carrier for delivery within three (3) calendar days, to the following non-CM/ECF participants:

Darryl Cotton
6176 Federal Blvd.
San Diego, CA 92114
Tel: 619-954-4447

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1 I declare under penalty of perjury under the laws of the State of California the
2 foregoing is true and correct and that this declaration was executed on August 17,
3 2020 at El Segundo, California.
4

5 /s/ Berta R. Howard

6 BERTA R. HOWARD, Declarant
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