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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Manuel Moreno, Jr.,

10 Plaintiff,

11 v.

12 Maricopa County Correctional Health
13 Services, et al.,

14 Defendants.

No. CV-17-01074-PHX-DJH (JFM)

ORDER

15
16 Plaintiff Manuel Moreno, Jr. (“Plaintiff”) objects to and has appealed various
17 rulings in three orders issued by Magistrate Judge Metcalf (Docs. 33, 56 & 63). Plaintiff
18 first challenges Judge Metcalf’s January 30, 2018 Order (Doc. 32) denying Plaintiff’s
19 Motion to Appoint an Independent Medical Expert. (Doc. 33). Plaintiff also challenges
20 portions of Judge Metcalf’s March 23, 2018 Order (Doc. 54), which in part, (1) denies
21 Plaintiff’s Motion for Entry of Default (Doc. 48); (2) denies Plaintiff’s Notice to the
22 Court seeking exemption from rules (Doc. 50); (3) strikes Plaintiff’s Response to
23 Defendant Alvarez’s First Set of Interrogatories, filed March 20, 2018 (Doc. 51); and (4)
24 denies Plaintiff’s Response to Order to Show Cause filed on March 20, 2018, which
25 Judge Metcalf construed to be a motion for reconsideration (Doc. 52). (Doc. 56). In that
26 appeal, Plaintiff requests that this Court withdraw the reference to Judge Metcalf as to
27 Docs. 48, 50, 51 & 52 and grant the relief Plaintiff originally sought in each of these
28 motions.

1 Finally, Plaintiff challenges portions of Judge Metcalf’s March 29, 2018 Order
2 (Doc. 59) that deny Plaintiff’s requests (1) to continue or stay proceedings; and (2) to
3 certify the case to the Attorney General. (Doc. 58). In that appeal, Plaintiff again asks
4 that this Court withdraw the reference to Judge Metcalf as to Doc. 58 and grant the relief
5 sought therein.

6 Finally, on May 29, 2018, Plaintiff filed a “Motion for A Decision on Docs. 33,
7 56, and 63” (Doc. 87) wherein he requests that this Court issue a decision on the pending
8 appeals within 21 days from the filing of his motion. The reference to Judge Metcalf has
9 been withdrawn as to that motion. For the reasons that follow, the Court will not
10 reconsider Judge Metcalf’s orders and Plaintiff’s Motion for a Decision on Docs. 33, 56,
11 and 63 (Doc. 87) is denied as moot.

12 I. Legal Standards

13 “A district court may refer a pretrial matter to a magistrate to ‘hear and
14 determine,’ and may review the magistrate’s order ‘where it has been shown that the
15 magistrate’s order is clearly erroneous or contrary to law.” 28 U.S.C. § 636(B)(1)(A);
16 *Osband v. Woodford*, 290 F.3d 1036, 1041 (9th Cir. 2002). Thus, this Court reviews an
17 appeal from a magistrate judge’s decision “for clear error.” *Maisonville v. F2 America,*
18 *Inc.*, 902 F.2d 746, 747 (9th Cir. 1990) (citations omitted). *Accord Grimes v. City &*
19 *County of S.F.*, 951 F.2d 236, 240 (9th Cir. 1991) (“The district court shall defer to the
20 magistrate’s orders unless they are clearly erroneous or contrary to law”) (citing Fed. R.
21 Civ. P. 72(b)). Clear error is met when the Court is “left with the definite and firm
22 conviction that a mistake has been committed.” *Easley v. Cromartie*, 532 U.S. 234, 242
23 (2001).

24 II. Analysis

25 A. Appeal of January 30, 2018 Order

26 Plaintiff first appeals Judge Metcalf’s denial of Plaintiff’s request for an
27 appointment of a medical expert witness. In denying that motion, Judge Metcalf noted
28 that the purpose of Federal Rule of Evidence 706 was to promote accurate fact-finding

1 and assist the trier-of-fact's ability to understand "a complex or esoteric subject." (Doc.
2 32 at 1 (*citing* Wright & Miller, 29 Fed. Prac. & Proc. Evid. § 6304 (2004))). The Court
3 found that the case at that early stage did not present the need for an independent expert
4 to resolve any pertinent issues. (Doc. 32 at 2). The Court specifically noted that
5 Plaintiff's case centered on claims of deliberate indifference, or subjective states of mind,
6 and not claims such as medical malpractice which would necessitate objective, expert
7 testimony. (*Id.*) Accordingly, he denied the motion without prejudice. (*Id.* (noting that
8 "[p]erhaps, as the case progresses, it will become apparent that issues remain which will
9 be best resolved by appointment of an independent expert"). Plaintiff has failed to
10 identify any legal error in the Court's analysis but complains, without citing to supporting
11 authority, that Judge Metcalf should have required briefing from the Defendants that
12 ordered them to answer whether they intended on using an expert witness for their pre-
13 trial pleadings. Failure to require an answer to this specific question at that point in time
14 was not legal error. Although Defendants were obligated to disclose any expert witnesses
15 and their reports by the deadline set in the Court's Scheduling Order¹, the Court did not
16 error by failing to require Defendants to answer whether they intended to present expert
17 testimony regarding Defendants' alleged deliberate indifference in a response to
18 Plaintiff's motion. This decision is therefore affirmed.

19 **B. Appeal of March 23, 2018 Order**

20 **i. Denial of Entry of Default**

21 Defendants did not respond to Plaintiff's objection of Judge Metcalf's decision to
22 deny his motion for appointment of a medical expert. Plaintiff thereafter moved for an
23 entry of default, citing Local Civil Rule 7.2.(i). Rule 7.2(i) provides that where there is a
24 "required answering memoranda" to a motion due, a non-response may be deemed
25 consent to the granting of the motion. As Judge Metcalf correctly noted in denying the
26 motion, LRCiv 7.2(i) does not govern Plaintiff's objection, which is permitted and

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28 ¹ According to the operative Scheduling Order in this matter, Defendants were obligated to disclose such information by April 8, 2018. (Doc. 20).

1 allowed under Fed. R. Civ. P. 72(a).² Rule 72(a) states, in part, that a party may “serve
2 and file objections to the [magistrate’s] order within 14 days after being served with a
3 copy [of that order].” Fed. R. Civ. P. 72(a). Thus even if the Court would construe
4 Plaintiff’s objection as a “motion,” as Plaintiff urges this Court to do, nothing in Rule
5 72(a) requires Defendants to file an answering memoranda such that the failure to
6 respond could constitute consent to the objections made therein. Having identified no
7 error in the magistrate’s analysis, this decision is also affirmed.

8 **ii. Decision on Compliance with Service Rules and to Strike**
9 **Responses to Defendant’s Interrogatories**

10 Plaintiff next objects to Judge Metcalf’s refusal to exempt him from the service
11 requirements in Fed. R. Civ. P. 5(d)(1) and paragraph 4.3(g) of the Court’s Scheduling
12 Order on account of his indigence. He specifically objects to the Court’s decision to
13 strike his filed Responses to Defendant’s Interrogatories for noncompliance with these
14 rules. Instead of serving Defendants with copies of his Responses to the Interrogatories,
15 Plaintiff filed them with the Court. Plaintiff also filed a “Notice” which included a
16 “Certificate of Service” that described his “service” of Defendants via the actual filing of
17 his Responses and the resulting notice in the CM/ECF system. (Doc. 50). Plaintiff’s
18 Notice also states that he cannot afford to pay for the copies and postage to serve his
19 Responses. (*Id.*)

20 Judge Metcalf’s Scheduling Order in no uncertain terms states that “Pursuant to
21 Federal Rule of Civil Procedure 5(d), the parties are **not** to file with the Court their... (b)
22 discovery requests and responses for... (ii) interrogatories.... Instead, the parties shall file
23 notice of service of such documents pursuant to Local Rule of Civil Procedure 5.2.”
24 (Doc. 20 (emphasis in original)). Noting that Plaintiff had proffered no specifics as to
25 why Plaintiff does not have the resources available to comply with the service rules,

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27 ² Plaintiff says Judge Metcalf clearly erred by characterizing Doc. 33 as an “objection”
28 where he has clearly titled it as an “appeal.” The nomenclature is immaterial; Plaintiff is
only authorized to “object” or “appeal” a magistrate’s nondispositive order under Rule
72(a), which simply does not mandate a response from the non-objecting party. Thus,
Defendants’ non-responsiveness is not construed as consent to the objection.

1 Judge Metcalf refused to excuse Plaintiff's noncompliance. Construing Plaintiff's Notice
2 as a motion for exemption from the rules, Judge Metcalf denied the motion, noting "If
3 Plaintiff's lack of funds and access to legal supplies persists; he may file a motion raising
4 the issue, supported with evidence of such lack of access, and seeking appropriate relief."
5 (Doc. 54 at 4). Judge Metcalf then struck Plaintiff's Responses from the docket. (*Id.*)

6 Notwithstanding the clear language of Fed. R. Civ. P 5(d) and the Court's
7 Scheduling Order prohibiting such filings, Plaintiff argues that General Order 14-17
8 ("GO 14-17") relating to the processing of prisoner filings "can be construed as an
9 exemption to the 'must not be filed' portion of Rule 5(d)." (Doc. 56 at 2). Plaintiff does
10 not specify exactly how GO 14-17 can interpreted be in this matter, however, and it does
11 not appear that such an argument was presented to Judge Metcalf. The Court finds that
12 nothing in GO 14-17 exempts Plaintiff from the clear prohibitions in Fed. R. Civ. P. 5(d)
13 or the Court's Scheduling Order. Plaintiff clearly violated court rules when he filed his
14 Responses and failed to send Defendants copies. Moreover, he insufficiently established
15 good cause to excuse the noncompliance. Judge Metcalf's decision to strike the
16 Responses and refusal to exempt Plaintiff from the rules was not in error and will be
17 affirmed.

18 **iii. Denial of Motion for Reconsideration**

19 Finally, Plaintiff objects to Judge Metcalf's decision to deny the relief sought in
20 his "Response to Order to Show Cause," which the magistrate judge construed to a
21 motion for reconsideration of its previous decision to deny Plaintiff's request to amend
22 his complaint. Plaintiff offers no grounds for error, but simply contends that he would
23 never file such a document because he knows that courts disfavor motions for
24 reconsideration. Plaintiff thus presents no grounds for disputing Judge Metcalf's rulings
25 and specifically fails to show that this decision was clearly erroneous or contrary to law.
26 The decision will be affirmed.

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1 **C. Appeal of March 29, 2018 Order**

2 **i. Denial of Stay Request**

3 Plaintiff first objects to Judge Metcalf’s refusal to stay the proceedings pending a
4 resolution of Plaintiff’s constitutional challenge to Arizona’s medical record disclosure
5 statute, Ariz. Rev. Stat. § 12-2294. As noted by Judge Metcalf, however, Plaintiff
6 “proffer[ed] no justification for such a stay” in his request. (Doc. 59 at 3). Plaintiff now
7 argues that the justification for the stay “was implied” and is justified because when
8 opposing counsel obtained Plaintiff’s medical records, it was using an unconstitutional
9 state statute that failed to provide him with notice and an opportunity to object to the
10 disclosure, as required by HIPAA. (Doc. 62 at 1-2). Plaintiff contends that Defendant’s
11 use of these documents to litigate is akin to law enforcement obtaining evidence without
12 a warrant. (*Id.* at 5).

13 A district court has discretion to stay civil proceedings in the interest of justice and
14 in the light of the particular circumstances of the case. *Grubbs v. Irely*, 2008 WL 906246,
15 at *1 n. 5 (E.D. Cal. Mar. 31, 2008) (citing *Sec. & Exch. Comm'n v. Dresser Indus., Inc.*,
16 628 F.2d 1368, 1375 (D.C. Cir. 1980)). Generally, however, motions to stay discovery
17 are disfavored because “discovery stays may interfere with judicial efficiency and cause
18 unnecessary litigation in the future.” *White v. E-Loan, Inc.*, 2006 WL 2850041, at *2
19 (N.D. Cal. Oct. 5, 2006) (citing *Feldman v. Flood*, 176 F.R.D. 651, 652 (M.D. Fla.
20 1997)). Here, Judge Metcalf noted that to the extent disputed records have already been
21 obtained by Defendants, the parties may continue to litigate this case while they litigate
22 the propriety of the disclosure. (Doc. 59 at 3). He further noted that to the extent the
23 disputed records have not been obtained, Plaintiff may move for a protective order under
24 Fed. R. Civ. P. 26(c). (*Id.*) Judge Metcalf thus appropriately denied Plaintiff’s request to
25 stay. Plaintiff has not identified, and the Court does not find, legal error in the decision.

26 **ii. Denial of Motion for Certification of Constitutional Question**

27 Plaintiff also objects to Judge Metcalf’s refusal to certify the case to the Arizona
28 Attorney General (“Arizona AG”) under Fed R. Civ. P. 5.1(b) and 28 U.S.C. § 2403. In

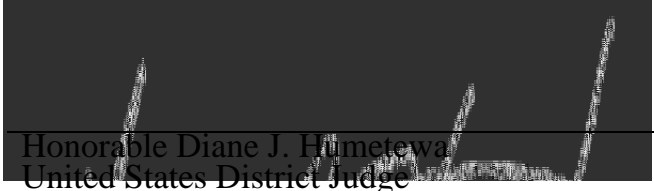
1 denying this request, Judge Metcalf in part found that Plaintiff had not served notice on
2 the Arizona Attorney General “by certified or registered mail or by sending it to an
3 electronic address designated by the attorney general for this purpose” as required by
4 Rule 5.1(a)(2). (Doc. 59). Without citing to any authority, Plaintiff now argues that
5 Judge Metcalf should bear this burden by “directing the Clerk of Court to send a copy of
6 Doc. 58 to the Arizona Attorney General’s electronic address they used to register with
7 the Court’s CM/ECF system.” (Doc. 63 at 3). However, Rule 5.1(a)(2) squarely puts the
8 burden of this service on the “party...drawing into question the constitutionality of a
9 federal or state statute,” not on the Court. As such, Judge Metcalf did not err in refusing
10 to certify the question under Rule 5.1 because Plaintiff had failed to comply with the
11 service requirements of that rule.

12 Accordingly,

13 **IT IS ORDERED** that Plaintiff’s Appeals of Magistrate Judge Decisions to
14 District Court (Docs. 33, 56, and 63) are **DENIED**. Plaintiff’s requests to withdraw the
15 reference to Judge Metcalf as to Docs. 48, 50, 51, 52, and 58 are **DENIED**.

16 **IT IS FURTHER ORDERED DENYING** Plaintiff’s Motion for a Decision on
17 Docs. 33, 56, and 63 (Doc. 87) as moot.

18 **Dated** this 28th day of June, 2018.



Honorable Diane J. Humetewa
United States District Judge