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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

GEORGE E. JACOBS IV,

CASE NO. 1:06-cv-01280-AWI-GSA PC

Plaintiff,

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF’S MOTION TO COMPEL

v.

PRODUCTION/INSPECTION AND DENYING SANCTIONS, and DENYING PLAINTIFF’S MOTION FOR PRESERVATION OF VIDEOTAPES

ALLEN K. SCRIBNER, et al.,

Defendants.

(Docs. 42 and 46)

**Order on Motion to Compel Production/Inspection of Documents With Sanctions
and Motion for Preservation of Videotapes**

Plaintiff George E. Jacobs IV (“Plaintiff”) is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983 and California law. This action is proceeding on Plaintiff’s complaint, filed September 18, 2006, against Defendants Martinez, German, and Northcutt for use of excessive physical force, assault and battery, and intentional infliction of emotional distress; and against Defendant Martinez for acting with deliberate indifference to Plaintiff’s serious medical needs. The excessive force claim, which is also brought against two Doe defendants, allegedly occurred during the escort of Plaintiff from the Acute Care Hospital to the Security Housing Unit on January 26, 2005. The medical care claim against Defendant Martinez arises from Defendant’s alleged failure to obtain medical care for Plaintiff on January 27, 2005, and the medical care claims against Does 3, 4, and 6-10 arise from the failure to obtain medical care for Plaintiff between January 27, 2005, and February 3,

1 2005. Plaintiff alleges that he was ultimately transported to an outside hospital for emergency
2 medical care on February 2, 2005, and lost the sight in one eye as a result of his injuries.

3 **I. Motion to Compel Production of Documents**

4 On March 7, 2008, Plaintiff filed a motion to compel further responses to his requests for
5 the production of documents. (Doc. 42.) Defendants filed an opposition on March 18, 2008 and
6 Plaintiff filed a reply on April 7, 2008. (Docs. 44, 48.)

7 Federal Rule of Civil Procedure 34 empowers a party to serve on any other party a request
8 to produce “any designated documents . . . which are in the possession, custody or control of the
9 party upon whom the request is served.” Fed. R. Civ. P. 34(a). Documents are in the
10 “possession, custody, or control” of the served party if “the party has actual possession, custody,
11 or control, or has the legal right to obtain the documents on demand.” In re Bankers Trust Co.,
12 61 F.3d 465, 469 (6th Cir.1995). Accordingly, a party may be required to produce documents
13 turned over to an agent, such as its attorney or insurer. *E.g.*, Henderson v. Zurn Indus., 131
14 F.R.D. 560, 567 (S.D. Ind.1990). Further, the responding party has a duty to supplement any
15 responses if the information sought is later obtained, or the response provided needs correction.
16 Fed. R. Civ. P. 26(e).

17 If Defendants object to one of Plaintiff’s discovery requests, it is Plaintiff’s burden on his
18 motion to compel to demonstrate why the objection is not justified. In general, Plaintiff must
19 inform the Court which discovery requests are the subject of his motion to compel, and, for each
20 disputed response, inform the Court why the information sought is relevant, and why
21 Defendants’ objections are not justified. Plaintiff’s motion to compel is deficient as it does not
22 address which discovery requests are the subject of his motion to compel; nor does he inform the
23 Court why the information sought is relevant and why Defendants’ objections are not justified
24 and/or of any deficiencies he alleges in the documents already produced by Defendants.¹

25
26 ¹ Plaintiff argues at one point that he is entitled to further production because the evidence he seeks “will
27 bring to light that Defendants superiors and the Corcoran State Prison administration as well as CDCR/Department
28 of Corrections should have been well aware of Defendants violent natures, based on similar acts of brutal
misconduct.” (Doc. 42, 11:18-24.) However, all such arguments and/or attempts at stating claims as to the
supervisory personnel are disregarded since this action is only proceeding on Plaintiff’s claims against Defendants
Martinez, German, and Northcutt for use of excessive physical force, assault and battery, and/or intentional infliction

1 However, Defendants have addressed each of Plaintiff's sixty-one production and/or inspection
2 requests. In the interest of conserving the Court's limited resources, and given both Defendants'
3 opposing efforts and the extent of discovery apparently being conducted in this case, the Court
4 opts to reach the merits of Plaintiff's motion to compel, rather than deny the motion without
5 prejudice to refiling.

6 Defendants shall provide Plaintiff with copies of the documents compelled produced
7 herein within forty-five days from the date of service of this order. Defendants may redact from
8 the relevant documents any information relating to the identities of third parties. If, after double-
9 checking with the appropriate record keeping departments and human resource personnel,
10 Defendants continue to contend that any of the requests granted herein are burdensome, they
11 shall so notify the Court within thirty days from the date of service of this order (including a
12 showing of the basis upon which they assert the burdensome objection) and the Court will revisit
13 the issue. Likewise Defendants shall notify the Court within thirty days from the date of service
14 of this order of any continuing belief (with supporting evidence) that disclosure of any
15 documents ordered produced herein will cause safety and security issues.

16 The Court issues combined rulings below on requests for production that are similar in
17 nature.

18 **Plaintiff's First Request for Production of Documents**

19 **Request for Production No. 1:**

20 "All documents that refer to allegations of misconduct or other
21 improper conduct by prison staff involving defendants J.M. Martinez,
22 Northcutt, German, and John Does 1 & 2, 3 & 4, 6-10. Whether such allegations
23 were made by an inmate or by a member of the prison staff. Per Departmental
24 Operational Manual (D.O.M.) 54100. 25-5, 54100. 25-6, 24100.25.7, pursuant
25 to p.c. 832-5(a) evidence codes 1043, 1044, 1045, 1046."

26 **Ruling:** Defendants objected to number 1 as being compound, vague and ambiguous,
27 burdensome, overly broad, not likely to lead to the discovery of admissible evidence, and
28 claiming that disclosure of the requested documents would violate Defendants' right to privacy
under California law. The Court grants Plaintiff's motion in part, subject to the limitation that

of emotional distress, and against Defendant Martinez for acting with deliberate indifference to Plaintiff's serious medical needs. (Doc. 9.)

1 this request for production of documents is narrowed to include only those grievances,
2 complaints, etc. filed against any Defendant(s) that involve claims similar to those raised by
3 Plaintiff in the instant action – i.e. Defendants Martinez, German, and Northcutt for use of
4 excessive physical force, assault and battery, and intentional infliction of emotional distress, and
5 Defendant Martinez for acting with deliberate indifference to serious medical needs. (Doc. 9.)
6

7 **Request for Production No. 2:**

8 “All medical documents that refer or relate to psychological history
9 of defendants J.M. Mertinez, [sic] Northcutt, German, John Does 1 & 2, 3 & 4, 6-10,
10 which may or may not have had an effect on their improper conduct. Pursuant
11 to P.C. 832.5(a), evidence codes 1043, 1045, 1046.”

12 **Ruling:** Defendants objected to number 2 as being compound, vague and ambiguous,
13 burdensome, overly broad, not likely to lead to the discovery of admissible evidence, and
14 claiming that disclosure of the requested documents would violate Defendants’ right to privacy
15 under California law. These objections are sustained. Plaintiff’s motion to compel is denied.

16 **Request for Production No. 3:**

17 “Please produce and relinquish the February 8th 2005 and February 9th
18 2005 excessive use of force videotape interview conducted by correctional
19 lieutenant Ruiz in 4A2building I.C.C. committee room, regarding the January 26th
20 2005 unnecessary and unauthorized excessive use of force on George E. Jacobs IV.
21 Pursuant to evidence code 1553, CDCR administrative bullentin [sic] 05-03, 11-22-05.”

22 **Ruling:** Defendants objected to number 3 as being vague and ambiguous. These objections are
23 overruled. However, Defendants further respond that per Lieutenant Ruiz, the interview of
24 Plaintiff was pursuant to his inmate appeal, and that it was not a use of force investigation. The
25 interview was not videotaped and there are no tapes to produce. Defendants cannot be compelled
26 to produce an item that does not exist. Plaintiff’s motion to compel is denied.

27 **Request for Production No. 4:**

28 “Please produce and relinquish excessive use of force videotape interview
of inmate witnesses that were housed in cells 4A2R-cell 42 and 4A2R-cell 44,
conducted by correctional LT. Ruiz on February 10th 2005. Pursuant to E.V. 1553
and CDCR Administrative bullentin [sic] 05-03, 11-22-05.”

Ruling: Defendants objected to number 4 as being vague and ambiguous. These objections are

1 overruled. However, Defendants further respond that per Lieutenant Ruiz, there were no
2 videotaped interviews of any purported witnesses arising out of Plaintiff's claims from January
3 26, 2005. Defendants cannot be compelled to produce an item that does not exist. Plaintiff's
4 motion to compel is denied.

5
6 **Request for Production No. 5:**

7 "All documents that refer or relate to the California department [sic]
8 of Corrections and Rehabilitative policies and procedures on calculated
9 use of force plans, authorized by the department [sic] of Corrections.
Pursuant [sic] to E.V. 1530,1532, including but not limited to the use of
force policy training handbook pursuant to Departmental Operational
Manual (D.O.M.) section 54060.36."

10 **Ruling:** Defendants objected to this request on the grounds that it is vague and ambiguous,
11 burdensome, and overly broad. Furthermore, sections of the Departmental Operational Manual
12 that relate to use of force is confidential and its release may jeopardize the safety and security of
13 the institution. Without waiving objections, Defendants produced sections of Title 15 section
14 3268, which deals with use of force. Defendants asserted that this request was vague and overly
15 broad because it does not request readily identifiable documents. The Court grants Plaintiff's
16 motion in part, subject to the limitation that this request for production of documents is narrowed
17 to include any policy training handbook, or section thereof, pursuant to Departmental Operational
18 Manual (D.O.M.) section 54060.36 on the use of force.

19
20 **Request for Production No. 6:**

21 "All documents that refer or relate to the California state prison-Corcoran
22 calculated use of force policies and procedures authorized by the C.S.P.-cor warden
[sic] A.K. scribner [sic] and/or derral [sic] G. Adams for the [sic] 2005 until the present.
Pursuant to E.V. 1530,1532, including but limited to Corcoran's Institution Operations
plan for use of force. Pursuant to D.O.M. section 54060-36."

23 **Ruling:** Defendants objected to this request on the grounds that it is compound, vague and
24 ambiguous, burdensome, overly broad, and would jeopardize the safety and security of the
25 institution. Defendants argue that Plaintiff did not provide Defendants with a request for a
26 readily identifiable document; rather asked for a wide range of potential documents spanning
27 three years; that they cannot guess as to Plaintiff's intentions; and that any relevant sections of
28 the Operational Manual dealing with use of force have been determined by prison officials to be

1 confidential, that releasing them to an inmate would cause safety and security concerns. The
2 events at issue in this action occurred in January of 2005. Plaintiff's request is narrowed to
3 Corcoran's Institution Operations plan for use of force, pursuant to D.O.M. section 54060-36,
4 authorized by Wardens Scribner and/or Adams for 2004 and 2005.

5
6 **Request for Production No. 7:**

7 "Please relinquish the following document(s); George E. Jacobs #J4866
8 CDC 114A daily log ("notes") file. Pursuant to E.V. 1530,1532,1600."

9 **Ruling:** Defendants objected to this request on the grounds that it is vague and ambiguous, and
10 overly broad, but argue that, without waiving these objections, they provided Plaintiff with his
11 requested document. Without any specific claim from Plaintiff as to how this production was
12 deficient, Defendants cannot be compelled to respond further. Plaintiff's motion to compel is
13 denied.

14 **Request for Production No. 8:**

15 "Please relinquish the following document(s); (ACH) unit log entry
16 for January 24, 26, 28, 29, 30, 31 of 2005. As well as entries for February 1,
17 2, 3 of 2005. Pursuant to E.V. 1530,1532,1600."

18 **Ruling:** Defendants objected to this request on the grounds that it is compound, vague and
19 ambiguous. Without waiving objections, Defendants argue that they are unable to produce these
20 documents because they made a reasonable inquiry and found, according to prison officials, ACH
21 Unit does not keep such logs. Defendants cannot be compelled to produce documents that do not
22 exist. Plaintiff's motion to compel is denied.

23 **Request for Production No. 9:**

24 "Please relinquish the following document(s); 4A2building unit log
25 entry for January 26, 27, 28 of 2005. As well as entries for February 3rd,
26 8th, 9th, 10th, of 2005. Pursuant to E.V. 1530,1532,1600."

27 **Ruling:** Defendants objected to this request on the grounds that it is, ambiguous, not reasonably
28 calculated to lead to the discovery of admissible evidence, on the grounds that the documents
requested cannot be turned over to Plaintiff due to institutional safety and security concerns, and
on the grounds that the documents reference activities unrelated to Plaintiff's claims but may

1 pertain to third party activities. Defendants argue in opposition to this motion, that they have no
2 direction as to which logs Plaintiff seeks, and that some logs maintained by prison officials in the
3 Security Housing Unit contain confidential information that cannot be released to inmates.
4 Plaintiff's request is narrowed to 4A2building unit log entry for January 26, 27, 28 of 2005 and
5 February 3rd, 8th, 9th, 10th, of 2005 as it relates to Plaintiff and Defendants only. Defendants may
6 redact any information pertaining to third party activities.

7
8 **Request for Production No. 10:**

9 "All documents an any reports that refer or relate to the excessive use
10 of force used on Jacobs at Corcoran state prison SHU 4A2building on
January 26, 2005. Pursuant to Title 15, California Code of Regulations
section 3268.1."

11 **Ruling:** Defendants objected to this request on the grounds that it is overly broad, burdensome,
12 vague and ambiguous, and that without waiving objections, after a reasonable search and diligent
13 inquiry no documents responsive to the request could be located. Defendants argue that, aside
14 from Plaintiff's own inmate appeal, which Plaintiff already has a copy of, Defendants were
15 unable to locate any other such documents. Defendants cannot be compelled to produce
16 documents that they are unable to locate. Plaintiff's motion to compel is denied.

17
18 **Request for Production No. 11:**

19 "Please produce and relinquish tangible item(s): Landyard device,
20 photographs of 4A2building "Rotunda"/ "Sally Port" area and C-section
21 entryway, as well as photographs of cell #43, CDCR standardized "Spit
Mask", leg irons, and transportation "Paper" jumpsuit used to transport
prisoners from one prison location to another. Pursuant to E.V. and 1553."

22 **Ruling:** Defendants objected to this request on the grounds that it is compound, it is not likely to
23 lead to the discovery of admissible evidence, it is not a proper request for production of
24 documents as it is not a request for a readily identifiable document as it requires Defendants to
25 compile photographs which do not already exist, and that the photographs and landyard device
26 cannot be turned over to Plaintiff due to safety and security concerns of the institution.
27 Defendants' objections are sustained. Plaintiff's motion to compel is denied.

1 **Request for Production No. 12:**

2 “Please produce and relinquish excessive use of force videotape
3 interview of witnesses, James Thompson #C89968, Lamont Rancher
4 #073399, Donald Glass #D54799, Charles Kensey #P-04738, Parker #P-
5 13216, and Kevin L. Harvey #E92954, arising from defendants actions.
6 pursuant to E.V. 1271,1550.1,1553,1562.”

7 **Ruling:** Defendants object to this request on the grounds that it is vague and ambiguous as to
8 “arising from defendants actions.” Without waiving these objections Defendants state that, per
9 Lieutenant Ruiz, there was no use of force interview videos arising out of Plaintiff’s claims from
10 January 26, 2005. Defendants cannot produce items which do not exist. Plaintiff’s motion to
11 compel is denied.

12 **Request for Production No. 13:**

13 “Please produce and relinquish all recommendations records by the
14 assistant Warden and facility captain, of all inmate interviews of excessive
15 use of force arising from defendants actions. Including but not limited to
16 the “Report of Findings.” Pursuant to E.V. 1271,1550.1, 1553, 1532.”

17 **Ruling:** Defendants object to this request on the grounds that it is vague and ambiguous, overly
18 broad, burdensome, and it is not reasonably calculated to lead to the discovery of admissible
19 evidence. Defendants argue that Plaintiff gives no guidance as to the type of document he seeks
20 and that it is unclear as to what Plaintiff refers to in “arising from defendants actions.”
21 Furthermore, there was no use of force interview completed in this case, only an investigation
22 connected to Plaintiff’s inmate appeal. Any documents pertaining to findings from the inmate
23 appeal are already in Plaintiff’s possession. Defendants cannot produce items which do not exist.
24 Plaintiff’s motion to compel is denied.

25 **Plaintiff’s Second Request for Production of Documents**

26 **Request for Production No. 14:**

27 “Please produce and relinquish the following document(s): All
28 adverse action records, which is punitive in nature and is intended to
correct misconduct or poor performance, or which terminates [sic] employment,
of each defendant named herein. Pursuant to E.V. § 1043, § 1045, § 1046.”

Request for Production No. 15:

“Please produce and relinquish the following document(s): All
Bureau of Independent Review (BIR) records of any/all investigative
and/or disciplinary action taken against each defendant named herein.

1 Pursuant to E.V. § 1046.”

2 **Request for Production No. 16:**

3 “Please produce and relinquish the following document(s): All
4 “SKELLY PACKAGES”, this material may include but is not limited to
5 the following; investigative report, applicable policies, procedures, and
6 Government Code Sections; records of training the employee(s) has
7 attended; job descriptions; and duty statements and/or post orders tha [sic]
8 are related to the charges, for each defendant named herein. Pursuant to
9 E.V. § 1043, § 1045, § 1046.”

10 **Request for Production No. 17:**

11 “Please produce and relinquish the following document(s): All
12 “corrective Action” records for each defendant named herein, this material
13 may include but is not limited to the following: verbal counseling, inservice
14 [sic] training, on the job training written counseling, or a letter of
15 instruction taken by a supervisor to assist an employee in improvising
16 his/her work performance behavior or conduct. Pursuant to E.V. § 1043, §
17 1045, § 1046.”

18 **Request for Production No. 18:**

19 “Please produce and relinquish the following document(s): All
20 “Designated Cases” records, assigned to the Vertical Advocates, for each
21 defendant named herein, this material may include but its not limited to the
22 following matters involving staff integrity and/or dishonest, abuse of
23 authority, sexual misconduct, use of force in which an inmate suffers death
24 or serious injury, use of deadly force, serious allegations made against
25 supervisors, and high profile or dismissal cases assigned to the Vertical
26 Advocate by the AGC. Pursuant to E.V. § 1043, § 1045, § 1046.”

27 **Request for Production No. 19:**

28 “Please produce and relinquish the following document(s): All
29 “Employee Counseling Records” for each defendant named herein, this
30 material may include but is not limited to the following: A written record
31 of counseling, documented on a CDC form 1123, between a supervisor and
32 subordinate which provides formal instructions about laws, rules, policies,
33 and employer expectations. Pursuant to E.V. § 1043, § 1045, § 1046.”

34 **Request for Production No. 20:**

35 “Please produce and relinquish the following document(s): All
36 “Executive Review” records regarding the investigative finding, proposed
37 disciplinary penalty, or settlement agreement, for each defendant named
38 herein. Pursuant to E.V. § 1043, § 1045, § 1046.”

39 **Request for Production No. 21:**

40 “Please produce and relinquish the following document(s): All
41 “Notice(s) of Adverse Action” for each defendant named herein, this
42 material may include but is not limited to the following: A notification to
43 the affected employee of the charges against him/her, the adverse action
44 penalty, and the effective date. Pursuant to E.V. § 1043, § 1045, § 1046.”

45 **Request for Production No. 22:**

46 “Please produce and relinquish the following document(s): All
47 “Office of Internal Affairs (OIA)” file(s), for each defendant named herein,
48 including but not limited to: investigative reports on allegations of

1 employee misconduct. Pursuant to E.V. § 1043, § 1045, § 1046.”

2 **Request for Production No. 23:**

3 “Please produce and relinquish the following document(s): All
4 “Preliminary Notice(s) of Adverse Action” for each defendant named
5 herein, this material may include but is not limited to the following:
6 Notification required of some Hiring Authorities in accordance with the
7 Bodiford Settlement Agreement, to an effected employee regarding charges
8 against him/her and the intent to impose adverse [sic] action. This notification
9 summarizes the specific subsections of the Government Code that have
10 been violated as well as the actions that constituted the violation. Pursuant
11 to E.V. § 1043, § 1045, § 1046.”

12 **Request for Production No. 24:**

13 “Please produce and relinquish the following document(s): All
14 “Skelly Hearing” results records for each defendant named herein, this
15 material may include but is not limited to the following: the Hiring
16 Authorities’ final decision regarding the imposition of a disciplinary
17 penalty. Pursuant to E.V. § 1043, § 1045, § 1046.”

18 **Request for Production No. 25:**

19 “Please produce and relinquish the following document(s): All
20 “Skelly Letters” for each defendant named herein, this material may
21 include but is not limited to the following: the Hiring Authority’s final
22 decision regarding the imposition of a disciplinary penalty. Pursuant to
23 E.V. § 1043, § 1045, § 1046.”

24 **Request for Production No. 26:**

25 “Please produce and relinquish the following documents: All
26 “(ERO) Employee Relations Officer- Disciplinary Officer’s Summary
27 adverse actions records, for each defendant named herein, this material
28 may include but is not limited to the following: A summary compiled by
the ERO/Disciplinary Officer of Allegations of Misconduct, from evidence
contained in an investigative report or other documents. Pursuant to E.V. §
1043, § 1045, § 1046.”

29 **Request for Production No. 27:**

30 “Please produce and relinquish the following documents: All
31 “Hiring Authority’s Investigative and disciplinary records for each
32 defendant named herein, this material may include but is not limited to the
33 following; CDC forms 989 to the OIA including those cases in which direct
34 adverse action is taken without an investigation, CDCR form(s) 402
35 completed, CDCR form(s) 403 employee disciplinary matrix. Pursuant to
36 E.V. § 1043, § 1045, § 1046.”

37 **Request for Production No. 28:**

38 “Please produce and relinquish the following documents: All
39 “Employee’s Supervisory Files” for each defendant named herein, this
40 material may include but is not limited to the following; filing
41 documentation related to corrective action, performance, behavior, conduct
42 of subordinate staff, imposition of corrective action, corrective action for
43 similar misconduct occurring within one(1) year prior to imposition of
44 corrective or adverse action, alleged misconducts, request for
45 investigations or adverse action to the Hiring Authority. Pursuant to E.V. §
46 1043, § 1045, § 1046.”

1
2 **Request for Production No. 29:**

3 “Please produce and relinquish the following documents: All
4 “Vertical Advocate” investigative interviews, notice of adverse action
5 drafts, accurate records of assignments and documenting in the legal
6 database all communications with the Hiring Authority and SAIG (Senior
7 and Inspectors General) regarding disciplinary penalties: the Skelly
8 hearings; the Skelly officer’s recommendation; the outcome of Executive
9 Review, settlement agreements; SPB hearings; and any appellate
10 proceedings, documentation in the legal page of CMS al communications
11 regarding investigative reports and investigative findings, for each
12 defendant named herein. Pursuant to E.V. § 1043, § 1045, § 1046.”

13 **Request for Production No. 30:**

14 “Please produce and relinquish all “Office of Personnel Services,
15 Human Resources” documents/reports that refer or relate to allegations of
16 misconduct or any other improper conduct, for each defendant named
17 herein, this material may include but is not limited to the following;
18 processing of adverse actions, filing and retaining Final Notices of Adverse
19 Action in employee office personnel files for three(3) years. Pursuant to
20 E.V. § 1043, § 1045, § 1046.”

21 **Request for Production No. 31:**

22 “Please produce and relinquish all “Office of Personnel Services,
23 Employee Discipline Unit” documents/reports that refer or relate to
24 allegations of misconduct or any other improper conduct, for each
25 defendant named herein, this material may include but is not limited to the
26 following; collecting and maintaining the official departmental copies of all
27 adverse action documents separate and apart form those held in the official
28 personnel files, statistical information and generating reports on adverse
actions using Case Management System. Pursuant to E.V. § 1043, § 1045,
§ 1046.”

29 **Request for Production No. 32:**

30 “Please produce and relinquish all memorandums forms “Order
31 for Forman IST and/or documentation of OJT”, for each defendant named
32 herein, Pursuant to E.V. § 1043, § 1045, § 1046.”

33 **Request for Production No. 33:**

34 “Please produce and relinquish all “Central Intake”
35 documents/investigative reports, that refer or relate to allegations of
36 misconduct or any other improper conduct, for each defendant named
37 herein, this material may include but is not limited to the following: the
38 case assignment and case assignment numbers in the Case Management
System (CMS) and the ProLaw database (legal database), updates of the
CMS legal Page, Cross reference numbers, the ERO/Disciplinary Officer’s
record of the findings in the CMS database. Copies of the CDCR Form
402, Vertical Advocate of all related communications in the legal page of
the CMS including, specifically, his/her recommendations, regarding the
investigative findings. Pursuant to E.V. § 1043, § 1045, § 1046.”

39 **Request for Production No. 34:**

40 “Please produce and relinquish all “Adverse Action Penalties”
41 documents that refer or relate to the allegations of misconduct or any other
42 improper conduct, for each defendant named herein, this material may

1 include but is not limited to the following; Letters of Reprimand, Salary
2 Reduction, Suspension without pay, demotion to a lower class, dismissal
3 from state service, all communications related to penalty imposition in the
4 legal database, Pursuant to E.V. § 1043, § 1045, § 1046.”

5 **Request For Production No. 35:**

6 “Please produce and relinquish all “Summary of Adverse Action
7 for non-designated cases by the ERO/Disciplinary Officer for each
8 defendant named herein, this material may include but is not limited to the
9 following: work history, location and dates of assignments, prior adverse
10 actions with causes and dates listed, chronological summary of
11 investigations, dates, times, and names of supervisors conducting
12 corrective interviews, copies of corrective memorandums, incident reports,
13 summary statements of Witnesses, transcripts, vouchers, receipts,
14 performance reports, photographs and CDC 602 Form (Inmate/Parolee
15 Appeal Form). Pursuant to E.V. § 1043, § 1045, § 1046.”

16 **Request For Production No. 36:**

17 “Please produce and relinquish all “ATO NOTICES” that refer or
18 relate to allegations of misconduct or any other improper conduct, for each
19 defendant named herein, Pursuant to E.V. § 1043, § 1045, § 1046.”

20 **Request For Production No. 37:**

21 “Please produce and relinquish all “EAPT REPORTS”
22 (Employment Advocacy and Prosecution Team), for C.S.P-CORCORAN
23 STATE PRISON, this material may include but is not limited to the
24 following: number of adverse actions by types of discipline, number of
25 direct (without an investigation) adverse action by type, number of adverse
26 actions with an investigation by type, number of actions where the
27 discipline was sustained by the Skelly officer, number of actions where the
28 Skelly officer recommended modification of the discipline, number that the
29 Hiring Authority accepted the recommendations, number that the Hiring
30 Authority rejected the recommendation, Number of settlements reached
31 prior to the SPB decision (State Personnel Board) decisions, Number of
32 cases where SPB upheld the original discipline, Pursuant to E.V. § 1043, §
33 1045, § 1046.”

34 **Request For Production No. 38:**

35 “Please produce and relinquish all “Disciplinary Audits”
36 prepared by the “Office of Legal Affairs, in conjunction with the “OIA”,
37 for Corcoran State Prison, this material may include but is not limited to
38 the following: the assessments, adequacy, and monitoring of the statue of
39 limitations, the assessments of training needs, evaluations, of the
40 effectiveness of each Vertical Advocate, the appropriateness and
41 thoroughness of the investigation, report, penalty, Notice of Adverse
42 Action and Settlement; and the policy issues involved and/or at stake.
43 Pursuant to E.V. § 1043, § 1045, § 1046.”

44 **Plaintiff’s Third Request for Production of Documents**

45 **Request For Production No. 39:**

46 “Please produce and relinquish the following document(s): All
47 (IHUOFC) “Instutional [sic] Head Use of Force Review Committees”, use of
48 force incidents reports for each defendant named herein, this material may
49 include but is not limited to the following: evaluation of all relevant
50 documents, executive review forms. Pursuant to E.V. § 1043, § 1045, §

1 1046.”

2 **Request For Production No. 40:**

3 “Please produce and relinquish the following document(s): All
4 “USE OF FORCE EXECUTIVE REVIEW” records, files, or reports for
5 each defendant named herein, this material may include but is not limited
6 to the following: Qualitative evaluation, analysis, videos involving
7 calculated uses of force for incident(s), administrators’ memorandums
8 addressed to the Warden of the outcome of the Department Executive
9 Review Committee, Pursuant to E.V. § 1043, § 1045, § 1046.”

6 **Request For Production No. 41:**

7 “Please produce and relinquish the following document(s): All
8 “Manager’s Review (Second Level) Review Forms: for all defendants
9 named herein, this material may include, but is not limited to the following:
10 second level analysis, determinations if use of force was within the
11 guidelines of the department/institution policy, procedure and training,
12 address [sic] violations of policy not identified [sic] in the review process,
13 pursuant to E.V. § 1043, § 1045, § 1046.”

11 **Request For Production No. 42:**

12 “Please produce and relinquish the following document(s): All
13 “Institutional Head Review of Use of Excessive Force Critique and
14 Qualitative Evaluation Analysis (Attachment E)”, records, files, or reports
15 for each defendant named herein. Pursuant to E.V. § 1043, § 1045, §
16 1046.”

14 **Request For Production No. 43:**

15 “Please produce and relinquish all “UOFC” use of force
16 committee Electronic data, on the database system established by the
17 “UOFC”, for each defendant named herein, this material may include but is
18 not limited to the following information collected from the use of force
19 incident reports., appeals of use of force, the use of force form, and the use
20 of force executive review, the type of force used, reasons for the use of
21 force, pursuant to E.V. § 1043, § 1045, § 1046.”

19 **Request For Production No. 44:**

20 “Please produce and relinquish all document(s), Electronic data,
21 from the “Management Information System, for each defendant named
22 herein, Pursuant to E.V. § 1043, § 1045, § 1046.”

21 **Request For Production No. 45:**

22 “Please produce and relinquish all videotape-recorded interviews
23 by inmates who sustained blows to the head, serious injury, or made
24 allegations of inappropriate use of force, against each defendant named
25 herein, this material may include, but not be limited to the following:
26 audiotapes, pursuant to E.V. § 1043, § 1045, § 1046.”

25 **Ruling:** Defendants objected to requests 14 - 45 on the grounds that they were compound, vague
26 and ambiguous, overly broad, not likely to lead to the discovery of admissible evidence, and that
27 the documents requested are privileged under state law such that disclosure would violate
28 Defendants’ and third parties right to privacy. Without waiving these objections, Defendants

1 responded that they were not disciplined for their actions in the incident giving rise to this
2 lawsuit. In their opposition, Defendants contend that requests 14 - 45 seek information in
3 Defendants' personnel files or disciplinary records; that the requests are overly broad and
4 burdensome and amount to nothing more than a fishing expedition into Defendants' personnel
5 records; that Defendants have not received any type of disciplinary action for any actions they
6 took on the dates pertinent to Plaintiff's complaint; that any information relating to prior conduct
7 is not likely to lead to admissible evidence and is irrelevant to the isolated events giving rise to
8 this lawsuit so as to be inadmissible character evidence; and that much of the information
9 requested by Plaintiff would violate Defendants privacy rights. Defendants do not cite any legal
10 authority in support of any of these arguments.

11 The Court grants Plaintiff's motion in part, subject to the limitation that these requests for
12 production of documents are narrowed to include only those grievances, complaints, disciplinary
13 records, etc. filed against any Defendant(s) that involve claims similar to those raised by Plaintiff
14 in the instant action – i.e. Defendants Martinez, German, and Northcutt for use of excessive
15 physical force, assault and battery, and/or intentional infliction of emotional distress, and
16 Defendant Martinez for acting with deliberate indifference to serious medical needs.

17
18 **Request For Production No. 46:**

19 "Please produce and relinquish all documents, for each defendant
20 named herein, post orders and other responsibilities for each job title and
21 position she/he has held while employed by the Corcoran State Prison-
Department of Corrections Branch. Located at 4001 King Avenue, In
Corcoran California. Pursuant to E.V. § 1043, § 1045, § 1046."

22 **Request For Production No. 47:**

23 "Please provide and relinquish the following document(s) All
24 policy statements concerning the use of "spit mask" and "management cell
25 status", "the use of the landyard [sic] device". Pursuant to E.V. § 1043, § 1045,
26 § 1046."

27 **Ruling:** Defendants objected to both requests 46 and 47 on the grounds that they were
28 compound, vague and ambiguous, overly broad, and were not requests to produce specific
identifiable documents. Without waiving objections, Defendants responded to request 46 that
Defendants Northcutt and German were Correctional Officers and Defendant Martinez was a
Correctional Sergeant during the times relevant to Plaintiff's complaint and produced duty

1 statements for those positions. Without waiving objections, Defendants responded to request 47
2 that policies regarding management cell status and the use of the landyard device cannot be
3 turned over to Plaintiff due to safety and security concerns, but produced the Operational
4 Procedure section. In their opposition, Defendants argue that these requests were vague and
5 broad as they did not ask for readily identifiable documents; but that they had provided
6 documents that were responsive to the request, and since Plaintiff did not specifically address his
7 issue with these responses, Defendants were unable to guess as to Plaintiff's contention with any
8 perceived deficiencies. Defendants produced documents responsive to this request. The Court is
9 unable to discern grounds upon which this production might be seen as deficient and Plaintiff
10 provides none. Plaintiff's motion to compel is denied.

11
12 **Request For Production No. 48:**

13 "Please produce and relinquish the following document(s): All
14 policy statements, data, and/or guidelines concerning the length of
15 maximum time a correctional "PEACE OFFICER" can be assigned to walk
16 the same unit, position and/or post consecutively, this material may include
17 but is not limited to the following: CDCR Statement Policy, C.S.P.-
18 Corcoran statement policy, pursuant to E.V. § 1043, § 1045, § 1046."

16 **Ruling:** Defendants objected to this request on the grounds that it is compound, vague and
17 ambiguous, overly broad, and it is not a request to produce specific identifiable documents.
18 Without waiving objections, Defendants responded that policies, data or, guidelines for specific
19 post orders cannot be turned over to Plaintiff due to safety and security concerns. Defendants
20 argue in their opposition that this request is vague and overly broad as it does not request a
21 readily identifiable document, and that after reasonable inquiry, Defendants cannot release
22 policies, data or guidelines for specific post orders based on security concerns of the institution.
23 The Court is unable to discern grounds upon which the information sought is relevant to
24 Plaintiff's claims and Plaintiff provides none. Plaintiff also fails to show that Defendants'
25 objections are not justified. Plaintiff's motion to compel is denied.

26
27 **Request For Production No. 49:**

28 "Please produce and relinquish all documents that relate or refer
to Medical treatment for prisoners who suffers injury, and/or serious injury,

1 this material may include, but is not limited to the following: Medical
2 treatment policies for M.T.A.'s R.N.'s and Psych Techs, Pursuant to E.V. §
3 1043, § 1045, § 1046.”

4 **Ruling:** Defendants object to this request on the grounds that it is compound, vague and
5 ambiguous, overly broad, and it is not a request to produce specific identifiable documents.

6 These objections are overruled. Defendants further object on the grounds that it requests
7 information not within defendants personal knowledge, possession, custody, or control. If after a
8 reasonable inquiry this information is truly not within Defendants’ possession, custody, or
9 control, then Plaintiff must accept that response. Plaintiff’s motion to compel is granted in as
10 much as Defendants did not state that they made a reasonable inquiry, and the Court is not
11 convinced that Defendants are unable to obtain and produce such documents. If no such
12 documents exist, Defendants must state as much in their supplemental responses.

13 **Request For Production No. 50:**

14 “Please produce and relinquish all documents that relate or refer
15 to the serious injury treatment policy for inmates housed in the “Acute Care
16 Hospital” (ACH), Pursuant to E.V. § 1043, § 1045, § 1046.”

17 **Ruling:** Defendants object to this request on the grounds that it is compound, vague and
18 ambiguous, overly broad, and it is not a request to produce specific identifiable documents.

19 These objections are overruled. Defendants further object on the grounds that it requests
20 information not within defendants personal knowledge, possession, custody, or control. If after a
21 reasonable inquiry this information is truly not within Defendants’ possession, custody, or
22 control, then Plaintiff must accept that response. Plaintiff’s motion to compel is granted in as
23 much as Defendants did not state that they made a reasonable inquiry, and the Court is not
24 convinced that Defendants are unable to obtain and produce such documents. If no such
25 documents exist, Defendants must state as much in their supplemental responses.

26 **Request For Production No. 51:**

27 “Please produce and relinquish the following documents: All
28 “JOB DESCRIPTIONS” for Medical Technician Assistances’ [sic]
Registered Nurses, IDT Chairmen board members, Facility Captain,
Unite [sic] Sergeants, Psych Techs [sic], Assistant Warden, Warden,
Pursuant to E.V. § 1043, § 1045, § 1046.”

1 **Ruling:** Defendants object to this request on the grounds that it is compound, vague and
2 ambiguous, overly broad, and it is not likely to lead to the discovery of admissible evidence.
3 Defendants further object on the grounds that it requests information not within their personal
4 knowledge, possession, custody or control. These objections are overruled. Plaintiff's motion to
5 compel is granted to the extent that each Defendant in this case must surely have access to, and
6 are required to produce, the job description applicable to their individual positions in January and
7 February of 2005.

8
9 **Request For Production No. 52:**

10 "Please produce and relinquish the following documents: All
Hunger Strike"

11 **Ruling:** Defendants objected to this request on the grounds that it is compound, vague and
12 ambiguous, overly broad, and it is not likely to lead to the discovery of admissible evidence.
13 In opposition, Defendants argue that this request does not seek a readily identifiable document
14 and is so unspecific that Defendants cannot "begin to seek their location." These objections are
15 sustained. Plaintiff's motion to compel is denied.

16
17 **Request For Production No. 53:**

18 "Please produce and relinquish the following document(s): GEORGE E.
19 JACOBS' "UNIT HEALTHCARE RECORDS", This material may include, but is not
20 limited to the following: (ACH) records, 1286 chrono documenting Hunger Strike for
21 dates 1-25-07 through 2-2-07, CDC 7219 dated 2-8-07, 2-9-07, CDC 7254 dated 1-25-
07 through 2-2-07, CDC 7225, all reports made to the A.W., HCM, CMO, AOD, PCP,
Warden, Division Regional Administrator, Deputy Director, Institutions Division, the
Chief Deputy Director/Director, Pursuant to Evidence Code Sections § 1271, § 1280,
§ 1530, § 1532, § 1550, § 1600."

22 **Request For Production No. 54:**

23 "Please produce and relinquish the following document(s): GEORGE E.
24 JACOBS' ENTIRE CENTRAL FILE RECORDS, including but not limited to all
confidential material, as it will not jeopardize the safety and security of the institution,
Pursuant to Evidence Code Sections § 1271, § 1280, § 1530, § 1532, § 1550, § 1600."

25 **Request For Production No. 59:**

26 "Identify and produce any and all documents; such as the medical order
27 which directed Corcoran State Prison officials to admit Plaintiff to the UNIVERSITY
MEDICAL CENTER EMERGENCY ROOM on February 2nd 2005. Pursuant to E.V.
§ 1560, § 1561, § 1562, § 1271 et al (IBID)."

28 **Ruling:** Defendants objected to requests 53, 54, and 59 on the grounds that they are compound,

1 vague and ambiguous, overly broad, and not likely to lead to the discovery of admissible
2 evidence. Without waiving objections, Defendants responded that the documents Plaintiff
3 requested are part of his CDCR unified health record which is available for inspection and
4 copying by Plaintiff under applicable institution policies and procedures, and that the items
5 requested by Plaintiff are located in his medical and central file to which he has the same access
6 as Defendants. Plaintiff's motion to compel is therefore denied.

7
8 **Request For Production No. 55:**

9 "Please produce and relinquish the identity, names of person,
10 John Does 1.2.3.4. and 6-10, all employees at C.S.P. Corcoran State Prison,
11 4001 King Avenue, Corcoran CA 93212-8800."

12 **Ruling:** Defendants objected to this request on the grounds that it is vague and ambiguous, and
13 does not request a readily identifiable document. Furthermore, Defendants have answered
14 through their interrogatories that they are unaware of the identities of the unnamed Defendants
15 listed in the complaint. Defendants cannot be compelled to produce an unidentified document,
16 nor are they required to compile information into a document that does not already exist.
17 Plaintiff's motion to compel is denied.

18 **Request For Production No. 56:**

19 "Please produce and relinquish the following documents: All
20 electronical [sic] data that refers or relates statistical [sic] information on
21 how many 602's ave [sic] been screened out as untimely by C.S.P.-Corcoran
22 Appeals Coordinators' Office, this material may include, but is not limited
23 to the following in how many cases hes [sic] C.S.P.-COR exercised its
24 discretion to consider untimely appeals, Pursuant to Evidence Code Sections
25 § 1271, § 1280, § 1530, § 1532, § 1550, § 1600."

26 **Request For Production No. 57:**

27 "Identify and produce any and all documents of policies and
28 procedures relating to the Americans with Disability Act Prison Program,
29 this material may include but is not limited to the following: regulations
30 instructions, notes, memorandums, internal communications and directives.
31 Pursuant to E.V. § 1560, § 1561, § 1562, 1271, et al. (IBID)."

32 **Ruling:** Defendants objected to requests 56 and 57 on the grounds that they are compound,
33 vague and ambiguous, overly broad, and not likely to lead to the discovery of admissible
34 evidence. This case is proceeding on Plaintiff's claims against Defendants Martinez, German,
35

1 and Northcutt for use of excessive physical force, assault and battery, and/or intentional infliction
2 of emotional distress, and Defendant Martinez for acting with deliberate indifference to
3 Plaintiff's serious medical needs. There are no issues as to the screening of appeals and/or the
4 Americans with Disability Act Prison Program in this case. Thus, Defendants objections are
5 sustained. Plaintiff's motion to compel is denied.

6
7 **Request For Production No. 58:**

8 "Identify and produce any and all documents, that refer or relate
9 to any insurance agreements that may cover all or part of any judgment, for
10 each defendant named herein. Pursuant to E.V. § 1560, § 1561, § 1562, §
11 1271, et al. (IBID)."

12 **Ruling:** Defendants object to this request on the grounds that it is compound, vague and
13 ambiguous, overly broad, not likely to lead to the discovery of admissible evidence, seeks
14 documents which are part of Plaintiff's CDCR unified health record which is available for
15 inspection and copying by Plaintiff under applicable institution policies and procedures, and
16 could potentially request thousands of unnecessary documents because it contains no specific
17 time frames. Plaintiff's motion to compel is granted to the extent that Defendants are required to
18 produce any insurance agreements in effect in January and February of 2005, that may cover all
19 or part of any judgment rendered in this case. In lieu of producing any such insurance agreement,
20 Defendants may produce an affidavit of an authorized CDCR employee as to whether there is
21 insurance coverage, for Plaintiff's claims in this action, in excess of the amounts sought in the
22 Complaint.

23 **Request For Production No. 60:**

24 "Identify any parties who were on duty at the prison (ACH) unit
25 at any time on the dates of January 26, 27, 28 of 2005. Also on January 29
26 through February 2nd of 2005."

27 **Request For Production No. 61:**

28 "Identify any parties who were scheduled for duty at the prison
(ACH) Unit at any time on the dates of January 26, 27, 28 of 2005, also on
January 29 through February 2nd of 2005, this includes but is not limited to:
Nurses, M.T.A.'s, psychiatrist, doctors, social workers, and prison Techs [sic]."

Ruling: Defendants objected to requests 60 and 61 on the grounds that it is compound, vague

1 and ambiguous, overly broad, not likely to lead to the discovery of admissible evidence, and is
2 not a proper request for production as it does not request a readily identifiable document. These
3 objections are sustained. This type of an inquiry is properly made as an interrogatory. Plaintiff's
4 motion to compel is denied.

5 **II. Plaintiff's Request for Sanctions for an Untimely Response**

6 Plaintiff contends that Defendants were late in responding to his discovery requests and
7 accordingly should be sanctioned by the Court. Defendants timely served their responses to
8 Plaintiff's request for production of documents. However, due to an inadvertent error,
9 Defendants mailed the responses to an incorrect address. This error was determined within
10 days and Plaintiff was re-sent the responses with an explanation for the delay. (*See* Doc 42,
11 Plaintiff's Motion, Exhibit A, page 23). Defendants made a good faith effort to serve timely
12 responses, Plaintiff was not harmed by this inadvertent error, and the error was corrected within
13 days. Although Rule 37(b) applies to all failures to comply with court orders, whether willful or
14 not, presence or lack of good faith in the parties is relevant to orders, which should be given and
15 the severity of the sanctions (if any) imposed. *See B.F. Goodrich Tire Co. v. Lyster*, 328 F.2d
16 411 (5th Cir. 1964) *citing Societe Internationale Pour Participations Industrielles v. Rogers*, 357
17 U.S. 197, 207 (1958). There is no basis for the Court to find that Defendants error in mailing
18 was made in bad faith. Plaintiff's request for sanctions is denied.

19 **III. Motion to Require Defendants to Preserve Videotapes**

20 On March 27, 2008, Plaintiff filed a motion to require the Defendants to preserve all
21 video tapes of Plaintiff's injuries and interviews of excessive use of force claims, and to impose
22 mandatory sanctions. (Doc. 46.) Neither an opposition, nor a reply were filed.

23 A motion to preserve evidence requires the court to consider "1) the level of concern the
24 court has for the continuing existence and maintenance of the integrity of the evidence in
25 question in the absence of an order directing preservation of the evidence; 2) any irreparable
26 harm likely to result to the party seeking the preservation of evidence absent an order directing
27 preservation; and 3) the capability of an individual, entity, or party to maintain the evidence
28 sought to be preserved, not only as to the evidence's original form, condition or contents, but also

1 the physical, spatial and financial burdens created by ordering the evidence preservation.” Daniel
2 v. Coleman Co., Inc., No. 06-5706 KLS, 2007 WL 1463102, *2 (W.D. Wash. May 17, 2007).

3 As discussed on page 13 herein above, Defendants filed responses to Plaintiff’s requests
4 for production of documents that no such videotapes exist. These responses were not signed
5 under oath by Defendants, but were signed by Defendants’ counsel which certifies that, to their
6 best knowledge, information, and belief after reasonable inquiry, the answers were given
7 consistent with the Federal Rules of Civil Procedure; not interposed for any improper purpose;
8 and not unreasonable, unduly burdensome, or expensive, given the needs of the particular case.
9 Fed. R. Civ. P. 26(g).

10 Just as Defendants cannot be compelled to produce items which after reasonable inquiry
11 have been determined not to exist, they also cannot be compelled to preserve non-existent
12 evidence. Defendants’ discovery responses state that no such videotapes exist, and Plaintiff fails
13 to present any evidence to the contrary. Accordingly, Plaintiff’s motion seeking to require
14 Defendants to preserve all video tapes of Plaintiff’s injuries and interviews of excessive use of
15 force claims, and for mandatory sanctions thereon is denied.

16 **IV. Order**

17 Based on the foregoing, it is HEREBY ORDERED that:

- 18 1. Plaintiff’s motion to compel responses to requests 2, 3, 4, 7, 8, 10-13, 46-48, 52-
19 57, and 59-61 is DENIED;
- 20 2. Plaintiff’s motion to compel responses to requests 1, 5, 6, 9, 14-45, 49-51, and 58
21 is GRANTED, subject to the limitations set forth in this order;
- 22 3. If Defendants are able to locate documents as directed herein, Defendants shall
23 serve a response **within forty-five days** from the date of service of this order;
- 24 4. In the alternative, if after double-checking with the appropriate record keeping
25 departments and human resource personnel, Defendants stand by their contention
26 that this request is burdensome, Defendants shall so notify the Court **within thirty**
27 **days** from the date of service of this order and the Court will revisit this objection;
28 and

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5. If after double-checking with the appropriate departments and/or prison administrators, Defendants stand by their contention that production of documents ordered produced herein will jeopardize the safety and/or security of any CDCR facility, staff, and/or inmates, Defendants shall so notify the Court **within thirty days** from the date of service of this order and the Court will revisit this objection.

IT IS SO ORDERED.

Dated: September 24, 2009

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE