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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

JOSEPH R. PULLIAM,  
  
Plaintiff,  
  
v.  
  
M. LOZANO, et al.,  
  
Defendants.

CASE NO. 1:07-cv-964-LJO-MJS (PC)  
  
ORDER GRANTING PLAINTIFF'S MOTION  
TO COMPEL (ECF No. 40);  
  
DENYING PLAINTIFF'S MOTION TO  
POSTPONE (ECF No. 42);  
  
AND GRANTING IN PART AND DENYING IN  
PART DEFENDANTS' MOTION TO COMPEL  
/ AND REQUEST FOR EXTENSION OF  
DISCOVERY DEADLINES (ECF No. 41)  
  
DISCOVERY DEADLINE RESET TO **MARCH  
31, 2011**  
  
PRE-TRIAL MOTION DEADLINE RESET TO  
**JUNE 30, 2011**

Plaintiff Joseph A. Pulliam ("Plaintiff") is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. Before the Court are: (1) Plaintiff's Motion to Compel (ECF No. 40); (2) Plaintiff's Motion to Postpone (ECF No. 44); (3) Defendants' Motion to Compel and for Sanctions (ECF No. 41); and (4) Defendants' Request for Extension of Discovery Deadline (ECF No. 41). Each of these motions will be addressed in turn below.

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1 **I. PLAINTIFF'S MOTION TO COMPEL**

2 Plaintiff moves to compel Defendants to provide additional responses to his initial  
3 request for production, specifically various CDCR reports, decisions on inmate appeals,  
4 and disciplinary records. (ECF No. 40.) Defendants contend that they have produced all  
5 documents within their custody, control or possession and have thereby satisfied their  
6 obligation under the discovery rules. (ECF No. 43.)

7 If Defendants seek to avoid production by contending that they are not in  
8 possession, custody or control of the requested documents, their objection is denied. The  
9 specific facts of this action render such an objection unfounded. By virtue of their  
10 employment with non-party CDCR, individual defendants are represented by the Attorney  
11 General's Office. It is this Court's experience that either individual defendants who are  
12 employed by CDCR and/or the Attorney General can generally obtain documents, such as  
13 the ones at issue here, from CDCR by requesting them. They have constructive control  
14 over the requested documents, and the documents must be produced. See, e.g., Mitchell  
15 v. Adams, 2009 U.S. Dist. LEXIS 24289, \*24-25, 2009 WL 674348, \*9 (E.D. Cal. Mar. 6,  
16 2009) (even though defendant warden was sued in his individual capacity, he had  
17 constructive control over requested documents because he had authority to obtain the  
18 requested documents from third party CDCR); see also Gray v. Faulkner, 148 F.R.D. 220,  
19 223-24 (N.D. Ind. 1992) (requiring certification that responding parties "have conducted a  
20 search for the information reasonably available to them through their agents, attorneys, or  
21 others subject to their control and have determined that the information requested either  
22 does not exist or that it has been produced.").

23 If Defendants choose to stand on this objection, they must provide factual support  
24 for their assertion that, in spite of their relationship with CDCR, they do not have  
25 possession, custody or control of the requested documents. (Defendants should also be  
26 mindful of the fact that maintenance of such an objection may preclude them from using  
27 the requested documents, or any documents of this kind, as evidence in support of  
28 summary judgment, in opposition to any of Plaintiff's positions, and in any way during trial.

1 See Fed. R. Civ. P. 37(c)(1). Should Defendants stand on this objection and subsequently  
2 seek to use the requested documents or like documents, they must—at  
3 minimum—supplement their responses and explain the method by which they obtained the  
4 documents. Id. They will also be required to demonstrate that the prior objection was in  
5 good faith given that they now have and seek to use the requested documents. Fed. R.  
6 Civ. P. 26(e)(1).

7 Accordingly, Plaintiff's Motion to Compel further response to his request for  
8 production of documents is granted. Defendants are to provide further response within  
9 thirty days from the date of service of this order.

10 **II. PLAINTIFF'S MOTION TO POSTPONE**

11 Defendants noticed Plaintiff's deposition for December 20, 2010. Both parties  
12 appeared on that date, along with a court reporter, but Plaintiff refused to answer any  
13 questions about the case. Plaintiff's refusal was based on the fact that he claimed to have  
14 filed a motion for the appointment of counsel and would not be deposed until such motion  
15 was resolved by the Court.

16 It appears Plaintiff may have been referring to the "Motion to Postpone" that he  
17 signed on December 6, 2010; it was not received and processed by the Court until  
18 December 27, 2010. (ECF No. 42.) In his Motion, Plaintiff acknowledges that Defendants  
19 noticed his deposition for December 20, 2010 and asks the Court to "postpone" the taking  
20 of his deposition. Plaintiff states that he intends to ask the Court to reconsider its denial  
21 of his motion for the appointment of counsel. (Id.) Plaintiff has yet to file such a motion.

22 Because the Court did not receive Plaintiff's Motion to Postpone until after  
23 December 20, 2010, the Motion is moot. Additionally, had Plaintiff sought reconsideration  
24 of his motion to appoint counsel, it would have been denied. Plaintiff has not shown that  
25 his case meets the "exceptional circumstances" standard. See Rand v. Rowland, 113 F.3d  
26 1520, 1525 (9th Cir. 1997). Thus far, Plaintiff has represented himself diligently and ably;  
27 the Court has no doubt that such performance will continue.

28 For the reasons stated above, Plaintiff's Motion to Postpone is DENIED as moot.

1 **III. DEFENDANTS' MOTION TO COMPEL**

2 Because Plaintiff refused to answer any questions during the December 20, 2010  
3 meeting, Defendants have yet to conduct his deposition. Defendants now move for an  
4 order compelling Plaintiff's deposition and ask the Court to award costs associated with the  
5 filing of this motion.

6 **A. Motion to Compel Deposition**

7 In opposition to the Motion to Compel, Plaintiff argues that Defendants should  
8 simply review the allegations in his Complaint to obtain information about his claims, the  
9 evidence he intends to produce at trial, and any available witnesses. (ECF No. 44.)  
10 Plaintiff claims that his reluctance to being deposed is "prudent" because he does not want  
11 to give Defendants' counsel any sworn testimony that could be used against him in these  
12 proceedings. Plaintiff denies that his refusal to participate in his deposition caused or will  
13 cause any harm or prejudice to Defendants.

14 While Plaintiff may prefer to keep his evidence private until trial, the Federal Rules  
15 of Civil Procedure do not allow him to do so. One of the purposes of the civil discovery  
16 rules is to "take the sporting element out of litigation, partly by affording each party full  
17 access to evidence in the control of his opponent." Martin v. Reynolds Metals Corp., 297  
18 F.2d 49, 56 (9th Cir. 1961). As the Supreme Court has held: "Mutual knowledge of all the  
19 relevant facts gathered by both parties is essential to proper litigation. To that end, either  
20 party may compel the other to disgorge whatever facts he has in his possession. The  
21 deposition-discovery procedure simply advances the stage at which the discovery can be  
22 compelled from the time of trial to the period proceeding it, thus reducing the possibility of  
23 surprise." Hickman v. Taylor, 329 U.S. 495, 507 (1947).

24 Rule 26(b)(1) give a party the **right** to discover "any nonprivileged matter that is  
25 relevant to any party's claim or defense." This includes the right to take the opposing  
26 party's deposition, so long as that deposition is properly noticed. Fed. R. Civ. P. 30. The  
27 Court's April 28, 2010 Discovery and Scheduling Order stated: "Pursuant to Federal Rule  
28 of Civil Procedure 30(a), defendants may depose plaintiff and any other witness confined

1 in a prison upon condition that, at least fourteen (14) days before such a deposition,  
2 defendants serve all parties with the notice required by Federal Rule of Civil Procedure  
3 30(b)(1).” (ECF No. 35.)

4 Under both Local and Federal Rules, Defendants are entitled to depose Plaintiff and  
5 Plaintiff is **required** to provide all non-privileged facts within his possession. This includes,  
6 at a minimum, answering questions posed by Defendants’ counsel in a deposition. It is  
7 undisputed that Defendants properly noticed Plaintiff’s deposition for December 20, 2010  
8 and that Plaintiff refused to answer any of the questions posed by Defendants. In so  
9 doing, Plaintiff clearly violated both the Federal Rules of Civil Procedure and the Court’s  
10 Discovery and Scheduling Order.

11 While the Court understands Plaintiff might prefer to be represented at his  
12 deposition, he has elected not to retain counsel and he is not entitled to appointed  
13 representation in this civil proceeding. Mallard v. United States District Court for the  
14 Southern District of Iowa, 490 U.S. 296, 298 (1989). With or without counsel, Plaintiff  
15 must obey all applicable procedural rules if he wishes to prosecute this action,. See King  
16 v. Atiyeh, 814 F.2d 565, 567 (9th Cir. 1986 (“Pro se litigants must follow the same rules of  
17 procedure that govern other litigants.”) Accordingly, Defendants’ Motion to Compel is  
18 granted. Defendants are entitled to notice Plaintiff’s deposition and Plaintiff is hereby  
19 ordered to participate in such deposition. Plaintiff is warned that failure to participated fully  
20 and completely in his deposition may result in sanctions, up to an including dismissal of this  
21 action. See Fed. R. Civ. P. 37(b)(2).

22 **B. Request for Costs**

23 Defendants also move for an award of the costs and fees associated with the  
24 attempted December 20, 2010 deposition and the filing of the instant Motion to Compel.  
25 Defendants seek a total of \$1,125 — \$275 for the court reporter and \$850 for attorney’s  
26 fees incurred researching and preparing the instant Motion. (ECF No. 41 at 4.)

27 Federal Rule of Civil Procedure 37 provides “If [a motion to compel] is granted . . .  
28 the court shall, after affording an opportunity to be heard, require the party . . . whose

1 conduct necessitated the motion . . . to pay to the moving party the reasonable expenses  
2 incurred . . . unless the court finds that . . . circumstances make an award of expenses  
3 unjust.” Fed. R. Civ P. 37(a)(2)(a).

4 It is inappropriate and unfair for Defendants to have had to incur otherwise  
5 unnecessary expense because of Plaintiff’s refusal to participate in a properly noticed  
6 deposition. However, that refusal followed a pre-deposition request to delay the deposition  
7 and resulted from Plaintiff’s reasonable desire to have legal counsel present, not an intent  
8 to frustrate discovery or delay this action. Moreover, as noted above, Defendants have in  
9 their own way contributed to the current discovery stalemate.

10 Accordingly, the Court will refrain for the present from imposing monetary sanctions  
11 on Plaintiff for his failure to participate in a properly noticed deposition but reserves to  
12 Defendants the right to re-submit the request in the event of further discovery obstruction  
13 by Plaintiff. Defendant’s request for such costs and fees is denied at this time without  
14 prejudice to Defendant’s right to re-file such motion in the event there is further  
15 inappropriate delay or failure to participate by Plaintiff.

16 **IV. DEFENDANTS’ REQUEST FOR EXTENSION OF DISCOVERY DEADLINE**

17 Defendants move for an extension of the Court’s previously imposed discovery  
18 deadline. (ECF No. 41 at 5.) The Court’s April 28, 2010 Discovery and Scheduling Order  
19 set the deadline for completion of all discovery as December 28, 2010.

20 As that date has passed and the Court has ordered both parties to provide  
21 additional discovery, an extension of the discovery deadline is appropriate and Defendants’  
22 Request is granted. The parties’ discovery deadline is extended to **March 31, 2011**. The  
23 deadline for filing pre-trial dispositive motions is extended to **June 30, 2011**.

24 **V. CONCLUSION**

25 For the reasons stated above, the Court hereby ORDERS the following:

- 26 1. Plaintiff’s Motion to Compel is GRANTED. Defendants shall file supplemental  
27 discovery responses not later than **February 25, 2011**;
- 28 2. Plaintiff’s Motion to Postpone his deposition is DENIED as moot;

- 1 3. Defendants' Motion to Compel is GRANTED in part and DENIED in part.  
2 Defendants are entitled to re-notice Plaintiff's deposition and Plaintiff is ordered to  
3 participate fully in compliance with his obligations under the Federal Rules of Civil  
4 Procedure. Plaintiff is on notice that failure to participate in his deposition may  
5 result in sanctions, up to and including dismissal of this action as well as monetary  
6 sanctions for past and/or future frustration of legitimate discovery. For now,  
7 Defendants' request for costs and fees is DENIED without prejudice;
- 8 4. The Court's April 28, 2010 Discovery and Scheduling Order is AMENDED as  
9 follows: The parties' discovery deadline is **March 31, 2011** and all pre-trial  
10 dispositive motions must be filed by **June 30, 2011**.

11  
12  
13 IT IS SO ORDERED.

14 Dated: January 31, 2011

*/s/ Michael J. Seng*  
UNITED STATES MAGISTRATE JUDGE