

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MICHAEL D. HARRISON,

Plaintiff,

v.

T. MOORE, et al.,

Defendants.

Case No. 1:08-cv-1065-AWI-MJS (PC)

**ORDER DENYING PLAINTIFF'S MOTION
TO COMPEL (ECF Nos. 228 & 229)**

Plaintiff is a state prisoner proceeding *pro se* and *in forma pauperis* in this civil rights action brought pursuant to 28 U.S.C. § 1983. The action proceeds on Plaintiff's Eighth Amendment claims against numerous defendants. (ECF No. 160.)

On March 23, 2015, Plaintiff moved to compel production of a declaration from Defendant J. Kim in support of Defendants' motion for summary judgment. (ECF Nos. 228 & 229.) Defendants opposed the motion (ECF No. 230) and Plaintiff objected to Defendants' opposition. (ECF No. 231.)

Plaintiff has moved to compel production of a declaration from Defendant Kim because he argues that it is needed to "proceed with litigation" (ECF No. 229, at 1) and there is "not enough evidence for [Kim] to obtain" summary judgment without the declaration. (ECF No. 231, at 1.)

1 Defendants point out that the motion to compel, filed eight months after the close
2 of discovery, is untimely. They also argue that no rule required Kim to make or submit a
3 declaration in support of his motion for summary judgment, and because of his
4 deployment to Afghanistan, he has done neither. Plaintiff cannot compel production of a
5 document that does not exist. Moreover, Defendants submit, it is for the Court, not
6 Harrison, to decide whether sufficient evidence exists, without a declaration, to grant
7 summary judgment in favor of Kim. (ECF No. 230.)

8
9 The Court finds the motion to compel to be unauthorized and unavailing.

10 Discovery in this case has been closed since July 2014. (ECF No. 169.) Plaintiff's
11 motion to compel is untimely. He has presented no good cause for allowing late filing or
12 for modification of the Scheduling Order. Although other discovery devices, if properly
13 pursued, might have produced evidence from Defendant Kim, Plaintiff has identified no
14 procedural basis for requiring Kim to submit a declaration at Plaintiff's request. No such
15 declaration being in existence, none can be produced even if Plaintiff had properly and
16 timely requested its production.
17

18 Accordingly, Plaintiff's motion to compel (ECF Nos. 228 & 229) is DENIED.
19

20
21 IT IS SO ORDERED.

22 Dated: May 15, 2015

/s/ Michael J. Seng
23 UNITED STATES MAGISTRATE JUDGE
24
25
26
27