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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

PATRICK KUNKEL,

Plaintiff,

v.

N. DILL, et al.,

Defendants.

CASE NO. 1:09-cv-00686-LJO-SKO PC

ORDER DENYING MOTIONS TO COMPEL

(Doc. 56, 70)

Plaintiff Patrick Kunkel (“Plaintiff”) is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. On September 15, 2010, Plaintiff filed a motion to compel. (Doc. #56.) Defendants Pfeiffer, Zamora, Araich, Ali, Mendoza, Mackey, Dileo, Robaina, Garcia, and Dill (“Defendants”) filed an opposition to Plaintiff’s motion to compel on September 24, 2010. (Doc. #62.) Plaintiff filed a reply to Defendants’ opposition on October 13, 2010. (Doc. #69.)

I. Discussion

A. Plaintiff’s Motion to Compel

Plaintiff’s motion to compel identifies a number of document production requests that he propounded on Defendants. Plaintiff contends that Defendants have failed to produce the requested documents, but fails to address how Defendants’ objections to each individual request were improper. Plaintiff generally argues that the requests were relevant to the claims raised in Plaintiff’s complaint and that the documents requested are not privileged. Plaintiff has not attached copies of his original requests to his motion. Instead, Plaintiff has attached copies of Defendants’ responses and

1 documents that Plaintiff titled “re-requests for documents” that appear to have been sent to
2 Defendants after Defendants sent their responses to Plaintiff.

3 Plaintiff also contends that Defendants have not answered Plaintiff’s interrogatories “fully
4 or truthfully.” (Mot. for Order Compelling Discovery 6, ECF No. 56.) However, Plaintiff fails to
5 demonstrate how Defendants’ responses were untruthful or incomplete. Plaintiff has not provided
6 the Court with copies of the interrogatories or copies of Defendants’ responses. To the extent that
7 Defendants objected to the interrogatories, Plaintiff has made no arguments to demonstrate how the
8 objections were improper.

9 It is neither the Court’s nor Defendants’ burden to read each discovery request and each
10 response and formulate arguments on Plaintiff’s behalf regarding the inadequacy of Defendants’
11 objections. In contrast to Plaintiff’s motion which fails to present specific arguments, Defendants’
12 opposition meticulously analyzes each request and response and justifies each objection raised by
13 Defendants. Plaintiff then filed a reply that presented specific arguments explaining how
14 Defendants’ objections were unfounded or improper.

15 Arguments made for the first time in a reply are generally waived. See Graves v. Arpaio, No.
16 08-17601, 2010 WL 3987721, at *3 (9th Cir. October 13, 2010) (“arguments raised for the first time
17 in a reply brief are waived”); U.S. v. Romm, 455 F.3d 990, 997 (9th Cir. 2006) (“arguments not
18 raised by a party in its opening brief are deemed waived”); Association of Irrigated Residents v. C
19 & R Vanderham Dairy, 435 F. Supp 2d 1078, 1089 (E.D. Cal. 2006) (“It is inappropriate to consider
20 arguments raised for the first time in a reply brief”).

21 The justification for this rule is apparent here. Defendants were unaware of Plaintiff’s
22 specific arguments and their opposition brief blindly attempted to defend all possible arguments
23 rather than offer pointed arguments in opposition to Plaintiff’s arguments. It is apparent that
24 Defendants’ burden would have been far less onerous had they been aware of Plaintiff’s arguments.
25 Further, given the fact that the Local Rules only explicitly recognize a motion, an opposition, and
26 a reply with regard to proper motion practice, see Local Rule 230(b)-(d), and (l), Defendants did not
27 have a reasonable opportunity to file a response to the arguments raised for the first time in
28 Plaintiff’s reply brief.

1 For example, it was not until Plaintiff filed his reply brief that Defendants learned that the
2 basis for Plaintiff's motion to compel the production of documents stemming from visits to outside
3 hospitals was that the outside hospitals, for some unknown or unclear reason, refused to provide
4 Plaintiff with Plaintiff's medical file. Plaintiff's reply brief argues that Defendants should contact
5 the outside hospitals and obtain the files on Plaintiff's behalf. Defendants were unaware of this
6 argument and opposed Plaintiff's motion by stating that they do not have possession of the medical
7 files held by outside hospitals. Had Defendants known the basis of Plaintiff's motion, they could
8 have noted in their opposition that a Rule 45 subpoena is the proper procedure for obtaining
9 documents held by third parties.

10 Similarly, Plaintiff argued for the first time in his reply brief that he did not have sufficient
11 access to his C-File because prison officials would not make copies of requested documents from
12 his C-File for him. Plaintiff noted in his reply that he received an Olsen Review of his C-File on
13 September 30, 2010 and had the opportunity to review the documents contained in his C-File.
14 (Plaintiffs[sic] Opp'n to Defendants[sic] Opp'n to Mot. to Compel Ex. 6, at 3, ECF No. 69.)
15 However, Plaintiff's main argument appears to be that prison officials are not providing Plaintiff
16 with copy services for certain documents in his C-File. Similarly, the only argument raised in
17 Plaintiff's reply brief with respect to Plaintiff's request for "a complete copy of the Plata v. Davis
18 suit" is that prison officials will not provide Plaintiff with his own personal copy of the decision, and
19 the prison's law library only provides a copy for Plaintiff to review. Had Plaintiff made these
20 arguments in his motion rather than in his reply brief, Defendants could have argued in their
21 opposition that nothing in Rule 34 compels Defendants to bear the costs for providing copy services
22 for documents to which Plaintiff already has access merely because Plaintiff cannot afford or obtain
23 copy services on his own. Instead, Plaintiff's motion to compel failed to mention why Defendants'
24 response was inadequate; thus, Defendants did not have a reasonable opportunity to rebut Plaintiff's
25 arguments.

26 The Court will deny Plaintiff's motion to compel. The Court also notes that Plaintiff filed
27 a second motion to compel on October 13, 2010 that suffers from the same deficiencies as his
28 September 15, 2010 motion to compel. Accordingly, the Court will also deny the October 13, 2010

1 motion to compel.

2 Plaintiff is advised that any future motion to compel must individually analyze each
3 discovery request and response and set forth arguments to explain how Defendants' objection to each
4 request is improper. Plaintiff's motion to compel must notify Defendants how each response is
5 deficient. Specifically, the motion to compel must: 1) set forth the disputed request exactly as
6 Plaintiff phrased it in his original request, 2) set forth Defendants' response exactly as Defendants
7 phrased it in their original response, 3) address each objection made by Defendants and explain how
8 each objection is improper, and 4) explain how any documents produced by Defendants were
9 deficient or were not produced in a reasonable manner. Plaintiff may not raise his arguments for the
10 first time in his reply brief and may not simply file a motion to compel that identifies the discovery
11 requests in dispute and provide vague and general conclusions regarding the inadequacy of
12 Defendants' response.

13 **B. Meet and Confer**

14 After reviewing the filings from Plaintiff and Defendants, the Court finds that the discovery
15 requests that are in dispute may be resolved if the parties were to meet and confer. For example,
16 Plaintiff's complaints regarding inadequate access to his C-file may be resolved if the parties
17 conferred and the Defendants arranged for an appropriate time and place for Plaintiff to review his
18 C-file.¹ Similarly, the Court notes that many of Plaintiff's document requests are written in a vague,
19 confusing, and possibly overbroad manner.² By meeting and conferring, Plaintiff may be able to
20 clarify and narrow the scope of those requests.

21 Accordingly, the Court will order Plaintiff to contact Defendants to arrange a time to meet
22 and confer regarding any outstanding discovery disputes prior to filing a motion to compel. Since
23 Plaintiff is incarcerated, Defendants are expected to reasonably make themselves available to meet
24

25 ¹ Plaintiff is advised that he is only entitled to reasonable access to those documents; he is not entitled to
26 unlimited access to discovery documents.

27 ² For example, one of Plaintiff's requests asked for all appeals or lawsuits filed against Defendants. The
28 request is vague and confusing because it is unclear what kinds of documents Plaintiff is requesting. The request is
also far too broad and would encompass documents that are not reasonably calculated to lead to the discovery of
admissible evidence.

1 and confer, either in person, via telephone, or via a video conference. The parties will also be
2 required to prepare and file a Joint Statement re Discovery Disagreement in accordance with Local
3 Rule 251 for any discovery disputes related to Plaintiff's document production requests.

4 **C. Sanctions**

5 The Court declines to issue sanctions against either party at this time. As noted in this order,
6 the record regarding the discovery disputes is not fully developed because Plaintiff failed to properly
7 set forth his arguments in his motion to compel and raised most of his arguments for the first time
8 in his reply brief. Thus, Defendants did not have a reasonable opportunity to address Plaintiff's
9 arguments.

10 **II. Conclusion and Order**

11 Based on the foregoing, it is HEREBY ORDERED that Plaintiff's motions to compel are
12 DENIED. To the extent that Plaintiff wishes to re-file a motion to compel, the parties must meet and
13 confer and file a Joint Statement re Discovery Disagreement regarding any outstanding discovery
14 disputes prior to the filing of any motion to compel based on Plaintiff's document production
15 requests.

16
17 IT IS SO ORDERED.

18 **Dated: November 1, 2010**

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE