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FILED
OCT 06 2014
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY  DEPUTY CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

GARRISON S. JOHNSON,

Plaintiff,

v.

CATE, et al.,

Defendants.

Case No. 1:10-cv-02348-LJO-MJS (PC)

**ORDER DENYING PLAINTIFF'S MOTION
FOR MARSHAL'S SERVICE OF A
SUBPOENA DUCES TECUM**
(ECF No. 72)

CLERK TO REFUND PLAINTIFF \$8

Plaintiff is a state prisoner proceeding pro se in this civil rights action filed pursuant to 42 U.S.C. § 1983. The action proceeds on an equal protection claim against Defendant Doran, Inmate Assignment Lieutenant at Kern Valley State Prison ("KVSP").

Before the Court is Plaintiff's motion to have the United States Marshal serve a subpoena duces tecum upon nonparty, KVSP Warden M.D. Biter. The subpoena provides for production and copying, by Plaintiff at California State Prison-Lancaster, of specified categories of documents and electronically stored information. Plaintiff also submitted an \$8 payment to cover service costs.

I. DISCUSSION

1 **A. Discovery Subpoena**

2 Subject to certain requirements, Plaintiff is entitled to the issuance of a subpoena
3 commanding the production of documents or electronically stored information from a
4 nonparty, Fed. R. Civ. P. 34(c); Fed. R. Civ. P. 45, relevant to his claim. Fed. R. Civ. P.
5 26(b).

6 However, the Court will consider granting such a request only if the documents or
7 electronically stored information sought from the nonparty are not equally available to
8 Plaintiff and are not obtainable from Defendant through a request for the production. Fed.
9 R. Civ. P. 34. If Defendant objects to Plaintiff's discovery request, a motion to compel is the
10 next required step. If the Court rules that the documents or electronically stored information
11 are discoverable but Defendant does not have care, custody, and control of them, Plaintiff
12 may then seek a subpoena of a nonparty. Alternatively, if the Court rules that the
13 documents and electronically stored information are not discoverable, the inquiry ends.

14 The Court will not issue a subpoena for a nonparty individual without Plaintiff first
15 following the procedure outlined above. Firstly, it is unclear whether the desired discovery
16 has been served upon Defendant and if so how she responded, if at all. Further, Plaintiff
17 seeks non-party discovery of documents and information relating to alleged inmate riots,
18 improper conduct by law library clerks, and his housing status. Plaintiff has not sufficiently
19 demonstrated why and how such documents and information are relevant to the equal
20 protection claim in issue.

21 **B. Service by Marshal**

22 Plaintiff is not proceeding in forma pauperis ("IFP") and is not entitled to Marshal's
23 service of the subpoena under the IFP statute. 28 U.S.C. § 1915(d). He asserts that
24 Marshal's service is appropriate under 28 U.S.C. § 1921. That statute only allows only for
25 collection of fees by the Marshal. He offers no other basis for the Marshal to serve his
26 subpoena.

27 It is Plaintiff's responsibility to serve discovery. The previously issued Discovery and
28 Scheduling Order provides that "discovery requests are to be served by the parties

1 pursuant to Federal Rule of Civil Procedure 5, 7, 11, 16, 26-36, and Local Rule 135; they
2 are to be filed when required by Local Rules 250.2, 250.3, and 250.4." (ECF No. 48, at
3 1:19-21.)

4 **II. CONCLUSION AND ORDER**

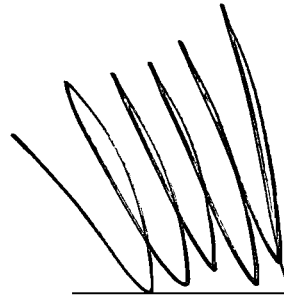
5 Plaintiff has not demonstrated that he is entitled to Marshal's service of a discovery
6 subpoena.

7 Accordingly, for the reasons stated, it is HEREBY ORDERED that:

- 8 1. Plaintiff's motion for Marshal's service of Warden Biter with a subpoena duces
9 tecum (ECF No. 72) is DENIED without prejudice to refiling consistent with
10 the above standards, and
- 11 2. The Clerk of the Court is directed to refund to Plaintiff the \$8 payment he
12 made to the Court.

13
14 IT IS SO ORDERED

15 10/1/2014
16 Dated: October 1, 2014



UNITED STATES MAGISTRATE JUDGE