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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 GRANTING PLAINTIFF'S MOTION
TO COMPEL FURTHER RESPONSE TO
REQUESTS FOR PRODUCTION, SET
ONE, ITEMS 5, 6, 7, 8 AND 12
(ECF No. 79)

ORDER DENYING CROSS-MOTIONS
FOR SANCTIONS
(ECF Nos. 80, 92)

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.

On September 29, 2014, Plaintiff filed the following motions which are before the Court: (1) a motion to compel further response to request for production (RFP) set one, items 5, 6, 7, 8, and 12, and (2) a motion for discovery sanctions. Defendant has opposed the motions and seeks monetary sanctions. Plaintiff replied to opposition to his sanction motion. The motions are deemed submitted. Local Rule 230(f).

1 **I. LEGAL STANDARDS - DISCOVERY MOTIONS**

2 The discovery process is subject to the overriding limitation of good faith. *Asea, Inc.*
3 *v. Southern Pac. Transp. Co.*, 669 F.2d 1242, 1246 (9th Cir. 1981). Parties may obtain
4 discovery regarding any non-privileged matter that is relevant to any party's claim or
5 defense, and for good cause, the court may order discovery of any matter relevant to the
6 subject matter involved in the action. Fed. R. Civ. P. 26(b)(1). Relevant information need
7 not be admissible at the trial if the discovery appears reasonably calculated to lead to the
8 discovery of admissible evidence. *Id.*

9 Generally, if the responding party objects to a discovery request, the party moving
10 to compel bears the burden of demonstrating why the objections are not justified. E.g.,
11 *Grabek v. Dickinson*, 2012 WL 113799, at *1 (E.D. Cal. Jan. 13, 2012); *Mitchell v. Felker*,
12 2010 WL 3835765, at *2 (E.D. Cal. Sep. 29, 2010); *Ellis v. Cambra*, 2008 WL 860523, at
13 *4 (E.D. Cal. Mar. 27, 2008). This requires the moving party to inform the court which
14 discovery requests are the subject of the motion to compel, and, for each disputed
15 response, why the information sought is relevant and why the responding party's
16 objections are not meritorious. *Grabek*, 2012 WL 113799, at *1; *Womack v. Virga*, 2011
17 WL 6703958, at *3 (E.D. Cal. Dec. 21, 2011).

18 Courts in the Eastern District of California have required, "at a minimum, [that] the
19 moving party plaintiff has the burden of informing the court (1) which discovery requests
20 are the subject of his motion to compel, (2) which of the defendant's responses are
21 disputed, (3) why he believes the defendant's responses are deficient, (4) why the
22 defendant's objections are not justified, and (5) why the information he seeks through
23 discovery is relevant to the prosecution of this action." *Walker v. Karelas*, 2009 WL
24 3075575, at *1 (E.D. Cal. Sep. 21, 2009); *Brooks v. Alameida*, 2009 WL 331358, at *2
25 (E.D. Cal. Feb. 10, 2009).

26 The court must limit discovery if the burden of the proposed discovery outweighs its
27 likely benefit. Fed. R. Civ. P. 26(b)(2)(C)(iii). "In each instance [of discovery], the
28

1 determination whether . . . information is discoverable because it is relevant to the claims
2 or defenses depends on the circumstances of the pending action.” Fed. R. Civ. P. 26
3 Advisory Committee's note (2000 Amendment) (Gap Report) (Subdivision (b)(1)).

4 All grounds for objection must be stated “with specificity.” See *Mancia v. Mayflower*
5 *Textile Services Co.*, 253 F.R.D. 354, 356 (D.Md. 2008) (boiler-plate objections waived
6 any legitimate objections responding party may have had).

7 The responding party has a duty to supplement any responses if the information
8 sought is later obtained or the response provided needs correction. Fed. R. Civ. P.
9 26(e)(1)(A).

10 **II. DISCUSSION**

11 **A. Requests for Production**

12 A party may serve on any other party a request within the scope of Rule 26(b) to
13 produce and permit the requesting party or its representative to inspect, copy, test, or
14 sample items in the responding party's possession, custody or control. Fed. R. Civ. P.
15 34(a)(1). “Property is deemed within a party's ‘possession, custody, or control’ if the party
16 has actual possession, custody, or control thereof or the legal right to obtain the property
17 on demand.” *Allen v. Woodford*, 2007 WL 309945, *2 (E.D. Cal. Jan. 30, 2007), citing *In re*
18 *Bankers Trust Co.*, 61 F.3d 465, 469 (6th Cir. 1995); accord *Bovarie v. Schwarzenegger*,
19 2011 WL 719206, at *4 (S.D. Cal. Feb. 22, 2011); *Evans v. Tilton*, 2010 WL 1136216, at
20 *1 (E.D. Cal. Mar.19, 2010).

21 The requests and responses in issue are as follows:

22
23 **RFP Numbers 5-8:** Any and all documents and electronically stored information in
24 your possession and control that relates to how many [Black prisoners] [White
25 prisoners] [Mexican prisoners] [prisoners classified (sic) as “Others”] were
assigned to the C-Facility library as clerks from 2009-2010.

26 **Defendant’s Response:** Defendant objects that the request is vague and
27 ambiguous as to the type of electronic information it seeks. Defendant also objects
28 to this request on the grounds that it calls for production of documents not within
the Defendant’s personal possession, custody or control, because the documents
sought do not exist. Kern Valley State Prison did not maintain past statistics

1 regarding the breakdown of ethnicities for prisoner jobs in 2009-2010. The only
2 statistics maintained are for current prisoner assignments in each facility.
Defendant therefore cannot product the requested documents.

3 **Defendant's Supplemental Response:** Pursuant to Federal Rule of Civil
4 Procedure 26(e), and without waiving these objections, Defendant produces [a]
5 redacted time log[s] for [an African-American library clerk] [Caucasian law clerk(s)]
[Mexican legal clerk(s)] [law clerk designated as "Other"] during the [requested]
[relevant] time period, as Exhibit [I] [J] [bates numbers 26, 29, 30, and 32.]

6 **Defendant's Second Supplemental Response:** Pursuant to Federal Rule of Civil
7 Procedure 26(e), and without waiving these objections, Defendant produces
8 additional documents for [Caucasian] [Mexican] library clerks during the requested
9 time period, as bates numbers [1, 3-6, 18-24, 25, 27-28, 31, 33, and 38-43] [2-4; 6-
17, and 34-37]. Defendant incorporates the previously served supplemental
responses in this second supplemental response for clarity due to re-identifying the
documents from lettered exhibits to numbered bates.

10 **Defendant's Third Supplemental Response:** Pursuant to Federal Rule of Civil
11 Procedure 26(e), and without waiving these objections, Defendant produces
12 additional documents for an African-American library clerk during the requested
time period, as bates numbers 44-46.

13 **RFP Number 12:** Any and all documents and electronically stored information in
14 your possession that relates to the dates and ethnicities of each prisoner at C-
Facility who were assigned to the library as clerks resulting from being on the clerks
waiting list during your tenure as Inmat(sic) Assignments Lieutenant.

15 **Defendant's Response:** Defendant objects that the request is vague and
16 ambiguous as to the type of electronic information it seeks. Defendant also objects
17 to this request on the basis that it is overbroad and unduly burdensome as to the
18 scope of time. Defendant has been employed as an Inmate/Assignments
19 Lieutenant beyond 2009-2010, which are the years at issue in Plaintiff's claims.
20 Defendant also objects to this request on the basis that, as to documents outside of
21 2009-2010, it requests documents that are not relevant to the claims or defenses at
issue. Defendant further objects to this request on the grounds that it calls for
production of documents not within the Defendant's personal possession, custody
or control, because the documents sought do not exist. Kern Valley State Prison did
not maintain past statistics regarding the breakdown of ethnicities for prisoner jobs
in 2009-2010. The only statistics maintained are for current prisoner assignments in
each facility. Defendant therefore cannot produce the requested documents.

22 **Supplemental Response to RFP No. 12:** Pursuant to Federal Rule of Civil
23 Procedure 26(e), and without waiving these objections, Defendant produces (1) a
24 redacted time log for an African-American legal clerk during the requested time
25 period, as Exhibit H; (2) a redacted time log for a Caucasian legal clerk during the
26 requested time period, as Exhibit I; and (3) redacted time logs for Mexican legal
27 clerks during the requested time period, as Exhibit J.

28 **[Second] Supplemental Response to RFP No. 12:** Pursuant to Federal Rule of
Civil Procedure 26(e), and without waiving these objections, Defendant produces
redacted time logs, training records, work change applications, signed statements,
memoranda, and letters as bates numbers 1-43. Defendant incorporates the
previously served supplemental responses in this second supplemental response

1 for clarity due to re-identifying the documents from lettered exhibits to numbered
2 bates.

3 A review of the motion reveals the only dispute over these items relates to the fact
4 the documents produced as numbered bates 1-43 redact prisoner names and CDC
5 numbers.

6 Plaintiff argues that, in order to identify witnesses and prepare for trial, he is entitled
7 to these documents without redaction of the non-party inmate's names and CDC numbers.

8 Defendant responds that: Plaintiff did not specifically request inmate identities;
9 Plaintiff has not disputed that the requests are vague and ambiguous and seek documents
10 not in Defendant's custody and control; and Plaintiff has not demonstrated why information
11 redacted from records relating to non-African American inmates is relevant to this action.

12 The Court finds Defendant's production of redacted documents bates number 1-43
13 obviates the pre-production objections above. Information redacted from non-African
14 American inmates is relevant to the racial make-up of law clerks at the institution during
15 times relevant and to Plaintiff's race based discrimination claim.

16 On August 27, 2014, the Court ruled on this same issue in the context of Plaintiff's
17 motion to compel a further response to RFP, set one, No. 5, Exhibit H. (See ECF No. 74.)
18 There the Court ordered Defendant either to produce document(s) without redaction of
19 inmate names and numbers, or provide a further response supporting objection. The Court
20 will do the same here. The specific reasons for the ruling are stated in the August 27th
21 order and will not be repeated.

22 **B. Plaintiff's Motion for Evidentiary Sanctions**

23 Federal Rule of Civil Procedure 37(b)(2) provides, in pertinent part:

24 If a party or a party's officer, director, or managing agent—or a witness designated
25 under Rule 30(b)(6) or 31(a)(4)—fails to obey an order to provide or permit
26 discovery, including an order under Rule 26(f), 35, or 37(a), the court where the
27 action is pending may issue further just orders. They may include the following:

- 28 (i) directing that the matters embraced in the order or other designated facts be
taken as established for purposes of the action, as the prevailing party

1 claims;

- 2 (ii) prohibiting the disobedient party from supporting or opposing designated
3 claims or defenses, or from introducing designated matters in evidence.

4 Plaintiff asserts that Defendant did not comply with the above August 27, 2014
5 discovery order because the unredacted Exhibit H produced in response thereto was
6 unsigned with no explanation why it was unsigned. Plaintiff claims Exhibit H and the
7 documents produced as bates numbers 44-46 are untrustworthy because they show the
8 non-party African-American inmate earning pay as a library clerk after transfer from that
9 position. Plaintiff also appears to claim Defendant did not comply with the Court's
10 concurrent order to provide further responses to interrogatories. Plaintiff seeks Rule 37
11 issue preclusion sanctions deeming established that African-American inmates were
12 excluded from library clerk positions.

13 Defendant responds that, as to Exhibit H, she made good faith efforts to comply
14 with the Court's discovery order. Defendant provided supplemental responses including
15 Exhibit H, albeit unsigned because no signed version could be located. Defendant
16 provided documents supporting alternative authentication (see bates number 45-46).
17 Defendant is not required to produce non-existent documents. The evidentiary sanctions
18 requested are unwarranted and tantamount to default judgment in Plaintiff's favor.
19 Plaintiff's moving papers are misleading and deserving of admonishment and sanction in
20 amount of \$1,912.50, attorney's fees incurred in opposing this motion.

21 The Court takes note that, in response to the August 27, 2014 order, Defendant
22 produced an unsigned unredacted Exhibit H along with an amended supplemental
23 response to RFP, set one, item 5. (See ECF No. 80 at 25:1-10.) The amended
24 supplemental response states that:

25 Pursuant to the Court's [August 27, 2014] Order, Defendant attaches an
26 unredacted copy of Exhibit H, which was renumbered as bates number 0019.
27 Defendant's counsel has made a good faith effort to obtain a signed copy of this
28 document by Supervisor Tartaglia but is unable to provide one because the
document no longer exists. Plaintiff's concerns regarding the reliability and

1 authenticity of this document can be satisfied by the inmate statement report
2 attached as bates numbers 0045-0046 to Defendant's Third Supplemental
3 Response to Plaintiff's Request for Production of Documents, set one. This report
4 shows that the inmate referenced in bates number 0019 was paid accordingly for
5 his service on the C Facility law library during May 2009.

6 The appropriateness of a discovery sanction is within the broad discretion of the
7 court. See *Von Brimer v. Whirlpool Corp.*, 536 F.2d 838, 844 (9th Cir. 1976); see also
8 *Raygoza v. City of Fresno*, 297 F.R.D. 603, 606 (E.D. Cal., 2014). The Ninth Circuit has
9 identified factors that the courts should consider in determining the appropriateness of
10 discovery sanctions. See *Wendt v. Host Int'l, Inc.*, 125 F.3d 806, 814 (9th Cir.1997), citing
11 *Wanderer v. Johnston*, 910 F.2d 652, 656 (9th Cir. 1990).

12 In *Wendt*, the court addressed the propriety of a preclusion order barring the
13 introduction of expert testimony as a sanction against the plaintiffs' former counsel for
14 failure to disclose damage evidence and for the untimely disclosure of expert witnesses.
15 The Ninth Circuit considered the following factors: "1) [t]he public's interest in expeditious
16 resolution of litigation; 2) the court's need to manage its docket; 3) the risk of prejudice to
17 the defendants; 4) the public policy favoring disposition of cases on their merits; [and] 5)
18 the availability of less drastic sanctions." *Wendt*, 125 F.3d at 814.

19 Granting the issue preclusion sanction requested by Plaintiff could be dispositive of
20 the case. As the Ninth Circuit explained in *Valley Engineers Inc. v. Electric Engineering*
21 *Co.*, 158 F.3d 1051, 1057 (9th Cir. 1998), "[W]hat is most critical for case-dispositive
22 sanctions . . . is whether the discovery violations "threaten to interfere with the rightful
23 decision of the case."

24 Here, considering the five-factor test articulated in *Wendt*, the Court concludes that
25 imposition of evidence sanctions is inappropriate. Defendant produced an unredacted
26 Exhibit H. Her failure to produce a signed version of that document, determined by
27 defense counsel to be non-existent, is not a basis for sanction. See e.g., *David v.*
28 *Caterpillar, Inc.*, 324 F.3d 851, 857 (7th Cir. 2003) (no discovery sanction where court in
its broad discretion finds the responding party's conduct to be justified or harmless).

1 Plaintiff does not explain with any specificity how he is harmed by production of an
2 unsigned Exhibit H, or why authentication as suggested by Defendant in her amended
3 supplemental response would not ameliorate any prejudice. See e.g., *Rayoza*, 297 F.R.D.
4 at 607. The documents produced do not necessarily demonstrate discrepancy between
5 dates the non-party African-American inmate was assigned as a library clerk and dates he
6 was paid for work in that position. None of the five *Wendt* factors can be said to weigh
7 heavily in favor of issue preclusion. See e.g., *Reilly v. NatWest Markets Group Inc.*, 181
8 F.3d 253, 269 (2d Cir. 1999) (the court may consider a party's explanation for failure to
9 comply, and any prejudice therefrom, when determining whether to impose evidentiary
10 sanction for failure to comply with a discovery order).

11 Plaintiff's does not argue that Defendant failed to comply with the Court's order to
12 provide further responses to interrogatories. His request for sanctions relating to further
13 responses to interrogatories fails.

14 **C. Defendant's Motion for Sanctions**

15 A court may assess attorney's fees when a party has "acted in bad faith,
16 vexatiously, wantonly, or for oppressive reasons." *Alyeska Pipeline Service Co. v.*
17 *Wilderness Society*, 421 U.S. 240,258–259 (1975), quoting *F.D. Rich Co. v. United States*
18 *ex rel. Industrial Lumber Co.*, 417 U.S. 116, 129 (1974).

19 Defendant argues that Plaintiff's motion for sanctions mischaracterizes the Court's
20 August 27, 2014 order and omits mention of Defendant's inability to provide a signed
21 version of Exhibit H. She claims the Court, in its inherent power to sanction bad faith
22 conduct, should award her \$1912.50, the cost of opposing Plaintiff's motion for sanctions.

23 Nothing before the Court suggests that Plaintiff intentionally mischaracterized the
24 August 27, 2014 discovery order or Defendant's response to it. Plaintiff included both the
25 order and Defendant's response (stating her inability to provide a signed Exhibit H) with
26 his instant motion to compel.

27 Defendant also points to Plaintiff's failure to include with his sanction motion
28

1 documents bates numbered 45-56 which Defendant “produced in lieu of a signed version
2 [of Exhibit H].” (See ECF No. 92 at 6:2-3.) However, these documents were not mentioned
3 in the August 27, 2014 order, nor were they to be produced thereunder. Even if these
4 documents were a subject of that order, Plaintiff references them in his motion for
5 sanctions, (ECF No. 92-1 at 14) and includes them in his motion to compel. (See ECF No.
6 79 at 73-74.)

7 Defendant’s motion for sanctions lacks merit.

8 **III. ORDER**

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

- 10 1. Plaintiff’s motion to compel a further response to requests for production, set
11 one, items 5, 6, 7, 8, and 12 (ECF No. 79) is GRANTED such that Defendant
12 shall produce unredacted copies of her previously produced documents
13 numbered bates 1-43, or provide a further response supporting objections,
14 within twenty (20) days of service of this Order, Defendant may notify the
15 non-party inmates involved and include their objections, if any, in her further
16 response,
- 17 2. Plaintiff’s motion for discovery sanctions (ECF No. 80) is DENIED, and
- 18 3. Defendant’s motion for sanctions (ECF No. 92) is DENIED.

19
20 IT IS SO ORDERED.

21 Dated: November 19, 2014

22 /s/ Michael J. Seng
23 UNITED STATES MAGISTRATE JUDGE
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