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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

LAMONT SHEPARD,  
Plaintiff,

vs.

COHEN, et al.,  
Defendants.

1:11-cv-00535-GSA-PC

ORDER GRANTING PLAINTIFF'S  
MOTION TO COMPEL  
(Doc. 45.)

ORDER DENYING PLAINTIFF'S  
MOTION FOR SANCTIONS, WITHOUT  
PREJUDICE TO RENEWAL OF THE  
MOTION WITHIN THIRTY DAYS

ORDER FOR DEFENDANTS TO RE-  
SERVE THEIR SUPPLEMENTAL  
RESPONSES UPON PLAINTIFF  
WITHIN TEN DAYS

**I. BACKGROUND**

Lamont Shepard ("Plaintiff") is a state prisoner proceeding pro se and in forma pauperis with this civil rights action filed pursuant to 42 U.S.C. § 1983. Plaintiff filed the Complaint commencing this action on March 30, 2011. (Doc. 1.) This action now proceeds on the Second Amended Complaint filed on May 19, 2014, against defendants Dr. Cohen, Sgt. J. Lopez, Correctional Officer (C/O) Z. Dean, C/O J. Campbell, and Vera Brown (LVN) on Plaintiff's due process claim and against defendants Dr. Cohen, Sgt. J. Lopez, C/O Z. Dean, and C/O J. Campbell on Plaintiff's excessive force claim. (Doc. 41.) On June 10, 2014, defendants Lopez, Dean, and Campbell filed an Answer to the Second Amended Complaint. (Doc. 43.)

1 To date, defendants Cohen and Brown have not been served with process nor appeared in this  
2 action. (Court Record.)

3 On January 29, 2014, the Court issued a Scheduling Order establishing a deadline of  
4 September 29, 2014, for the parties to complete discovery, including the filing of motions to  
5 compel. (Doc. 22.) The Scheduling Order required the parties to serve responses to written  
6 discovery requests within forty-five days after the request is first served. (Id. ¶2.)

7 On July 7, 2014, Plaintiff filed a motion to compel production of documents from  
8 defendants Lopez, Dean, and Campbell (“Defendants”). (Doc. 45.) On July 25, 2014,  
9 Defendants filed an opposition to the motion. (Doc. 46.) On August 7, 2014, Plaintiff filed a  
10 reply to the opposition. (Doc. 49.)

11 Plaintiff’s motion to compel, filed on July 7, 2014, is now before the court.

12 **II. MOTION TO COMPEL**

13 **A. Federal Rules of Civil Procedure 26(b), 34, and 37(a)**

14 Under Rule 26(b), “[U]nless otherwise limited by court order, the scope of discovery is  
15 as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to  
16 any party's claim or defense — including the existence, description, nature, custody, condition,  
17 and location of any documents or other tangible things and the identity and location of persons  
18 who know of any discoverable matter. For good cause, the court may order discovery of any  
19 matter relevant to the subject matter involved in the action.<sup>1</sup> “Relevant information need not be  
20 admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of  
21 admissible evidence.” Fed. R. Civ. P. 26(b)(1).

22 Pursuant to Rule 34(a) of the Federal Rules of Civil Procedure, “any party may serve on  
23 any other party a request to produce and permit the party making the request . . . to inspect and  
24 copy any designated documents . . . which are in the possession, custody or control of the party  
25 upon whom the request is served.” Fed. R. Civ. P. 34(a)(1). “[A] party need not have actual  
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27 <sup>1</sup>“Evidence is relevant if (a) it has any tendency to make a fact more or less probable than it would be  
28 without the evidence; and (b) the fact is of consequence in determining the action.” Fed. R. Evid. 401.

1 possession of documents to be deemed in control of them.” Clark v. Vega Wholesale Inc., 181  
2 F.R.D. 470, 472 (D.Nev. 1998) quoting Estate of Young v. Holmes, 134 F.R.D. 291, 294  
3 (D.Nev. 1991). “A party that has a legal right to obtain certain documents is deemed to have  
4 control of the documents.” Clark, 181 F.R.D. at 472; Allen v. Woodford, No. CV–F–05–1104  
5 OWW LJO, 2007 WL 309945, \*2 (E.D.Cal. Jan. 30, 2007) (citing In re Bankers Trust Co., 61  
6 F.3d 465, 469 (6th Cir.1995)); accord Evans v. Tilton, No. 1:07CV01814 DLB PC, 2010 WL  
7 1136216, at \*1 (E.D.Cal. Mar. 19, 2010).

8 Under Rule 34(b), the party to whom the request is directed must respond in writing  
9 that inspection and related activities will be permitted as requested, or state an objection to the  
10 request, including the reasons. Fed. R. Civ. P. 34(b)(2). Also, “[a] party must produce  
11 documents as they are kept in the usual course of business or must organize and label them to  
12 correspond to the categories in the request.” Fed. R. Civ. P. 34(b)(E)(I).

13 Pursuant to Rule 37(a), a party propounding discovery may seek an order compelling  
14 disclosure when an opposing party has failed to respond or has provided evasive or incomplete  
15 responses. Fed. R. Civ. P. 37(a)(3)(B). “[A]n evasive or incomplete disclosure, answer, or  
16 response must be treated as a failure to disclose, answer, or respond.” Fed. R. Civ. P. 37(a)(4).  
17 “It is well established that a failure to object to discovery requests within the time required  
18 constitutes a waiver of any objection.” Richmark Corp. v. Timber Falling Consultants, 959  
19 F.2d 1468, 1473 (9th Cir. 1992) (citing Davis v. Fendler, 650 F.2d 1154, 1160 (9th Cir. 1981)).  
20 The moving party bears the burden of demonstrating “actual and substantial prejudice” from the  
21 denial of discovery. See Hallett v. Morgan, 296 F.3d 732, 751 (9th Cir. 2002) (citations  
22 omitted).

### 23 **Parties’ Arguments**

24 Plaintiff requests a court order compelling Defendants to produce documents in  
25 response to his Request for Production of Documents (“RFP”), Set Two, which Plaintiff asserts  
26 he served upon Defendants on or about May 4, 2014. Plaintiff has re-stated the relevant three  
27 RFP’s for the court’s review. Plaintiff alleges that on June 4, 2014, Defendants informed him  
28 that they would provide responses by June 20, 2014; however, by June 28, 2014, Plaintiff had

1 not received any responses. Plaintiff requests sanctions of \$1,000.00 as reasonable expenses  
2 for bringing this motion to compel.

3 Defendants assert that Plaintiff served his RFP, Set Two, on April 24, 2014, and that on  
4 June 6, 2014, Defendants served a Response. (Declaration of John P. Walters, Doc. 46-1 ¶3.)  
5 In the Response, Defendants explained that a search was being conducted, and that they would  
6 provide Plaintiff with an update by June 20, 2014. (Id., Exh. A.) Defendants served  
7 Supplemental Responses on July 8, 2014, stating that no documents responsive to RFP Nos. 1  
8 and 2 were found after a diligent search, and objecting to RFP No. 3 for relevance, without  
9 producing any documents. (Id. ¶5, Exh. B.) Plaintiff replies that as of July 31, 2014, he had  
10 not received Defendants' Supplemental Responses.

### 11 **Discussion**

12 Defendants acknowledge that they failed to provide Plaintiff with an update of their  
13 search for documents, as promised, by June 20, 2014, and did not serve their Supplemental  
14 Responses until July 8, 2014. However, Defendants have submitted their July 8, 2014  
15 Supplemental Responses to the court in support of their opposition, which was served upon  
16 Plaintiff on July 25, 2014. (Id.) Thus, Plaintiff should now have received the Supplemental  
17 Responses. However, in the event that Plaintiff somehow did not receive the Supplemental  
18 Responses when he was served with Defendants' opposition, Defendants shall be directed to re-  
19 serve their Supplemental Responses, dated July 8, 2014, upon Plaintiff within ten days.  
20 Therefore, Plaintiff's motion to compel shall be granted.

### 21 **III. DISCOVERY SANCTIONS – RULE 37**

22 Rule 37(a)(5)(A) of the Federal Rules of Civil Procedure provides that if a motion to  
23 compel is granted, "the court must, after giving an opportunity to be heard, require the party or  
24 deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or  
25 both to pay the movant's reasonable expenses incurred in making the motion, including  
26 attorney's fees. But the court must not order this payment if (i) the movant filed the motion  
27 before attempting in good faith to obtain the disclosure or discovery without court action; (ii)

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1 the opposing party's nondisclosure, response, or objection was substantially justified; or (iii)  
2 other circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(a)(5)(A).

3 Plaintiff requests the imposition of sanctions of \$1,000.00 upon Defendants for their  
4 failure to timely serve responses to Plaintiff's RFP, Set Two. Plaintiff asserts that \$1,000.00 is  
5 reasonable compensation for his expenses in obtaining this order, arguing that Defendants had  
6 no substantial justification for their refusal to answer and/or produce the documents requested.

7 Defendants have acknowledged that they served their Supplemental Responses in an  
8 untimely manner. However, Plaintiff submits no evidence that he is reasonably entitled to  
9 \$1,000.00 for his expenses for bringing the motion to compel. Therefore, Plaintiff's motion for  
10 sanctions shall be denied, without prejudice to renewal of the motion within thirty days,  
11 showing evidence of his costs in bringing the motion to compel filed on July 7, 2014.

12 **IV. CONCLUSION**

13 Based on the foregoing, IT IS HEREBY ORDERED that:

- 14 1. Plaintiff's motion to compel, filed on July 7, 2014, is GRANTED;
- 15 2. Plaintiff's motion for sanctions is DENIED, without prejudice to renewal of the  
16 motion within thirty days of the date of service of this order, showing evidence  
17 of his costs in bringing the motion to compel filed on July 7, 2014; and
- 18 3. Defendants are directed to re-serve their Supplemental Responses to Plaintiff's  
19 Request for Production of Documents, Set Two, dated July 8, 2014, upon  
20 Plaintiff within ten days of the date of service of this order, and file a proof of  
21 service with the court.

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23 IT IS SO ORDERED.

24 Dated: August 12, 2014

/s/ Gary S. Austin  
25 UNITED STATES MAGISTRATE JUDGE  
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