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4 UNITED STATES DISTRICT COURT
5 EASTERN DISTRICT OF CALIFORNIA
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7 C. DWAYNE GILMORE,

8 Plaintiff,

9 vs.

10 D. AUGUSTUS, et al.,

11 Defendants.
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1:12-cv-00925-LJO-GSA-PC

ORDER DENYING PLAINTIFF'S
MOTION TO COMPEL
(Doc. 60.)

ORDER GRANTING PLAINTIFF
LEAVE TO RE-SERVE
INTERROGATORY NO. 1 OF
PLAINTIFF'S INTERROGATORIES,
SET TWO, UPON DEFENDANTS FOR
FURTHER RESPONSE

14 **I. BACKGROUND**
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16 C. Dwayne Gilmore ("Plaintiff") is a state prisoner proceeding pro se and in forma
17 pauperis with this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff filed the Complaint
18 commencing this action on June 7, 2012. (Doc. 1.) This action now proceeds on the First
19 Amended Complaint filed on March 8, 2013, against defendants Correctional Officer (C/O) C.
20 Lockard, C/O C. Lopez, C/O J. Hightower, and C/O J. J. Torres for excessive force, and against
21 defendant C/O J. J. Torres for denial of adequate medical care, in violation of the Eighth
22 Amendment.¹ (Doc. 12.) This case is now in the discovery phase.²
23

24 ¹ On November 18, 2013, the court issued an order dismissing all other claims and defendants from this
25 action for failure to state a claim. (Doc. 17.) Defendants Lieutenant D. Augustus, Sergeant J. S. Diaz, Licensed
26 Vocational Nurse (LVN) A. Serna, LVN B. Ismat, LVN I. Bari, LVN J. Canada, LVN Z. Nartume, and John Doe
27 were dismissed from this action based on Plaintiff's failure to state any claims against them upon which relief may
28 be granted under §1983, and Plaintiff's claims based on supervisory liability and claims for conspiracy and
violation of due process were dismissed from this action for Plaintiff's failure to state a claim under § 1983. (*Id.*)

² On April 25, 2014, the Court issued a scheduling order in this action, opening discovery and
establishing a deadline of December 25, 2014 for the completion of discovery. (Doc. 36.)

1 On July 17, 2014, Plaintiff filed a motion to compel further responses to interrogatories
2 by defendant Hightower. (Doc. 60.)

3 **II. MOTION TO COMPEL**

4 **A. Federal Rules of Civil Procedure 26(b), 33, and 37(a)**

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

13 Pursuant to Rule 33(a), an interrogatory may relate to any matter that may be inquired
14 into under Rule 26(b). Fed. R. Civ. P. 33(a)(2). Each interrogatory must, to the extent it is not
15 objected to, be answered separately and fully in writing under oath, Fed. R. Civ. P. 33(b)(3),
16 and the grounds for objecting to an interrogatory must be stated with specificity, Fed. R. Civ. P.
17 33(b)(4). A party answering interrogatories cannot limit his answers to matters within his own
18 knowledge and ignore information immediately available to him or under his control. Essex
19 Builders Group, Inc. v. Amerisure Insurance Co., 230 F.R.D. 682, 685 (M.D. Fla. 2005). If a
20 party cannot furnish details, he should say so under oath, and say why and set forth the efforts
21 used to obtain the information, and cannot plead ignorance to information that is from sources
22 within his control. Milner v. National School of Health Technology, 73 F.R.D. 628, 632 (E.D.
23 Pa.1977). “However, where the answer states that no record exists, the court cannot compel
24 the impossible.” Id. at 633 (citing Moss v. Lane Co., 50 F.R.D. 122, 128 (W.D. Va. 1970),
25 aff'd in part, remanded in part, 471 F.2d 853 (4th Cir. 1973)). A sworn answer indicating a lack
26 of knowledge and no means of obtaining knowledge is not objectionable. Milner 73 F.R.D. at
27 633 (citing Brennan v. Glenn Falls Nat. Bank & Trust Co., 19 F.R.Serv.2d 721, 722-23
28 (N.D.N.Y.1974)).

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

11 **Parties’ Positions**

12 Plaintiff seeks a court order compelling defendant Hightower (“Defendant”) to serve
13 further responses to Plaintiff’s Interrogatories Set One, Nos. 1-11 & 14-24, and Interrogatories
14 Set Two, No. 1. Plaintiff asserts that he served Defendant’s counsel with Interrogatories Set
15 One on May 19, 2014, and Interrogatories Set Two on May 29, 2014. (Doc. 60, Attachments
16 A,B,C,D.) Defendant served his responses on July 3, 2014.

17 Plaintiff argues that Defendant’s objections are tactical, to evade responding to
18 Plaintiff’s interrogatories. Plaintiff contends that his interrogatories are relevant to the claims
19 or defenses at issue and do not call for speculation. Plaintiff takes issue with Defendant’s
20 response that he “cannot recall (at this time) the requested information, due to the length of
21 time that has passed since the incident occurrence (*sic*) of July 8, 2010.” (Doc. 60 at 4-5.)
22 Plaintiff argues that this response is “absurd, evasive and inadequate, especially in light of
23 defendant J. Hightower’s [detailed] response to interrogatory number 12.” (Id. at 4:6-8.)

24 Plaintiff requests a court order (1) requiring Defendant to respond to Interrogatories Set
25 One, Nos. 1-11 & 14-15 within ten days, or in the alternative, prohibiting Defendant from
26 opposing Plaintiff’s claims; (2) requiring Defendant to fully respond to Interrogatories Set One
27 Nos. 16-24 within ten days; (3) requiring Defendant to fully respond to Plaintiff’s Request for
28 Interrogatories Set Two within ten days; (4) ruling that Plaintiff did not exceed the permissible

1 number of interrogatories under Rule 33(a); and (5) admonishing Defendant and his counsel for
2 their disobedience of discovery and other court orders concerning good faith. Plaintiff also
3 seeks sanctions.

4 Defendant argues that Plaintiff's motion to compel is procedurally defective because
5 Plaintiff fails to address Defendant's objections in the context of each interrogatory, and does
6 not demonstrate how Defendant's responses are insufficient or explain why he is entitled to
7 further responses. Defendant contends that in contrast, Defendant provided complete and
8 adequate responses to Plaintiff's interrogatories.

9 Defendant also argues that because of discrete subparts, every interrogatory after
10 Interrogatory No. 15 surpasses the limit of twenty-five interrogatories allowed by Rule
11 33(a)(1).³ Defendant contends that his assertion that he could not recall the requested
12 information is valid, and that he was able to respond in detail to Interrogatory No. 12 because
13 the interrogatory was not as detailed as the interrogatories he could not answer.

14 Plaintiff replies that Defendant failed to furnish the information available to him in
15 responding to the interrogatories, as required by Rule 33(a). Plaintiff argues that Defendant
16 only offered two substantive responses, to Interrogatories Nos. 12 & 13, and that other
17 responses were entirely boilerplate objections, which are disfavored by the court. Plaintiff
18 asserts that he did not exceed the permissible number of interrogatories, and argues that many
19 of Defendant's responses were evasive and stated in bad faith.

20 **Discussion**

21 Plaintiff has not met his burden, as the moving party, of informing the court in his
22 motion, for *each* disputed response, why Defendant's responses are not justified. Plaintiff may
23 not simply assert in his motion that he is dissatisfied for various reasons with most of
24 Defendants' responses, without addressing *each* of the objectionable interrogatories. While
25 Plaintiff specifically addresses some of the individual interrogatories in his reply to

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27 ³ Defendant acknowledges, however, that in light of the court's July 28, 2014 order expressly granting
28 Plaintiff leave to propound limited discovery on the issue of identifying Defendant Torres' representative, even if
such requests exceed the permissible number of interrogatories, Defendants will answer such future discovery
requests to the extent of their ability without objecting on the basis of violating Rule 33(a). (Doc. 65 at 4 fn.1.)

1 Defendant's opposition, this is not sufficient to meet Plaintiff's burden. Therefore, Plaintiff's
2 motion to compel shall be denied on this ground alone.

3 The court finds that Plaintiff exceeded the number of interrogatories permitted under
4 Rule 33(a). While Plaintiff served only twenty-five numbered interrogatories, some of the
5 interrogatories contained impermissible discrete subparts, causing Plaintiff to exceed more than
6 twenty-five interrogatories. Although the term "discrete subparts" does not have a precise
7 meaning, courts generally agree that interrogatory subparts are counted as one interrogatory for
8 purposes of Rule 33(a) if they are logically or factually subsumed within and necessarily
9 related to the primary question. Trevino v. ACB American, Inc., 232 F.R.D. 612 (N.D. Cal.
10 Jan. 27, 2006), subsequent determination, Trevino v. ACB American, Inc., 2006 WL 391797
11 (Feb. 17, 2006); Safeco of America v. Rawstron, 181 F.R.D. 441, 445 (C.D. Cal. 1998). For
12 example, Plaintiff's Interrogatory No. 1 counts as two interrogatories because it contains two
13 distinct subparts which are not necessarily related: (1) "what duty was Defendant performing?"
14 and (2) "who accompanied Defendant?" In contrast, Interrogatory No. 3 counts as only one
15 interrogatory because the three subparts -- (1) "where was Plaintiff located?", (2) "where was
16 Officer Torres located?", and (3) "where was Officer Herrera located?" -- are factually
17 subsumed and necessarily related to the primary question, "where were the individuals located
18 when you observed the Plaintiff running towards Officer Torres and Officer Herrera?" The
19 parties are advised to consider this rule when propounding and responding to interrogatories.

20 The court finds Defendant's response, that he is unable to recall particular information,
21 adequate. Plaintiff must accept Defendant's response that he is unable to recall the details of
22 what occurred during the incident at issue, given the passage of time. Defendant cannot be
23 compelled to remember what he has forgotten.

24 In light of the court's order of July 28, 2014, Plaintiff shall be granted leave to re-serve
25 Interrogatory No. 1 of Plaintiff's Interrogatories, Set Two, upon Defendants for a further
26 response to Plaintiff's inquiry about the name and address of defendant Torres' legal
27 representative. Defendants are required to respond to this request to the extent of their ability
28 without objecting on the basis of violating Rule 33(a), as they have agreed.

1 **III. CONCLUSION**

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

- 3 1. Plaintiff's motion to compel, filed on May 9, 2014, is DENIED; and
- 4 2. Plaintiff is granted leave to re-serve Interrogatory No. 1 of Plaintiff's
- 5 Interrogatories, Set Two, upon Defendants for a further response to Plaintiff's
- 6 inquiry about the name and address of defendant Torres' legal representative,
- 7 and Defendants are required to respond to this request to the extent of their
- 8 ability without objecting on the basis of violating Rule 33(a).

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10 IT IS SO ORDERED.

11 Dated: September 2, 2014

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

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