

1  
2  
3  
4  
5  
6  
7  
8 UNITED STATES DISTRICT COURT  
9 EASTERN DISTRICT OF CALIFORNIA  
10

11 COREY MITCHELL,  
12 Plaintiff,

13 v.

14 CHAVEZ, et al.,  
15 Defendants.

Case No. 1:13-cv-01324-DAD-EPG-PC

ORDER DENYING PLAINTIFF'S MOTION  
TO ENFORCE COURT ORDER

(ECF No. 48)

16 **I. BACKGROUND**

17 Plaintiff Corey Mitchell, an inmate in the custody of the California Department of  
18 Corrections and Rehabilitation ("CDCR") has alleged a claim under the Eighth Amendment  
19 against Defendant Correctional Officer ("C/O") Chavez and Defendant Sergeant Sheldon for  
20 failure to protect. Plaintiff alleges in his second amended complaint that on September 5, 2011,  
21 Defendants Chavez and Sheldon ignored Plaintiff's concerns regarding his safety and directed  
22 Plaintiff to accept a cellmate, Baylor, who thereafter stabbed Plaintiff in the chest while they  
23 were incarcerated at Kern Valley State Prison ("KVSP").

24 Discovery concluded in this case on February 25, 2016. (ECF No. 20.) On May 5, 2016,  
25 Defendant Chavez filed a motion for summary judgment on the merits of the case. (ECF No. 37.)  
26 A telephonic status conference was held twelve days later on May 17, 2016. (ECF Nos. 41-42.)  
27 Several pending motions and discovery disputes were addressed at the hearing. (*Id.*) The Court  
28

1 ordered Defendant Chavez to produce certain documents, or indicate that they are being withheld  
2 on the ground of privilege, in which case Defendant Chavez should submit withheld documents  
3 for *in camera* review. (*Id.*) Specifically, the Court ordered Defendant Chavez to produce to  
4 Plaintiff inmate McCloud's staff complaint, Appeal #KVSP-0-11-01157, and all related  
5 documents including reports of investigation. (ECF No. 41, pp. 2-3.) The Court also ordered  
6 Defendant Chavez to produce the Baylor Crime Incident Report (CIR) and the Rules Violation  
7 Report (RVR) of the Baylor incident. (*Id.* at 3).

8 Plaintiff filed a response in opposition to the pending motion for summary judgment on  
9 May 27, 2016 (ECF No. 43.) On June 7, Defendant Chavez filed a reply in support of his motion  
10 for summary judgment. (ECF No. 46.) Defendant Chavez also submitted a brief in support of  
11 application of the official information privilege as a basis for withholding production of certain  
12 documents, and submitted the withheld documents for *in camera* review. (ECF No. 45.) The *in*  
13 *camera* submission was reviewed, and the Court issued an order on June 22, requiring further  
14 production and finding other information properly withheld. (ECF No. 47.)

15 After the discovery deadline had passed, Plaintiff filed the instant discovery motion on  
16 June 27, 2016. (ECF No. 48.) He requests a court order requiring:

- 17 1) Defendant Chavez to produce certain photographs that were attached to the  
18 Baylor CIR and RVR and sanctions for failing to produce the photographs;
- 19 2) the deposition of inmate McCloud in order to explain inconsistencies  
20 between a document that Plaintiff viewed at an earlier date and the  
21 McCloud's staff complaint, Appeal #KVSP-0-11-01157, later produced to  
22 Plaintiff; and
- 23 3) the defendants to produce any statements they made concerning the Baylor  
24 incident.

25 Defendant Chavez filed a response in opposition to the discovery motion on July 13. (ECF No.  
26 49).

27 This Court issued findings and recommendations on July 19, 2016, recommending that  
28 Defendant Chavez's motion for summary judgment be denied. (ECF No. 50.) The findings and  
recommendations were adopted in full on September 14. (ECF No. 53.) The next day, Plaintiff

1 filed a motion for emergency restraining order. (ECF No. 54.)

2 The Court held a telephonic status conference on October 20, 2016, wherein the Court  
3 discussed the pending motions and scheduling for the remainder of the case. Plaintiff orally  
4 presented a motion to appoint counsel, which was denied without prejudice for reasons stated on  
5 the record. Separate orders will issue concerning the scheduling of a settlement conference,  
6 pretrial conference, trial, and related deadlines. Findings and recommendations will be issued  
7 separately concerning Plaintiff's request for an emergency restraining order (Doc. 54). For the  
8 reasons stated at the hearing and in this order, Plaintiff's discovery motion (Doc. 48) is denied.

9 **II. DISCUSSION**

10 **A. Photographs**

11 Plaintiff requests an order requiring Defendant Chavez to produce certain photographs  
12 that were attached to the Baylor CIR and RVR and sanctions for failing to produce the  
13 photographs. (ECF No. 48.) Plaintiff argues that Defendant Chavez deliberately withheld the  
14 photographic evidence that would have assisted Plaintiff in opposing Defendant Chavez's  
15 motion for summary judgment, and as a result, sanctions should be imposed. (*Id.*, p. 2.)

16 Defendant Chavez responds by stating that the photographs were not produced because it  
17 was unclear whether Plaintiff sought the photographs at the time of the May 17 hearing. (ECF  
18 No. 49, p. 3.) Defendant Chavez further explains that Plaintiff never raised an issue concerning  
19 the photographs, and they were always available for inspection with Plaintiff's correctional  
20 counselor. (*Id.*) Although it is true that the photographs were part of the CIR that was ordered  
21 produced, Defendant Chavez notes that the photographs were in a separate entry on his privilege  
22 log. (*Id.*) With the filing of his response, Defendant Chavez also produced copies of the  
23 photographs to Plaintiff. (*Id.*)

24 The Court finds it troubling that these documents were not previously produced to  
25 Plaintiff. The photographs were plainly relevant to Plaintiff's case. Although this case has  
26 already moved passed summary judgment, the photographs would have been beneficial to  
27 Plaintiff's response to the pending motion for summary judgment.

28 However, the Court does not find evidence of bad faith or intentional disregard of a court

1 order required to impose sanctions. Defendant Chavez’s counsel indicated that he evaluated the  
2 photographs and considered production of the photographs to be a security concern. (ECF No.  
3 49-1, p.2 ¶ 6.) Thus, the photographs, although technically part of the CIR ordered produced,  
4 were withheld pursuant to official information privilege and separately listed on Defendant  
5 Chavez’s privilege log. (*Id.*) The privilege log indicated that Plaintiff could have requested to  
6 view the photographs as early as September 4, 2015. (*Id.* ¶ 7). Ultimately, Plaintiff was not  
7 prejudiced by this oversight. Plaintiff now has the photographs, and this case has proceeded past  
8 dispositive motions.

9 **B. Inmate McCloud Deposition**

10 Plaintiff also seeks a court order requiring the deposition of inmate McCloud in order to  
11 explain inconsistencies between a document that Plaintiff viewed at an earlier date and the  
12 McCloud’s staff complaint, Appeal #KVSP-0-11-01157, later produced to Plaintiff. Plaintiff  
13 indicates that inmate McCloud, a third-party, showed Plaintiff a copy of the appeal, and the  
14 appeal mentioned the security concerns relevant to Plaintiff’s case. Plaintiff states that he wrote  
15 down everything on McCloud’s appeal, and then he turned over his only copy to counsel for the  
16 defendants around the time of his deposition. After Plaintiff received the copy of McCloud’s  
17 appeal from Defendant Chavez, the document did not contain the information concerning  
18 Plaintiff that he believes he viewed earlier. Therefore, Plaintiff believes that an attachment to the  
19 appeal may have been withheld by Defendant Chavez. To resolve this situation, Plaintiff would  
20 like inmate McCloud to be deposed by counsel for the defendants with a list of questions  
21 provided by Plaintiff, who does not want to depose inmate McCloud himself.

22 When faced with a Rule 34 request for production, the responding party must produce or  
23 permit inspection of documents in their possession, custody, or control. Fed. R. Civ. P. 34. A  
24 responding party’s obligation in locating responsive documents is appropriately summarized as  
25 follows:

26 “[A] party responding to a Rule 34 production request is under an affirmative  
27 duty to seek that information reasonably available to it from its employees,  
28 agents, or others subject to its control.” *A. Farber & Partners, Inc. v. Garber*, 234  
F.R.D. 186, 189 (C.D.Cal. 2006) (internal quotations and citations omitted). A

1 reasonable inquiry requires, “at a minimum, a reasonable procedure to distribute  
2 discovery requests to all employees and agents of the [party] potentially  
3 possessing responsive information, and to account for the collection and  
4 subsequent production of the information to [the opposing party].” *Id.* (quoting  
5 *Nat'l Ass'n of Radiation Survivors v. Turnage*, 115 F.R.D. 543, 556 (N.D.Cal.  
6 1987)). Where a party does not have responsive documents, it must come forward  
7 with an explanation of the search conducted “with sufficient specificity to allow  
8 the court to determine whether the party made a reasonable inquiry and exercised  
9 due diligence.” *Rogers v. Giurbino*, 288 F.R.D. 469, 485 (S.D.Cal. 2012).  
10 Information regarding the search conducted should be provided through  
11 declarations under oath detailing the nature of the efforts to locate responsive  
12 documents. *See Meeks v. Parsons*, No. 1:03-cv-6700-LJO-GSA, 2009 WL  
13 3003718, at \* 4 (E.D.Cal. Sept.18, 2009) (citing *A. Farber & Partners Inc.*, 234  
14 F.R.D. at 190).

15 *McKeen-Chaplin v. Provident Sav. Bank*, FSB, No. 2:12-CV-03035 GEB AC, 2015 WL 502697,  
16 at \*8 (E.D. Cal. Feb. 5, 2015).

17 Here, Defendant Chavez informed the Court that he has not found any evidence that an  
18 attachment to the McCloud appeal ever existed. Counsel for Defendant Chavez contacted the  
19 KVSP litigation coordinator, conducted further search through additional channels, and could not  
20 locate the attachment. The Court concludes that Defendant Chavez has satisfied his Rule 34  
21 obligations with respect to this document by conducting a reasonable search. Additionally, the  
22 procedure proposed by Plaintiff to depose McCloud is unworkable for a number of reasons.  
23 First, the discovery deadline has passed. Additionally, Plaintiff cannot require the defendants to  
24 pay the costs of the deposition, including the cost of hiring a court reporter, and Plaintiff cannot  
25 compel opposing counsel to ask a set of questions on his behalf.

26 On a related note, Plaintiff indicated at the October 20 hearing that he no longer had a  
27 copy of his own handwritten copy of McCloud’s appeal. Counsel for Defendant Chavez  
28 indicated that this document was made part of the exhibits to Plaintiff’s deposition. Defendant  
Chavez is directed to send a copy of the exhibit to Plaintiff within 14 days of this order.

### **C. Defendant Statements**

Finally, Plaintiff requests a court order requiring Defendants’ statements concerning  
Appeal No. KVSP-0-11-01299 to be produced. (ECF No. 48.) Production of these documents  
was ordered on June 22, 2016. (ECF No. 47.) The documents were then produced on June 23.

1 (ECF No. 49-1, p. 2 ¶10.) Thus, it appears to the Court that the documents were in the process of  
2 being produced to Plaintiff by the time Plaintiff filed the instant motion on June 27.  
3 Accordingly, this dispute is now moot.

4 **III. CONCLUSION**

5 For the reasons stated at the hearing and in this order, Plaintiff's discovery motion (Doc.  
6 48) is denied. Defendant Chavez shall send Plaintiff a copy of Plaintiff's handwritten notes  
7 concerning inmate McCloud's appeal within 14 days of this order.

8  
9  
10 IT IS SO ORDERED.

11 Dated: October 24, 2016

12 /s/ Eric P. Gray  
13 UNITED STATES MAGISTRATE JUDGE  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28