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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

DARRELL HARRIS,
Plaintiff,
v.
S. ESCAMILLA,
Defendant.

Case No. 1:13-cv-1354-DAD-MJS (PC)

**ORDER DENYING PLAINTIFF'S
MOTION FOR LEAVE TO STAY THE
PROCEEDINGS AND REOPEN
DISCOVERY**

(ECF No. 78)

**ORDER GRANTING PLAINTIFF'S
REQUEST FOR JUDICIAL NOTICE**

(ECF No. 94 EX. A)

**ORDER DIRECTING PLAINTIFF TO
FILE AN OPPOSITION OR STATEMENT
OF NON-OPPOSITION TO
DEFENDANT'S SUMMARY JUDGMENT
MOTION WITHIN TWENTY-ONE (21)
DAYS OF THIS ORDER**

TWENTY-ONE (21) DAY DEADLINE

Plaintiff is a state prisoner proceeding pro se and in forma pauperis in this civil rights action brought pursuant to 28 U.S.C. § 1983. The case proceeds against Defendant Escamilla for violating Plaintiff's First Amendment right to exercise his

1 religion.¹ Plaintiff's allegations stem from a cell search on January 14, 2013. (ECF Nos.
2 9-10, 33 & 26.)

3 Before the Court is Plaintiff's March 21, 2016 "motion for stay of proceedings to
4 complete discovery" (sic), brought pursuant to Federal Rule of Civil Procedure 56(d).²
5 (ECF No. 78) (hereafter "Pl. Mot. to Stay.") Defendant filed an opposition on April 11,
6 2016. (ECF No. 82) (hereafter "Def.'s Opp'n.") Plaintiff's reply was filed on May 26,
7 2016. (ECF No. 94) (hereafter "Pl. Reply.") The matter is submitted pursuant to Local
8 Rule 230(/).

9 **I. PROCEDURAL HISTORY**

10 This action proceeds on Plaintiff's October 31, 2013, first amended civil rights
11 complaint. (ECF No. 9.)

12 The Court issued a discovery and scheduling order on April 1, 2015, setting a
13 discovery deadline of December 1, 2015 and a dispositive motion deadline of February
14 8, 2016. (ECF No. 39.) On February 8, 2016, Defendant filed a motion for summary
15 judgment. (ECF No. 69.) On February 22, 2016, Plaintiff filed a motion for a sixty-day
16 extension of time to respond to Defendant's motion, which was granted. (ECF Nos. 72
17 & 73.) Plaintiff has not filed an opposition to Defendant's motion for summary judgment.
18 Instead, Plaintiff has filed the instant motion requesting the Court stay the proceedings
19 to complete discovery, on the grounds that he lacks sufficient evidence to file an
20 opposition. (ECF No. 78.)

21 **II. PLAINTIFF'S ALLEGATIONS**

22 At the time of the events underlying this action, Plaintiff was incarcerated at
23 California State Prison ("CSP-Corcoran") in Corcoran, California. Plaintiff was
24 transferred to the California Institute for Men ("CIM") in Chino, California, on October 27,
25 2014, and he is currently held there.

26 _____
27 ¹ On January 25, 2016, this Court recommended dismissal of Plaintiff's Fourteenth Amendment Equal
28 the Equal Protection claim is not a subject of the motion for summary judgment at issue here.

² Formerly Fed. R. Civ. P. 56(f).

1 Plaintiff alleges that Defendant Escamilla searched Plaintiff's cell on January 14,
2 2013, outside of Plaintiff's presence. When Plaintiff returned to his cell, he found his
3 Quran had been kicked under his bed and defiled by a boot mark. Plaintiff's cellmate,
4 who witnessed the search, told Plaintiff that Defendant Escamilla was responsible for
5 the search.

6 **III. MOTION TO STAY PROCEEDINGS TO REOPEN DISCOVERY**

7 **A. Legal Standard**

8 Federal Rule of Civil Procedure 56(d) permits the Court to delay consideration of
9 a motion for summary judgment to allow parties to obtain discovery to oppose the
10 motion. When a motion for summary judgment is filed "before a party has had any
11 realistic opportunity to pursue discovery relating to its theory of the case," a Rule 56(d)
12 motion should be freely granted. Burlington N. Santa Fe R.R. Co. v. Assiniboine and
13 Sioux Tribes of the Fort Peck Reservation, 323 F.3d 767, 773 (9th Cir. 2003).

14 A party asserting that discovery is necessary to oppose a motion for summary
15 judgment "shall provide a specification of the particular facts on which discovery is to be
16 had or the issues on which discovery is necessary." Local Rule 260(b). However, where
17 "no discovery whatsoever has taken place, the party making a Rule 56[(d)] motion
18 cannot be expected to frame its motion with great specificity as to the kind of discovery
19 likely to turn up useful information, as the ground for such specificity has not yet been
20 laid." Burlington N., 323 F.3d at 774. "The Courts which have denied a Rule 56[(d)]
21 application for lack of sufficient showing to support further discovery appear to have
22 done so where it was clear that the evidence sought was almost certainly nonexistent or
23 was the object of pure speculation." VISA Int'l. Serv. Ass'n v. Bankcard Holders of Am.,
24 784 F.2d 1472, 1475 (9th Cir. 1986) (citation omitted).

25 Where a party requests to reopen discovery after discovery has closed, the
26 request also must meet the requirements of Federal Rule of Civil Procedure 16. District
27 courts must enter scheduling orders that "limit the time to join other parties, amend the
28 pleadings, complete discovery, and file motions." Fed. R. Civ. P. 16(b)(3)(A). Once

1 entered by the court, a scheduling order “controls the course of the action unless the
2 court modifies it.” Fed. R. Civ. P. 16(d). Scheduling orders are intended to alleviate
3 case management problems. Johnson v. Mammoth Recreations, Inc., 975 F.2d 604,
4 610 (9th Cir.1992). As such, a scheduling order is “not a frivolous piece of paper, idly
5 entered, which can be cavalierly disregarded by counsel without peril.” Id. (quoting
6 Gestetner Corp. v. Case Equip. Co., 108 F.R.D. 138, 141 (D. Maine 1985)). Good
7 cause must be shown for modification of the scheduling order. Fed. R. Civ. P. 16(b)(4).

8 The Ninth Circuit explained:

9 Rule 16(b)'s “good cause” standard primarily considers the
10 diligence of the party seeking the amendment. The district
11 court may modify the pretrial schedule if it cannot reasonably
12 be met despite the diligence of the party seeking the
13 extension. Moreover, carelessness is not compatible with a
14 finding of diligence and offers no reason for a grant of relief.
15 Although the existence of a degree of prejudice to the party
16 opposing the modification might supply additional reasons to
17 deny a motion, the focus of the inquiry is upon the moving
18 party’s reasons for seeking modification. If that party was not
19 diligent, the inquiry should end.

16 Johnson, 975 F.2d at 609 (internal quotation marks and citations omitted). Therefore,
17 parties must “diligently attempt to adhere to the schedule throughout the course of the
18 litigation.” Jackson v. Laureate, Inc., 186 F.R.D. 605, 607 (E.D. Cal. 1999). The party
19 requesting modification of a scheduling order may be required to show:

20 (1) that she was diligent in assisting the Court in creating a
21 workable Rule 16 order, (2) that her noncompliance with a
22 Rule 16 deadline occurred or will occur, notwithstanding her
23 diligent efforts to comply, because of the development of
24 matters which could not have been reasonably foreseen or
25 anticipated at the time of the Rule 16 scheduling conference,
26 and (3) that she was diligent in seeking amendment of the
27 Rule 16 order, once it become apparent that she could not
28 comply with the order.

Id. at 608 (internal citations omitted).

1 **B. Plaintiff's Arguments**

2 Plaintiff seeks an order staying the proceedings for four months and reopening
3 discovery to communicate with several inmate witnesses prior to opposing Defendant's
4 summary judgment motion. He also seeks an order directing Defendant to facilitate
5 communication between him and these witnesses.

6 As to the latter issue, first, it appears the institution provided Plaintiff the CDCR
7 numbers and locations of the inmate witnesses on April 16, 2016, and as of May 12,
8 2016, gave Plaintiff initial approval to communicate with them in writing. See Pl. Reply
9 Ex. D, "Requests for Correspondence Approval." Thus, it does not appear Plaintiff
10 actually needs assistance facilitating this communication. Indeed, Plaintiff concedes
11 that the process of communicating with them "appears to be underway." Pl. Reply at
12 26.

13 Plaintiff gives a list of reasons why he could not seek this discovery earlier:
14 health issues; movement between facilities; lack of access to the law library; inefficient
15 prison mail system; inconvenient timing of his deposition; having to file or respond to an
16 onerous number of motions; and Defendant's evasiveness in responding to Plaintiff's
17 discovery requests. Pl. Reply at 5, 23.

18 Plaintiff states that he did not request permission to correspond with these
19 inmates earlier because he did not know where they were incarcerated and thus could
20 not request approval for correspondence as required by the California Code of
21 Regulations. Pl. Reply Ex. D, "May 18, 2016 Decl. D. Harris." He alleges he had no
22 way of learning the inmates' whereabouts because he was incarcerated and believed
23 that seeking help from someone outside the prison would have been "illegal."³ Id.
24 Plaintiff alleges that he had been asking correctional counselors since October 2014
25 how to communicate with inmates but only recently learned the correct procedures. Id.
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27 _____
28 ³ The CDCR maintains a free, public website where individuals may look up the CDCR numbers and facilities of any prison inmate in California. See <http://inmatelocator.cdcr.ca.gov>.

1 Below, the Court will summarize Plaintiff's proffered testimony as to each
2 witness.

3 **1. Inmate Rudy Tellez**

4 Mr. Rudy Tellez, who was Plaintiff's cellmate on the date of the cell search in
5 question, has firsthand knowledge of Defendant Escamilla's actions and statements
6 during the search. Sometime after the search, Mr. Tellez signed a declaration in which
7 he described it in detail. Pl. Mot. to Stay Ex. B,⁴ "Decl. of R. Tellez." The declaration is
8 not dated.

9 In his declaration, Mr. Tellez writes that on January 14, 2013, he was transferred
10 to Plaintiff's cell, 3c03 138 up. Id. Mr. Tellez had never met Plaintiff before the transfer.
11 Id. When Mr. Tellez arrived in his new cell, Plaintiff was not present. Id. Shortly after,
12 floor officer Defendant Escamilla searched the cell even though Officer Sanchez had
13 already searched it. Id. Mr. Tellez describes Defendant Escamilla's behavior as rude
14 and abrasive; he seemed "angry about something." Id. Mr. Tellez observed Defendant
15 Escamilla throw Plaintiff's legal work on the floor and spread it around with his foot as if
16 looking for something. Id. Mr. Tellez then saw Defendant Escamilla pick up Plaintiff's
17 Quran, which was in a gray cover, and dump the Quran out of the cover and onto the
18 floor and kick it under the bed. Id. While Defendant Escamilla was searching the cell,
19 Mr. Tellez heard him say something to Officer Sanchez. Id. Mr. Tellez, fearing Plaintiff
20 would blame his new cellmate for the mess, immediately asked Defendant Escamilla to
21 give him a cell search slip. Id. Defendant Escamilla told Mr. Tellez to "work it out with
22 [his] cellie." Id. Mr. Tellez left the cell in its state of disrepair, and when Plaintiff
23 returned to the cell, Mr. Tellez immediately told Plaintiff that Defendant Escamilla was
24 responsible for the mess. Id. Mr. Tellez reports that Defendant Escamilla did not give
25 Plaintiff a cell search slip until twenty-four hours later. Id.

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28 ⁴ Plaintiff actually left this exhibit sheet blank, however as this exhibit follows Exhibit A the Court will refer to it as Exhibit B.

1 During Plaintiff's November 19, 2015 deposition, Plaintiff testified that Mr. Tellez
2 told him a few weeks after the cell search that he heard Defendant Escamilla refer to
3 Plaintiff as a "Black raghead Muslim terrorist" while he was searching Plaintiff's
4 belongings. Pl. Reply Ex. C, "Tr. of Pl. Dep. Test." at 117:6-19. Mr. Tellez told Plaintiff
5 that he did not disclose this information earlier due to his fear of reprisal from Defendant
6 Escamilla. Id. at 119:1-12. At his deposition, Plaintiff conceded that Mr. Tellez already
7 stated he did not wish to testify further as to the cell search, but maintains that Mr.
8 Tellez's reticence was due to his fear of retaliation from Defendant Escamilla. Id. at
9 165:12-166:1. Plaintiff argues that as Mr. Tellez is no longer incarcerated in CSP-
10 Corcoran, he has no need to fear retaliation and will therefore speak freely about this
11 case. Pl. Mot. to Stay at 6-7.

12 **2. Inmate Barns**

13 Plaintiff believes Mr. Barns will testify that Defendant Escamilla desecrated his
14 own Quran during a cell search several weeks after January 14, 2013, an incident which
15 led Mr. Barns to file a 602 against Defendant Escamilla. Pl. Mot. to Stay at 5. Plaintiff
16 also claims that Mr. Barns witnessed the January 14, 2013 search of Plaintiff's cell and
17 can testify as to Defendant Escamilla's demeanor during the cell search, which Mr.
18 Barns will describe as angry and hateful towards Muslims. Pl. Reply at 13. Plaintiff
19 states that to the best of Plaintiff's knowledge, Mr. Barns is currently on parole and living
20 with his family in Santa Clarita. Pl. Reply at 14.

21 **3. Inmate Larry Banks**

22 Plaintiff claims Mr. Banks witnessed the aftermath of the cell search on January
23 14, 2013 and spoke to Mr. Tellez about the search afterward, although Mr. Banks
24 himself was unable to see inside Plaintiff's cell during the search. Pl. Mot. to Stay at 6.
25 Mr. Banks would also have information pertaining to the search of Mr. Barns' cell
26 several weeks later. Id. at 7. Mr. Banks has had prior personal experiences with
27 Defendant Escamilla and would testify as to Defendant Escamilla's habit of destroying
28 inmates' cells during cell searches. Pl. Reply at 15.

1 **4. Inmate Roberto Ballard**

2 Plaintiff attaches two written statements from Mr. Roberto Ballard to his motion.
3 The first statement, dated August 30, 2013, details a search of Mr. Ballard’s cell on July
4 19, 2013, during which Defendant Escamilla left Mr. Ballard’s cell in a state of utter
5 disrepair. Pl. Mot. to Stay Ex. B, “Aug. 30, 2013 Decl. R. Ballard.” In the second
6 statement, dated October 8, 2013, Mr. Ballard states that on January 19, 2013⁵, he was
7 housed directly across from Plaintiff’s cell. Pl. Mot. to Stay Ex. B, “Oct. 8, 2013 Decl. R.
8 Ballard.” Mr. Ballard observed Defendant Escamilla conduct a “routine” search of
9 Plaintiff’s cell. Id. Mr. Ballard saw Defendant Escamilla throw a personal religious
10 book onto the floor during the search. Id. Defendant Escamilla also left Plaintiff’s other
11 personal property in a state of disarray. Id. Mr. Ballard describes Defendant Escamilla’s
12 actions as “obviously deliberate with malicious intent as his goal.” Id.

13 Mr. Ballard would also testify to his personal knowledge of Defendant Escamilla’s
14 disrespectful treatment of inmates’ religious property. Pl. Reply at 17.

15 **5. Inmate Cisneros**

16 Plaintiff believes Mr. Cisneros may have seen or heard about the cell search on
17 January 14, 2013. Pl. Mot. to Stay at 8. He also attaches a written statement by Mr.
18 Cisneros, dated May 1, 2013, in which Mr. Cisneros describes in detail a search
19 conducted by Defendant Escamilla in Mr. Cisneros’ own cell. Pl. Mot. to Stay Ex. B,
20 “Decl. R. Cisneros.” Mr. Cisneros writes that on February 18, 2013, Defendant
21 Escamilla, along with CO Clausen, searched Mr. Cisneros’ cell. Id. During the search,
22 Defendant Escamilla removed legal books, dictionaries, and other items from Mr.
23 Cisneros’ cell, and left Mr. Cisneros’ cell in such a state of disarray that it took Mr.
24 Cisneros the rest of the day to put everything back where it belonged. Mr. Cisneros
25 writes that he harbors no animus against Defendant Escamilla, but rather does not
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28 ⁵ Presumably Mr. Ballard meant to write January 14, 2013.

1 understand why Defendant Escamilla chose to so thoroughly disrupt his personal
2 property during the cell search. Id.

3 Plaintiff further argues that Mr. Cisneros would testify as to his own personal
4 knowledge of Defendant Escamilla's improper treatment of other inmates' property
5 during cell searches due to the inmates' religion, race, or crimes. Pl. Reply at 21.

6 **6. Inmate Doug Bauer**

7 Plaintiff concedes Mr. Doug Bauer was not an eyewitness to the cell search and
8 Plaintiff does not seek to gain additional information from him. Mr. Bauer's testimony
9 will therefore not be further discussed.

10 **C. Defendant's Arguments**

11 Defendant objects that Plaintiff has not shown what new and relevant evidence
12 these inmate witnesses will provide and why or how it might help Plaintiff respond to
13 Defendant's summary judgment motion. Defendant contends that Plaintiff improperly
14 seeks to engage in a "fishing expedition" in the hopes of turning up new evidence
15 without articulating what this new evidence would be.

16 Defendant further claims that even if Plaintiff's inmate witnesses did possess
17 relevant information, Defendant would not be able to facilitate communication with them,
18 as the CDCR has established procedures for inmates who wish to correspond with
19 other inmates. See Cal. Code Regs. § 3139. Defendant argues that Plaintiff has failed
20 to show good cause for not following these procedures earlier in the litigation.

21 Finally, Defendant argues that Plaintiff was not diligent in obtaining information
22 from these inmates prior to the close of discovery, either on his own or through
23 Defendant. Defendant points out that in the eight months during which discovery
24 remained open, Plaintiff propounded two sets of requests for admissions and
25 interrogatories on Defendant, but never propounded discovery seeking information
26 about the inmate witnesses listed in the present motion. Defendant further argues that
27 Plaintiff's failure to obtain further statements from the inmate witnesses while they

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1 remained in CSP was inexcusable, particularly in light of the fact Plaintiff obtained
2 written statements from some witnesses even before he filed his complaint.

3 **C. Discussion**

4 **1. Plaintiff's Request for Defendant to Facilitate Communication**
5 **with Incarcerated Witnesses**

6 The Court need not consider Plaintiff's request for an order that Defendant
7 facilitate communication with incarcerated eyewitnesses, as Plaintiff has already
8 requested and received permission from Correctional Counselor Coleman to engage in
9 written communication with those witnesses.

10 **2. Plaintiff's Request That This Court Stay Proceedings Pending**
11 **Plaintiff's Communication With Inmate Witnesses**

12 The sole remaining issue before the Court is whether or not to grant Plaintiff's
13 request to stay the proceedings pending Plaintiff's communication with the listed
14 incarcerated witnesses. In deciding whether to grant Plaintiff's motion, the Court must
15 consider: (1) whether Plaintiff exercised diligence in pursuing this discovery before
16 discovery closed; and (2) whether the evidence Plaintiff seeks both exists and would
17 impact ruling on Defendant's summary judgment.

18 **a. Plaintiff's Diligence In Pursuing Discovery**

19 Plaintiff argues that a stay must be granted because he has not had a "realistic
20 opportunity to pursue discovery" in this case. The Court disagrees. This incident
21 occurred on January 14, 2013. In the following three year-plus time period, Plaintiff
22 obtained written statements from inmates Tellez, Ballard, Cisneros, and Bauer. Plaintiff
23 also remained cellmates with Mr. Tellez for several weeks after the cell search took
24 place. Plaintiff has not shown why he was unable to follow-up on these statements or
25 obtain more detailed statements from other inmates while they remained incarcerated in
26 the same institution as Plaintiff.

27 Plaintiff fails to show good cause for waiting so long to utilize the avenues
28 available to him under CDCR regulations to correspond with witnesses transferred out

1 of CSP. At least as early as October 2014, Plaintiff began investigating methods of
2 communicating with inmates at other institutions. The reasons given for not acting on
3 such information are not persuasive, particularly since Plaintiff has shown himself to be
4 quite capable of maneuvering through the litigation process. The Court is unable to find
5 that Plaintiff's failure to further contact the witnesses is "compatible with a finding of
6 diligence." Johnson, 975 F.2d at 609.

7 Furthermore, discovery opened on April 1, 2015. Over the course of discovery,
8 Plaintiff served Defendant with two requests for Admissions and Interrogatories and
9 filed two motions to compel. (ECF Nos. 51 & 61.) Within those requests, Plaintiff did not
10 ask Defendant to disclose the CDCR numbers and whereabouts of any inmate
11 witnesses, and indeed, did not propound a single question pertaining to inmates Bauer,
12 Ballard, Banks, or Cisneros. His excuse for not doing so is that Defendant had been so
13 unforthcoming during discovery. If Plaintiff had formally asked for and been denied
14 such information, he could have asked the Court for relief as he has done elsewhere in
15 this case. Similarly, if he needed more time to propound discovery to Defendant, he
16 could have asked for it. Indeed, the Court has granted seven motions for extensions of
17 time brought by Plaintiff in this case. (See ECF Nos. 53 and 56; 67 and 68; 72 and 73;
18 75 and 76; 88, 89, 90, and 91).

19 The Court finds Plaintiff has not shown he made a diligent effort to obtain the
20 requested discovery prior to the close of discovery. Mackey v. Pioneer Nat. Bank, 867
21 F.2d 520, 524 (9th Cir. 1989) ("A movant cannot complain if it fails diligently to pursue
22 discovery before summary judgment.")

23 **b. Necessity of the Testimony to Plaintiff's Opposition**

24 Though Plaintiff's lack of diligence justifies denial of this motion, the Court also
25 disagrees with Plaintiff's claim that the inmate witnesses have information essential to
26 Plaintiff's opposition to Defendant's summary judgment motion.

27 To defeat summary judgment, Plaintiff will have to show that there exists a
28 genuine issue of material fact as to whether Defendant violated a clearly established

1 constitutional right and whether Defendant's actions substantially burdened Plaintiff's
2 ability to practice his religion. Defendant argues that Plaintiff has failed to show that
3 Defendant substantially burdened Plaintiff's ability to exercise his religion. Def's Mot. for
4 Summ. J. (ECF No. 69-1.) Defendant also argues that the alleged conduct has not been
5 shown to violate a clearly established constitutional right and thus is qualifiedly immune.
6 Id.

7 Without additional discovery, Plaintiff can aver to his own observations as to what
8 happened in his cell during his absence. He has a statement from Mr. Tellez attributing
9 those happenings and specific acts to Defendant. To the extent Defendant denies
10 those acts, we may have a factual dispute. If so, summary judgment will address the
11 legal issue of whether Plaintiff's allegations, if believed, would support a finding for
12 Plaintiff. This latter issue focuses on the law and is not likely to be influenced by further
13 corroboration of Plaintiff's claims. From Plaintiff's proffers, the proposed additional
14 witnesses will do no more than corroborate Plaintiff's claims as to what Defendant did.
15 Plaintiff has not suggested otherwise or outlined what new and relevant evidence he
16 believes his inmate witnesses might offer.

17 In light of Plaintiff's failure to demonstrate diligence in obtaining this evidence
18 prior to the close of discovery, his failure to state with specificity what new and helpful
19 evidence these witnesses would disclose if discovery were reopened, and it not
20 appearing the proposed new evidence is necessary or helpful in responding to
21 Defendant's motion for summary judgement, Plaintiff's motion to stay the proceedings
22 for the purpose of reopening discovery pursuant to Rule 56(d) will therefore be denied.

23 **V. PLAINTIFF'S REQUEST FOR JUDICIAL NOTICE**

24 Plaintiff requests this Court take judicial notice of its own filings in this case. Pl.
25 Reply Ex. A, "Request for Judicial Notice." That motion will be granted.

26 **V. CONCLUSION AND ORDER**

27 Based on the foregoing, it is HEREBY ORDERED that:
28

1. Plaintiff's motion for leave to stay the proceedings and reopen discovery (ECF No. 78) is DENIED;
2. Plaintiff request for the Court to take judicial notice of its own filings (ECF No. 94, Ex. A) is GRANTED;
3. Plaintiff is afforded twenty-one (21) days from the date of service of this order in which to file his opposition to Defendant's motion for summary judgment; and
4. If Plaintiff fails to file an opposition or statement of non-opposition within twenty-one days, the Court will recommend that the action be dismissed, with prejudice, for failure to obey a court order and failure to prosecute.

IT IS SO ORDERED.

Dated: June 15, 2016

/s/ Michael J. Seng
UNITED STATES MAGISTRATE JUDGE