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7 UNITED STATES DISTRICT COURT
8 EASTERN DISTRICT OF CALIFORNIA
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10 JOSE J. PULIDO,

11 Plaintiff,

12 vs.

13 M. LUNES, et al.,

14 Defendants.

1:14-cv-01174-DAD-EPG-PC

ORDER FOLLOWING INITIAL
SCHEDULING CONFERENCE HELD ON
JUNE 29, 2016
(Resolves ECF No. 53.)

ORDER DENYING PLAINTIFF'S
MOTION TO STRIKE DEFENDANTS
CRUZ AND SHAW'S AFFIRMATIVE
DEFENSES
(ECF No. 47.)

ORDER DENYING PLAINTIFF'S
MOTION TO STRIKE DEFENDANT
LUNES' AFFIRMATIVE DEFENSES
(ECF No. 48.)

ORDER DENYING PLAINTIFF'S
MOTION FOR RECONSIDERATION
(ECF No. 49.)

**Telephonic Discovery Status Conference:
Oct. 17, 2016 at 2:00 p.m.
Courtroom 10 (EPG)**

24 **I. BACKGROUND**

25 Plaintiff, Jose J. Pulido ("Plaintiff"), is a state prisoner proceeding *pro se* and *in forma*
26 *pauperis* with this civil rights action pursuant to 42 U.S.C. § 1983.

27 This case now proceeds on the original Complaint filed by Plaintiff on July 28, 2014,
28 against defendants Sergeant M. Lunes, Correctional Officer Cruz, and Correctional Officer

1 Shaw (“Defendants”), on Plaintiff’s Eighth Amendment claims that Defendants were
2 deliberately indifferent to a serious risk to Plaintiff’s safety. (ECF No. 1.)

3 On April 27, 2016, defendants Cruz and Shaw filed an Answer to the Complaint. (ECF
4 No. 39.) On April 28, 2016, defendant Lunes filed an Answer to the Complaint. (ECF No. 40.)
5 On April 29, 2016, the Court issued an order requiring the parties to make initial disclosures
6 and setting a telephonic mandatory scheduling conference for June 29, 2016 at 11:00 a.m.
7 before Magistrate Judge Erica P. Grosjean. (ECF No. 41.) On June 15, 2016, Plaintiff filed a
8 notice of compliance with the initial disclosures requirement. (ECF No. 52.) On June 17,
9 2016, defendants Cruz and Shaw filed a notice of compliance with the initial disclosures
10 requirement (ECF No. 54.) On June 17, 2016, defendant Lunes filed a notice of compliance
11 with the initial disclosures requirement. (ECF No. 55.) On June 22, 2016, defendants Lunes,
12 Cruz, and Shaw filed Scheduling Conference Statements. (ECF Nos. 56, 57.)

13 Now pending are Plaintiff’s motion to strike defendants Cruz and Shaw’s affirmative
14 defenses (ECF No. 47), filed on May 20, 2016; Plaintiff’s motion to strike defendant Lunes’
15 affirmative defenses (ECF No. 48), filed on May 23, 2016; Plaintiff’s motion for
16 reconsideration of the Court’s order denying appointment of counsel (ECF No. 49), filed on
17 June 6, 2016; and Plaintiff’s request for status of discovery order (ECF No. 53), filed on June
18 15, 2016. Defendants have opposed Plaintiff’s motions to strike their affirmative defenses.
19 (ECF Nos. 50, 51.)

20 **II. STATUS CONFERENCE**

21 On June 29, 2016, at 11:00 a.m., a telephonic mandatory scheduling conference was
22 held before Magistrate Judge Erica P. Grosjean. Plaintiff appeared telephonically on his own
23 behalf, California Deputy Attorney General Andrew Whisnand appeared telephonically on
24 behalf of defendants Cruz and Shaw, and Tom Feher of LeBeau – Thelen, LLP appeared
25 telephonically on behalf of defendant Lunes. The parties discussed the status of this case, the
26 parties’ initial disclosures, Plaintiff’s pending motions, exhaustion of administrative remedies,
27 discovery, and further scheduling of this case.

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1 claims in this case. (ECF No. 48.) On June 8, 2016, defendant Lunes filed an opposition to the
2 motion and requested leave to file an amended answer withdrawing all but these eleven
3 affirmative defenses: (1) Failure to Exhaust Administrative Remedies, (2) Immunity/Qualified
4 Immunity, (3) Good Faith Performance of Official Duties, (4) Liability or Damages, If Any,
5 Was Caused by the Actions of Third Parties, (5) Liability or Damages, If Any, Was Caused by
6 an Intervening and/or Superseding Cause, (6) Assumption of the Risk, (7) Liability or
7 Damages, If Any, Was Caused by an Unavoidable Incident, (8) Failure to Reasonably Mitigate
8 Damages, (9) Unclean Hands, (10) Statute of Limitations, and (11) Plaintiff's Attempted
9 Suicide Was a Volitional Act. (ECF No. 50.)

10 At the hearing, the Court granted defendant Lunes' request to file an amended answer,
11 and ordered defendant Lunes to file the amended answer within seven days, including only the
12 eleven affirmative defenses listed above.² The Court found the eleven listed affirmative
13 defenses to be legally recognized and appropriately plead. In light of defendant Lunes'
14 expected amended answer, Plaintiff's motion to strike was denied.

15 **D. Parties' Initial Disclosures**

16 At the hearing, Plaintiff indicated that he has no issues with Defendants' initial
17 disclosures, and the Court found that Defendants had complied with the Court's initial
18 disclosures requirement.

19 Defense counsel questioned the adequacy of Plaintiff's initial disclosures. On June 15,
20 2016, Plaintiff filed notice that he "does not have any names, locations or other identifying
21 information of individuals who have information about the event described in plaintiff's
22 complaint." (ECF No. 52.) Defense counsel argued that Plaintiff needs to identify witnesses
23 and documents that might be used.

24 Plaintiff responded that his family recently sent him two documents related to his
25 habeas case. Plaintiff also identified witnesses including Nurse Davila who was at the hospital
26 the morning after Plaintiff attempted suicide; another (male) nurse who worked in the C-Yard
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28 ² Defendant Lunes filed the First Amended Answer on July 1, 2016. (ECF No. 60.)

1 crisis bed area and was present in the evening; and an unnamed doctor at the District Hospital
2 who stitched Plaintiff's wound(s). The Court ordered Plaintiff to supplement his initial
3 disclosures, within thirty days, to include all possible witnesses who may have relevant
4 information and documents that might be used.³

5 **E. Defendants' Assertion of Privileges**

6 At the hearing, the Court discussed Defendants' claim that certain documents withheld
7 from their initial disclosures are privileged under the official information privilege. On June
8 17, 2016, defendants Cruz and Shaw filed a Conference Statement which included a privilege
9 log and declaration in support of the privilege log. (ECF No. 56 at 11-20.) On June 22, 2016,
10 defendant Lunes filed a Conference Statement which included a privilege log. (ECF No. 57 at
11 6-8.)

12 Federal common law recognizes a qualified privilege for official information. Kerr v.
13 United States Dist. Ct. for N.D. Cal., 511 F.2d 192, 198 (9th Cir. 1975), aff'd, 426 U.S. 394
14 (1976). To determine whether the information sought is privileged, courts must weigh the
15 potential benefits of disclosure against the potential disadvantages. If the latter is greater, the
16 privilege bars discovery. Sanchez v. City of Santa Ana, 936 F.2d 1027, 1033-34 (9th Cir.
17 1990), as amended on denial of reh'g (Feb. 27, 1991), as amended on denial of reh'g (May 24,
18 1991) (citing Jepsen v. Florida Bd. of Regents, 610 F.2d 1379, 1384-85 (5th Cir. 1980);
19 Zaustinsky v. University of California, 96 F.R.D. 622, 625 (N.D. Cal. 1983); Kelly v. City of
20 San Jose, 114 F.R.D. 653, 668 (N.D. Cal. 1987) (discussing procedure for invoking the official
21 information privilege). *In camera* review is proper to determine whether withheld documents
22 are privileged. Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 788, 791-92
23 (D.C. Cir. 1971) ("*In camera* inspection of allegedly privileged documents . . . is a procedure
24 approved by the courts at least where . . . military and diplomatic secrets are not at issue.");
25 Breed v. U.S. Dist. Court for Northern Dist. of California 542 F.2d 1114, 1116 (9th Cir. 1976)

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28 ³ Plaintiff filed notice of compliance with the Court's order on July 1, 2016. (ECF Nos. 61, 62.)

1 (“Also, as required by Kerr, we recognize ‘that in camera review is a highly appropriate and
2 useful means of dealing with claims of governmental privilege.’”).

3 Defendants were ordered to submit the documents withheld from their initial
4 disclosures on the basis of the official information privilege, for *in camera* review within thirty
5 days, in both unredacted and redacted form, with argument why the documents are privileged.
6 Plaintiff may also submit legal argument, within thirty days, why the documents are not
7 privileged and Defendants should produce them.

8 **F. Exhaustion Issue**

9 At the hearing, Defendants argued that Plaintiff failed to exhaust his administrative
10 remedies, because his appeal was rejected as untimely at the third level of review during the
11 prison’s appeals process. Plaintiff argued that the appeals process was not available to him
12 because he was in the Los Angeles County Jail for proceedings in his habeas case and therefore
13 was unable to file a timely appeal.

14 The Court made no ruling on the exhaustion issue at the hearing. Defendants were
15 granted leave to file an exhaustion motion on or before September 14, 2016. Plaintiff’s
16 opposition to the motion is due within twenty-one days after the date of service of Defendants’
17 motion. Local Rule 230(l). Within thirty days, Plaintiff shall submit to the Court the
18 documents in his possession showing he was out to court during the relevant time.

19 **G. Discovery Schedule**

20 At the hearing, the Court granted the parties leave to conduct discovery for this action
21 immediately, with a deadline of December 16, 2016 in which to complete discovery, including
22 the filing of motions to compel. The parties may now propound written requests, issue third
23 party subpoenas, schedule depositions, and otherwise conduct discovery.

24 On October 17, 2016 at 2:00 p.m., a telephonic Discovery Status Conference shall be
25 held before Magistrate Judge Erica P. Grosjean in Courtroom 10. Counsel for Defendants Cruz
26 and Shaw is required to arrange for the participation of Plaintiff in the telephonic Discovery
27 Status Conference and to initiate the telephonic hearing at **(888)-251-2909**, Access Code
28 **1024453**. The parties are required to serve all discovery before the Discovery Status

1 Conference. No later than two weeks before the Discovery Status Conference, the parties are
2 required to file statements of pending discovery issues. Any opposition to the statements is due
3 no later than one week before the Discovery Status Conference. The Court directed the parties
4 not to file any motions to compel before the Discovery Status Conference, with the exception
5 of motions to compel related to exhaustion issues, which the parties *shall* file before the
6 Discovery Status Conference.

7 **H. Evidence of Defendants' Past Acts**

8 At the hearing, Plaintiff raised the issue of acquiring and using evidence of past
9 incidents involving Defendants that are similar to the incident alleged by Plaintiff in this case.
10 The Court did not limit Plaintiff from serving discovery on that issue. Nevertheless, the Court
11 advised Plaintiff that such evidence is usually not allowed, and directed Plaintiff to Rule 404 of
12 the Federal Rules of Evidence, which prohibits the admission of character evidence “to prove
13 that on a particular occasion the person acted in accordance with the character or trait” and
14 evidence of crimes, wrongs, or other acts “to show that on a particular occasion the person
15 acted in accordance with the character.” Fed. R. Evid. 404(a)(1), (b)(1).

16 **I. Further Schedule for this Action**

17 At the hearing, the Court established the following deadlines for the parties to this
18 action: September 14, 2016 for the filing of exhaustion motions; December 16, 2016 to
19 conduct nonexpert discovery, including the filing of motions to compel; January 13, 2017 for
20 expert disclosure; February 3, 2017 for rebuttal to expert disclosure; February 24, 2017 to
21 conduct expert discovery; and March 3, 2017 for the filing of pretrial dispositive motions.

22 The Court also set dates for a telephonic trial confirmation hearing (TTCH) and jury
23 trial for this case before District Judge Dale A. Drozd in Courtroom 5. The TTCH shall be held
24 on October 16, 2017 at 2:30 p.m. and jury trial shall commence on December 12, 2017 at 8:30
25 a.m.⁴

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⁴ A more detailed scheduling order is forthcoming.

