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8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA
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11 VANCE EDWARD JOHNSON,

12 Plaintiff,

13 vs.

14 BARAJAS,

15 Defendant.
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1:14-cv-01690-LJO-GSA-PC

ORDER GRANTING DEFENDANT
BARAJAS' MOTION TO COMPEL
(ECF No. 28.)

ORDER FOR PLAINTIFF TO RESPOND TO
DEFENDANT BARAJAS' REQUEST FOR
PRODUCTION OF DOCUMENTS, SET ONE,
WITHIN THIRTY DAYS

17 **I. BACKGROUND**

18 Vance Edward Johnson ("Plaintiff") is a state prisoner proceeding pro se and in forma
19 pauperis with this civil rights action pursuant to 42 U.S.C. § 1983. The case now proceeds with
20 the First Amended Complaint filed by Plaintiff on August 21, 2015, against defendant
21 Correctional Officer M. Barajas ("Defendant"), on Plaintiff's claim for adverse conditions of
22 confinement under the Eighth Amendment. (ECF No. 9.)

23 On January 31, 2017, the court issued a Discovery and Scheduling Order establishing
24 deadlines of June 30, 2017, for completion of discovery, including the filing of motions to
25 compel, and September 1, 2017, for the parties to file pretrial dispositive motions. (ECF No.
26 27.)

27 On May 2, 2017, Defendant filed a motion to compel responses to Defendant's Request
28 for Production of Documents, Set One. (ECF No. 28.) Plaintiff has not filed an opposition to

1 the motion to compel.

2 **II. MOTION TO COMPEL**

3 **A. Legal Standards**

4 **Rule 26(b) - Scope of Discovery**

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.¹ 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 **Rule 34 - Production of Documents**

14 Under Rule 34(a), “any party may serve on any other party a request to produce and
15 permit the party making the request . . . to inspect and copy any designated documents . . .
16 which are in the possession, custody or control of the party upon whom the request is served.”
17 Fed. R. Civ. P. 34(a)(1). “[A] party need not have actual possession of documents to be
18 deemed in control of them.” Clark v. Vega Wholesale Inc., 181 F.R.D. 470, 472 (D.Nev. 1998)
19 quoting Estate of Young v. Holmes, 134 F.R.D. 291, 294 (D.Nev. 1991). “A party that has a
20 legal right to obtain certain documents is deemed to have control of the documents.” Clark, 81
21 F.R.D. at 472. Under Rule 34(b), the party to whom the request is directed must respond in
22 writing that inspection and related activities will be permitted as requested, or state an objection
23 to the request, including the reasons. Fed. R. Civ. P. 34(b)(2). Also, “[a] party must produce
24 documents as they are kept in the usual course of business or must organize and label them to
25 correspond to the categories in the request.” Fed. R. Civ. P. 34(b)(E)(I).

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27 ¹“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 (2) the fact is of consequence in determining the action.” Fed. R. Evid. 401.

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2 **Court's Scheduling Order**

3 The court's Scheduling Order of January 31, 2017, instructed the parties that
4 "[r]esponses to written discovery requests shall be due 30 calendar days after the request is
5 served." (ECF No. 27 at 2:5.) The parties were also informed that "Local Rule 251 and the
6 requirements set forth in Federal Rules of Civil Procedure 26 and 37– that a party certify he/she
7 has conferred in good faith or attempted to confer with the opponent in an effort to resolve the
8 dispute prior to seeking court action – shall not apply unless otherwise ordered. Nevertheless,
9 voluntary compliance with this provision of Federal Rules of Civil Procedure 26 and 37 is
10 encouraged." (Id. at 2:18-21.)

11 **Rule 37 - Motions to Compel**

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

22 **B. Defendant's Motion**

23 Defendant seeks an order compelling Plaintiff to respond to Defendant's Request for
24 Production of Documents, Set One. Defendant asserts that Plaintiff failed to respond at all to
25 the Request. Defendant provides evidence that on February 17, 2017, defense counsel served
26 Defendant's Request for Production of Documents, Set One, on Plaintiff. (Declaration of
27 Joseph R. Wheeler, ECF No. 28-2 ¶2 & Exh. A.) Pursuant to the court's Discovery and
28 Scheduling Order, Plaintiff's responses were due no later than March 22, 2017. (Id. ¶3.) On

1 April 5, 2017, defense counsel mailed Plaintiff a letter in an attempt to confer in good faith
2 regarding his overdue responses, informing Plaintiff that his responses were late and requesting
3 that he provide counsel with the responses as soon as possible. (Id. at ¶4 & Exh. B.) As of
4 May 2, 2017, Plaintiff had not provided any response to the Request for Production of
5 Documents nor the meet and confer letter. (Id. at ¶5.)

6 **C. Discussion**

7 Plaintiff has not opposed Defendant's motion to compel. Based on the evidence set
8 forth above by Defendant, the court finds that Plaintiff failed to timely respond to Defendant's
9 Request for Production of Documents, Set One, thus waiving any objections. Therefore,
10 Defendant's motion to compel shall be granted.

11 **III. CONCLUSION**

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

- 13 1. Defendant Barajas' motion to compel, filed on May 2, 2017, is GRANTED;
- 14 2. Plaintiff is required to respond to Defendant's Request for Production of
15 Documents, Set One, within thirty (30) days of the date of service of this order;
- 16 3. No objections to the discovery requests are permitted; and
- 17 4. Plaintiff's failure to comply with this order shall result in a recommendation that
18 this action be dismissed.

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20 IT IS SO ORDERED.

21 Dated: September 29, 2017

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