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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

JARED M. VILLERY,  
Plaintiff,  
v.  
JAY JONES, ET. AL.,  
Defendants.

Case No. 1:15-cv-01360-DAD-HBK  
ORDER DENYING PLAINTIFF’S MOTION  
TO MODIFY DISCOVERY AND  
SCHEDULING ORDER TO EXTEND THE  
DISPOSITIVE MOTION DEADLINE  
(Doc. No. 132)

Pending before the Court is Plaintiff’s motion to modify the discovery and scheduling order, attaching his own declaration, filed May 27, 2021. (Doc. No. 132, “Motion”; Doc. No. 132 at 9-12, “Pl. declaration”). Defendants Escarcega, Jones, Schmidt, and Yerton filed a response opposing the Motion on June 17, 2021, including declaration of attorney Arthur B. Mark. (Doc. No. 135, “Response”; Doc. No. 135-1. “Def. declaration”). Plaintiff filed a reply, including exhibits, totaling 36 pages. (Doc. No. 139, “Reply”). This matter is ripe for review.

**I. SUMMARY**

Plaintiff seeks to enlarge the dispositive motion deadline. (Doc. No. 132 at 1). Specifically, Plaintiff requests the dispositive deadline be extended for sixty days from the later of: (1) the court’s resolution of Plaintiff’s pending discovery motions; or (2) after Defendants Jones and Escarcega

1 comply with the Court’s October 28, 2020 Order.<sup>1</sup> (Doc. No. 132 at 7). Plaintiff states he requires  
2 an extension to the dispositive deadline so he may “seek summary judgment against Defendant  
3 Schmidt” and “defend against any dispositive motions that the Defendants may file.” (*Id.* at 4).  
4 Plaintiff argues that two “ongoing discovery disputes” support his need for more time: (1)  
5 “additional discovery from Nelson” and (2) “to obtain the Office of Internal Affairs recordings-  
6 subject of the October 28, 2020 order.” (*Id.* at 4). Noting that the current dispositive motion  
7 deadline expired on May 26, 2021, Plaintiff submits that he cannot move for summary judgment  
8 or oppose Defendants’ pending motions for summary judgment with the above-referenced  
9 discovery disputes. (*Id.* at 6).

10 Defendants Yerton, Schmidt, Escarcega and Jones oppose Plaintiff’s Motion, providing a  
11 thorough overview of the case history. (*See* Doc. No. 135). Significantly, Defendants point out that  
12 the May 26, 2021 dispositive deadline applied *only* to Defendants Yerton, Schmidt, Escarcega, and  
13 Jones, not to Nelson. (*Id.* at 2) (emphasis added) (citing Doc. No. 118). Defendants argue that  
14 Plaintiff has failed to establish good cause and diligence to justify enlarging the dispositive motion  
15 deadline based on his claims that he needs to create handwritten transcripts of the audio recordings  
16 from the Office of Internal Affairs’ (hereinafter “OIA”) investigation, or the need to receive  
17 Defendant Nelson’s responses to his request for admission. (*Id.* at 1-2).

18 Regarding Plaintiff’s need to create handwritten transcripts, Defendants submit that only  
19 Nelson and Jones were interviewed for the OIA Investigation. (*Id.*). Escarcega, Yerton, and  
20 Schmidt were not interviewed. (*Id.*) So, to the extent Plaintiff claims he was unable to file a motion  
21 for summary judgment because he needs to create handwritten transcripts, Defendants argue that  
22 the acknowledged delay in receiving audible recordings of Nelson’s and Jones’s interviews does

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23 <sup>1</sup> The Court’s October 28, 2020 Order granted Plaintiff’s motion for reconsideration of the former  
24 magistrate judge’s order on Plaintiff’s motion to compel, directing Defendants to produce CDCR Internal  
25 Affairs documents set forth in Plaintiff’s RFP No. 18 and 24 and inmate complaints against staff in RFP  
26 No. 6. (*See* Doc. No. 105). In summary, RFPs 18 and 24 were identical, but merely directed at Defendant  
27 Jones and Escarcega, respectively, and generally stated: Please identify and produce any and all witness  
28 statements, statements from plaintiff, evidence gathered, investigation reports, and/or any other documents  
or recordings created in connection with the investigation conducted by CDCR Internal Affairs  
Investigator Magallan, into plaintiff’s allegation that he was moved into the cell with inmate Cedric Jones  
on July 24, 2014 in retaliation by CCI staff. Doc. No. 57 at 30.

1 not support why Plaintiff could not have filed a dispositive motion as to these other Defendants by  
2 the current deadline. (*Id.* at 2). Defendants further point out that since February 13, 2020, Plaintiff  
3 has had in his possession the OIA report containing detailed summaries of the recorded interviews  
4 from Jones and Nelson, which Plaintiff could use to oppose any summary judgment motions. (*Id.*  
5 at 3, 5-6).

6 Turning to address Plaintiff's claim that he needs Defendant Nelson's responses to  
7 Plaintiff's request for admissions, Defendants assert that Nelson's admissions are binding on  
8 Nelson only, not on the other defendants. (*Id.* at 4-5). In Reply, Plaintiff asserts that his request  
9 for production addressed in the Court's October 28, 2020 order was not only directed at Nelson's  
10 admissions, but also on a request for production of documents directed at Nelson.<sup>2</sup> (Doc. No. 139  
11 at 2).

## 12 II. APPLICABLE LAW

13 Federal Rule of Civil Procedure 1 requires that the Court the parties secure "the just, speedy,  
14 and inexpensive determination of every action." *Id.* Fed. R. Civ. P. 6(b) provides for extending  
15 deadlines for good cause shown, if the request to extend time is made before the original time, or  
16 its extension expires; or, on a motion made after the time has expired, if the party failed to act  
17 because of excusable neglect. Additionally, Fed. R. Civ. P. 16(b)(4) permits a court to modify a  
18 scheduling order for good cause shown and with the judge's consent.

19 Good cause requires less than manifest injustice but a focus on the diligence of the moving  
20 party and that party's reasons for seeking modification are the court's focus in determining whether  
21 to permit an enlargement of time. *Stoddart v. Express Services*, 2017 WL 3333994 \*1-\*2 (E.D.  
22 Ca. August 4, 2017) (other citations omitted). "A scheduling order is not 'a frivolous piece of  
23 paper, idly entered, which can be cavalierly disregarded by counsel without peril.'" *Id.* at 1 (other  
24 citations omitted). If the moving party fails to show diligence, the inquiry should end. *United*

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25 <sup>2</sup> In his Motion, Plaintiff notes needing more time because he did not have the Nelson and Jones recordings  
26 from the OIA interviews. (Doc. No. 132 at 4). After filing the Motion, Plaintiff received another copy of  
27 the recordings, which appears to be audible. (Doc. No. 135-1 at 4). In his Reply, Plaintiff modifies his  
28 argument to also include his former request for production of documents directed at Nelson. (Doc. No.  
139 at 2). Plaintiff's argument raised for the first time in a reply brief, not raised in the initial Motion, are  
waived. *Eberle v. City of Anaheim*, 901 F.2d 814, 818 (9th Cir. 1990).

1 *States for use and benefit of Chen v. K.O.O. Construction, Inc.*, 445 F. Supp.3d 1055, 1056 (S.D.  
2 Ca. May 8, 2020) (citing *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir.  
3 1992)).

### 4 III. DISCUSSION

5 At the outset, Defendant Nelson did not respond the instant Motion and the Court does not  
6 construe the Motion as seeking an extension of the dispositive motion deadline as to Defendant  
7 Nelson. The deadline for dispositive motions directed at Defendant Nelson has long expired.  
8 (*See* Doc. No. 118). More than a year ago, Defendant Nelson filed a motion for summary  
9 judgment on June 22, 2020. (Doc. No. 85). The Court’s February 4, 2021 denied Plaintiff’s prior  
10 motion to extend the case management deadlines as to Nelson but permitted a 14-day  
11 enlargement of time to file any motions to compel directed at Nelson. (Doc No. 118 at 5-6).  
12 Specifically, the February 4 Order determined as to Nelson that “Plaintiff has [not] exercised  
13 diligence to justify extending the case management deadlines for a fifth time against Nelson, over  
14 Nelson’s objection.” (*Id.* at 5). The Court further noted that absent Plaintiff filing a motion to  
15 compel, any opposition to Nelson’s motion for summary judgment was due within thirty days.<sup>3</sup>  
16 (*Id.* at 6). Thus, the Court does not construe the instant motion as seeking an extension of the  
17 dispositive deadline as to Defendant Nelson as the Court already denied Plaintiff that relief in its  
18 February 24, 2021 Order.

19 The Court’s February 4 Order, however, did grant Plaintiff’s unopposed motion extending  
20 both the discovery deadlines and the dispositive deadline as to Defendants Escarcega, Jones,  
21 Schmidt and Yerton—setting May 26, 2021 as the dispositive deadline for these Defendants. (*Id.*  
22 at 7). Plaintiff now again moves to extend the dispositive deadline as to Defendants Escarcega,  
23 Jones, Schmidt, and Yerton (hereinafter “these Defendants”). The Court finds Plaintiff has not  
24 established either due diligence or good cause to extend the dispositive motions deadline as to  
25 these Defendants.

26 Scheduling orders are at the heart of case management and intended to alleviate case

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28 <sup>3</sup> Because Plaintiff’s motion to compel remains pending, Plaintiff’s response to Nelson’s motion for  
summary judgment is not yet due.

1 management problems. *Jackson v. Laureate, Inc.*, 186 F.R.D. 605, 607 (E.D. Ca. 1999) (citations  
2 omitted). Good faith compliance with Federal Rule of Civil Procedure 16 “plays an important  
3 role in this process.” *Id.* (citations omitted). To demonstrate diligence under Rule 16’s “good  
4 cause” standard a movant may be required to show the following: (1) that he or she was diligent  
5 in assisting the Court in creating a workable Rule 16 order; (2) that non-compliance with a Rule  
6 16 deadline occurred or will occur, notwithstanding diligent efforts to comply, because of the  
7 development of matters which could not have been reasonable foreseen or anticipated at the time;  
8 and (3) that he or she was diligent in seeking amendment to the Rule 16 order, once it became  
9 apparent that he could not comply with the order. *Id.* at 607-608 (citations omitted).

10 Here, the case has been pending since 2015. As noted in the February 4 Order, discovery  
11 was supposed to end nearly two years ago—well before the current COVID-19 crisis. (Doc. No.  
12 118 at 3). Notably, Plaintiff filed the instant Motion on the eve of the deadline, which had  
13 already been extended. (*See* docket). Thus, Plaintiff waited until the last minute and has not  
14 shown diligence in seeking amendment to the case management and scheduling order deadline  
15 earlier.

16 Nor has Plaintiff shown that he assisted in creating a workable, modified Rule 16 order.  
17 Prior to the Court’s issuance of its February 4 Order extending the dispositive motions deadline as  
18 to these Defendants, the undersigned held a teleconference hearing on January 20, 2021. (*See*  
19 docket). Plaintiff represented during that January 20, 2021 hearing that he would *not* be filing  
20 any dispositive motions. Thus, merely six months ago, when Plaintiff had the opportunity to  
21 discuss the issues surrounding Plaintiff’s prior motion to modify the case management and  
22 scheduling order and discovery, Plaintiff did not alert the Court that he anticipated filing *any*  
23 dispositive motions. Plaintiff’s concern at that time was the outstanding discovery and  
24 responding to Defendant Nelson’s pending motion for summary judgment. Consequently,  
25 Plaintiff has not shown that he assisted in creating a workable, modified Rule 16 order.

26 Putting aside Plaintiff’s representation to the undersigned at the January 2021 status  
27 conference that he did not intend to file any dispositive motions, the two reasons Plaintiff relies  
28 on for now needing more time do not justify another extension of time in this case. Regarding

1 Nelson's responses to his requests for admission, Plaintiff makes no logical showing as to how  
2 Nelson's responses to admissions are necessary for him to file a dispositive motion directed at the  
3 Escarcega, Jones, Schmidt, and Yerton. Regarding the OIA recorded interviews of Jones and  
4 Nelson, Defendants acknowledge that the audio recordings previously provided to Plaintiff  
5 appear to have not worked. (Doc. No. 135-1 at 3-4). Significant, however, is the fact that  
6 Plaintiff has had summaries of these interviews available to him and has not shown how his  
7 transcribed version of these interviews are necessary to support his motion for summary  
8 judgment.


9 Further, as represented by the case history and the Defendants' declaration, Plaintiff has  
10 received responses and supplemental responses to his request for production addressed in the  
11 Court's October 28, 2020 order. Plaintiff was served 355 pages of documents including the OIA  
12 investigation report on February 13, 2020; a supplemental response containing emails on April 8,  
13 2020; and a supplemental response containing an unredacted OIA report. (Doc. No. 135-1, 1-2).

14 Turning to Plaintiff's deadlines *to respond* to the Defendants' respective dispositive  
15 motions, Plaintiff's deadline to respond to Nelson's summary judgment remains governed by the  
16 Court's February 4 Order providing him thirty days to respond after the Court rules on his motion  
17 to compel directed at Nelson. (Doc. No. 118 at 6) (permitting 30 days from date of ruling on  
18 motion to compel to file response to Nelson's summary judgment motion). Additionally,  
19 regarding the motion for summary judgment filed on behalf of Defendants Escarcega, Jones,  
20 Schmidt, and Yerton, the Court recently granted Plaintiff's motion to extend the time to file an  
21 opposition—setting the deadline as August 31, 2021. (Doc. No. 141).

22 Accordingly, it is **ORDERED**:

23 Plaintiff's motion to modify the scheduling order (Doc. No. 132) to extend the time to file  
24 dispositive motions against Defendants Escarcega, Jones, Schmidt, and Yerton is DENIED.

25 Dated: July 26, 2021

26   
27 HELENA M. BARCH-KUCHTA  
28 UNITED STATES MAGISTRATE JUDGE