

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

GARDELL COWART,
Plaintiff,
v.
RAHMAN, et al.,
Defendants.

1:16-cv-000004-AWI-SKO (PC)

ORDER ON PLAINTIFF’S MOTION TO COMPEL (Doc. 48)

FOURTEEN (14) DAY DEFENSE DEADLINE

ORDER ON DEFENDANTS’ MOTION TO MODIFY THE DISCOVERY AND SCHEDULING ORDER (Doc. 52)

Discovery Cut-Off Date: May 1, 2018
Dispositive Motion Deadline: July 1, 2018

I. BACKGROUND

Plaintiff is a prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. This action is proceeding on Plaintiff’s claims in the First Amended Complaint against Dr. Ngozi Ignibinoza, Dr. Scharffenberg, Dr. Kandkhorova, Dr. Ugwueze, and Dr. Sunduram for deliberate indifference to Plaintiff’s serious medical needs in violation of the Eighth Amendment. The Discovery and Scheduling Order issued on July 13, 2017, opening discovery and setting a discovery cut-off date of December 13, 2017, and a dispositive motion deadline of February 12, 2018. (Doc. 40.)

On August 29, 2017, Plaintiff filed a subpoena to obtain medical records for treatment he received at Dignity Health, Mercy Hospital, 2215 Truxtun Ave., Bakersfield, CA, 93301. (Doc. 43.) On October 3, 2017, an order issued indicating that Plaintiff met the requirements for the

1 issuance of a subpoena. (Doc. 44.) In that order, defense counsel was directed to file a statement
2 setting forth the steps taken to obtain the records sought by Plaintiff and stating whether they
3 would be willing to provide Plaintiff copies of any documents obtained. (Id.) In compliance with
4 that order, on October 12, 2017, defense counsel filed a statement indicating that records from the
5 facility where Plaintiff is currently housed were recently received, which included some, but not
6 all records from outside providers. (Doc. 45.) Defense counsel forwarded a copy of the records
7 received to Plaintiff that same week. (Id.) It therefore appeared that a subpoena was no longer
8 required and the order granting it was withdrawn. (Doc. 47.) Following receipt and review of
9 those records, Plaintiff was permitted to file a renewed request for a subpoena, if he believed they
10 were incomplete and was able to specify the missing records and their relevance to this action.

11 (Id.)

12 **II. PLAINTIFF'S MOTION TO COMPEL**

13 On November 3, 2017, Plaintiff filed a motion to compel indicating that upon review, he
14 discovered the set of records provided by defense counsel did not contain his complete records
15 from (1) Sierra Vista Regional Medical Center, 1010 Murray Ave., San Luis Obispo, CA 93405
16 (where the initial surgery was performed); and (2) Dignity Health Mercy Hospital, 2215 Truxtun
17 Ave., Bakersfield, CA 93301 (where Plaintiff received medical care and treatment when the
18 surgical site became infected), and Plaintiff's medical records from the California Department of
19 Rehabilitation and Corrections. (Doc. 48.) Plaintiff requests full copies of the records from these
20 facilities and \$2,000 as "reasonable expenses in obtaining this order." (Id., p. 4.)

21 Defendants response to Plaintiff's motion indicated that they subpoenaed Plaintiff's
22 medical records from the facility where Plaintiff is incarcerated, which should have included all
23 of the records from the outside providers sought by Plaintiff. (Doc. 50.) As such, Defendants did
24 not issue separate subpoenas for records from the outside providers. (Id.) Counsel for
25 Defendants indicated they would separately subpoena the records from Dignity Health/Mercy
26 Hospital and provide Plaintiff a copy. (Id.) To accommodate this, Defendant requested
27 extensions of the discovery cut-off to January 13, 2017, and the dispositive motion deadline to
28 March 12, 2018. (Id.) This motion is deemed submitted. L.R. 230(1).

1 **III. DEFENDANTS’ MOTION TO MODIFY SCHEDULING ORDER**

2 On December 28, 2017, Defendants filed a motion to modify the Discovery and
3 Scheduling Order, stating that on December 19, 2017, they received the subpoenaed records from
4 Dignity Health/Mercy Hospital which “consist of several hundred additional pages of medical
5 records.” (Doc. 52, p. 2.) Defendants request further extensions of the discovery deadline to
6 February 12, 2018, and the dispositive motion deadline to May 1, 2018. (Id., p. 4.)

7 Plaintiff opposes Defendants’ motion to modify the Discovery and Scheduling Order.
8 (Doc. 55.) Plaintiff acknowledges receipt of the “several hundred additional pages” of medical
9 records from defense counsel, but contends that defense counsel were evasive and untrustworthy
10 since counsel did not initially provide him a full copy of his medical records. (Id.) Plaintiff
11 further contends that Defendants’ production is still incomplete because the records provided do
12 not contain his records from the other facilities where he received care and treatment for his
13 infection—Sierra Vista Regional Medical Center in San Luis Obispo, California and San Joaquin
14 Hospital in Bakersfield, California. (Id.) Defendants’ reply does not address whether records
15 from either of these two facilities have been subpoenaed or provided to Plaintiff, focusing instead
16 on their diligence to obtain records once Plaintiff brought the incomplete nature of the records
17 from his facility to light, and the lack of prejudice to Plaintiff if the deadlines are extended as
18 requested. (Doc. 57.) This motion is deemed submitted. L.R. 230(l).

19 **IV. DISCUSSION**

20 **A. Plaintiff’s Request for Medical Records**

21 Federal Rule of Civil Procedure (“Rule”) 45 permits issuance of subpoenas for discovery
22 from nonparties equivalent to discovery from parties under Rule 34. See Adv. Comm. Note to
23 1991 Amendment to FRCP 45. Rule 34 governs discovery of designated documents,
24 electronically stored information, and designated tangible things subject to the provisions of Fed.
25 R. Civ. P. 26(b). *Meeks v. Parsons*, 2009 WL 3003718, *2 (E.D. Cal. 2009) (citing *Fahey v.*
26 *United States*, 18 F.R.D. 231, 233 (S.D.N.Y. 1955)). Rule 26(b)(1) establishes the scope of
27 discovery, stating in pertinent part:

28 Parties may obtain discovery regarding any nonprivileged matter that is relevant

1 to any party's claim or defense-including the existence, description, nature,
2 custody, condition, and location of any books, documents, or other tangible
3 things and the identity and location of persons having knowledge of any
4 discoverable matter. For good cause, the court may order discovery of any
5 matter relevant to the subject matter involved in the action. Relevant
6 information need not be admissible at trial if the discovery appears reasonably
7 calculated to lead to the discovery of admissible evidence.

8 Pursuant to Rule 34, the test for admissibility is the relevance of the requested material or
9 information. *Id.*, (citing *Weahkee v. Norton*, 621 F.2d 1080, 1082 (10th Cir.1980); *White v.*
10 *Jaegerman*, 51 F.R.D. 161, 162 (S.D.N.Y.1970); *Ceramic Corp. of Amer. v. Inka Maritime Corp.*,
11 *Inc.*, 163 F.R.D. 584 (C.D.Cal.1995)).

12 "The law [of discovery] begins with the presumption that the public is entitled to every
13 person's evidence." *Richards of Rockford, Inc. v. Pacific Gas & Elec. Co.*, 71 F.R.D. 388, 389
14 (N.D.Cal.1976). A nonparty may be compelled to produce documents and tangible things as
15 provided in Rule 45. Fed. R. Civ. P. 34(c). Assuming that the subpoena is properly constituted
16 and served, Rule 45 requires the subpoena's recipient to produce the requested information and
17 materials, provided the issuing party "take[s] reasonable steps to avoid imposing undue burden or
18 expense." Fed. R. Civ. P. 45(c)(1) and (d)(1).

19 Plaintiff has the right to subpoena documents from a third party that are relevant to the
20 claims upon which he proceeds in this action. Care and treatment for Plaintiff's medical
21 condition which is the subject of this action is clearly relevant for discovery purposes. Plaintiff
22 contends that he received care and treatment for the medical condition which is the subject of this
23 action at Dignity Health/Mercy Hospital, Sierra Vista Regional Medical Center and at San
24 Joaquin Hospital. All parties now appear to have received a full set of the records from Dignity
25 Health/Mercy Hospital. It does not appear however that either side has obtained the records from
26 the latter two facilities.¹

27 It is clear from the parties' pleadings on these discovery issues that the copy of Plaintiff's
28 records from the facility of his current incarceration was less than complete. Thus, the records of
Sierra Vista Regional Medical Center and San Joaquin Hospital are discoverable. Since the

¹ Defendants did not indicate in any of their filings whether they have obtained records from either or both of these facilities.

1 surgery which precipitated Plaintiff's claims occurred in 2015, only Plaintiff's records from 2015,
2 2016, and 2017 at these facilities needs to be obtained.

3 Plaintiff requests \$2,000 as "reasonable expenses in obtaining this order." (Doc. 48, p. 4).
4 The Court "may . . . apportion the reasonable expenses" incurred for discovery motions. Fed. R.
5 Civ. Pro. 37(a)(5)(C). Defendants did not specifically respond to Plaintiff's sanction request, and
6 instead address efforts to subpoena Plaintiff's records from Dignity Health/Mercy Hospital to
7 obtain a full set of Plaintiff's records and their production to Plaintiff. Defendants' efforts were
8 not unreasonable under the circumstances presented. The Court also notes that Plaintiff does not
9 present any evidence that prior to filing his motion to compel, he notified defense counsel that he
10 received treatment for infections at Sierra Vista Regional Medical Center and San Joaquin
11 Hospital, but that their records were missing from his prison medical file. Under these
12 circumstances, an award of expenses to Plaintiff would be unjust.

13 **B. Modification of the Discovery and Scheduling Order**

14 Pursuant to F.R.Civ.P. 16(b)(3)(A), district courts must enter scheduling orders to
15 establish deadlines for, among other things, filing motions and completing discovery. "A
16 schedule may be modified only for good cause and with the judge's consent." F.R.Civ.P.
17 16(b)(4). This standard "primarily considers the diligence of the party seeking the amendment."
18 *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992). However, there are a
19 number of factors that may be considered:

20 1) whether trial is imminent, 2) whether the request is opposed, 3) whether the
21 non-moving party would be prejudiced, 4) whether the moving party was
22 diligent in obtaining discovery within the guidelines established by the court,
23 5) the foreseeability of the need for additional discovery in light of the time
24 allowed for discovery by the district court, and 6) the likelihood that the
25 discovery will lead to relevant evidence.

26 U.S. ex rel. *Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1526 (9th Cir. 1995) vacated on other
27 grounds, 520 U.S. 939 (1997) citing *Smith v. United States*, 834 F.2d 166, 169 (10th Cir.1987).

28 Here, trial is not imminent. Although Plaintiff opposes Defendants' request to modify the
schedule in this case, Plaintiff will benefit from an extension because Plaintiff desires additional
medical records and the extensions will be equally applicable to Plaintiff. Further, the current

