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8 UNITED STATES DISTRICT COURT  
9 EASTERN DISTRICT OF CALIFORNIA  
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11 MICHAEL SCOTT McRAE,

12 Plaintiff,

13 v.

14 BAIRAMIAN DIKRAN, et al.,

15 Defendants.  
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**1:16-01066-NONE-GSA-PC**

**ORDER DENYING PLAINTIFF'S  
MOTION TO COMPEL**

**ORDER DENYING REQUEST FOR  
ISSUANCE OF SUBPOENAS, WITHOUT  
PREJUDICE**

**(ECF No. 100.)**

21 **I. BACKGROUND**

22 Michael Scott McRae ("Plaintiff") is a former federal prisoner proceeding *pro se* and *in*  
23 *forma pauperis* with this civil rights action pursuant to Bivens vs. Six Unknown Agents, 403  
24 U.S. 388 (1971). This case now proceeds with Plaintiff's Second Amended Complaint filed on  
25 March 9, 2018, against defendants Dr. Dikran Bairamian,<sup>1</sup> Dr. Kevin Cuong Nguyen, and Dr.  
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28 <sup>1</sup> In his original Complaint, Plaintiff referred to this defendant as Dr. Bairamian, Dikran, M.D.  
(ECF No. 1.) The court entered the defendant's name as Bairamian Dikran. (Court docket.) In his Answer to the  
complaint, defense counsel clarifies that this defendant's name is Dikran Bairamian. (ECF No. 32.)

1 David Betts for inadequate medical care under the Eighth Amendment, and state law claims for  
2 medical malpractice and medical battery. (ECF No. 14.) This case is now in the discovery phase  
3 pursuant to the court’s scheduling order issued on October 2, 2020. (ECF No. 32.)

4 On March 18, 2021, Plaintiff filed a motion to compel Defendants to produce medical  
5 records from Plaintiff’s current doctors in Fayetteville, North Carolina. (ECF No. 100.) Plaintiff  
6 also requested the court to issue subpoenas to his doctors’ offices. On April 5, 2021, defendants  
7 Bairamian and Betz each filed an opposition to the motion. (ECF Nos. 101, 102.) On April 19,  
8 2021, Plaintiff filed a reply to the opposition. (ECF No. 103.)

9 Plaintiff’s motion to compel is now before the court. Local Rule 230(l).

10 **II. MOTION TO COMPEL**

11 **A. Federal Rules of Civil Procedure 26(b), 34, and 37(a)**

12 Under Rule 26(b), “[U]nless otherwise limited by court order, the scope of discovery is  
13 as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to  
14 any party’s claim or defense” including the existence, description, nature, custody, condition,  
15 and location of any documents or other tangible things and the identity and location of persons  
16 who know of any discoverable matter. For good cause, the court may order discovery of any  
17 matter relevant to the subject matter involved in the action.<sup>2</sup> “Relevant information need not be  
18 admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of  
19 admissible evidence.” Fed. R. Civ. P. 26(b)(1).

20 Pursuant to Rule 34(a) of the Federal Rules of Civil Procedure, “any party may serve on  
21 any other party a request to produce and permit the party making the request . . . to inspect and  
22 copy any designated documents . . . which are in the possession, custody or control of the party  
23 upon whom the request is served.” Fed. R. Civ. P. 34(a)(1). “[A] party need not have actual  
24 possession of documents to be deemed in control of them.” Clark v. Vega Wholesale Inc., 181  
25 F.R.D. 470, 472 (D.Nev. 1998) quoting Estate of Young v. Holmes, 134 F.R.D. 291, 294 (D.Nev.

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27 <sup>2</sup>“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 (b) the fact is of consequence in determining the action.” Fed. R. Evid. 401.

1 1991). “A party that has a legal right to obtain certain documents is deemed to have control of  
2 the documents.” Clark, 181 F.R.D. at 472; Allen v. Woodford, No. CV–F–05–1104 OWW LJO,  
3 2007 WL 309945, \*2 (E.D.Cal. Jan. 30, 2007) (citing In re Bankers Trust Co., 61 F.3d 465, 469  
4 (6th Cir.1995)); accord Evans v. Tilton, No. 1:07CV01814 DLB PC, 2010 WL 1136216, at \*1  
5 (E.D.Cal. Mar. 19, 2010).

6 Under Rule 34(b), the party to whom the request is directed must respond in writing that  
7 inspection and related activities will be permitted as requested, or state an objection to the  
8 request, including the reasons. Fed. R. Civ. P. 34(b)(2). Also, “[a] party must produce documents  
9 as they are kept in the usual course of business or must organize and label them to correspond to  
10 the categories in the request.” Fed. R. Civ. P. 34(b)(E)(I).

11 Under Rule 37 of the Federal Rules of Civil Procedure, “a party seeking discovery may  
12 move for an order compelling an answer, designation, production, or inspection.” Fed. R. Civ.  
13 P. 37(a)(3) (B). The court may order a party to provide further responses to an “evasive or  
14 incomplete disclosure, answer, or response.” Fed. R. Civ. P. 37(a)(4). “District courts have  
15 ‘broad discretion to manage discovery and to control the course of litigation under Federal Rule  
16 of Civil Procedure 16.’” Hunt v. County of Orange, 672 F.3d 606, 616 (9th Cir. 2012) (quoting  
17 Avila v. Willits Env'tl. Remediation Trust, 633 F.3d 828, 833 (9th Cir. 2011)). Generally, if the  
18 responding party objects to a discovery request, the party moving to compel bears the burden of  
19 demonstrating why the objections are not justified. E.g., Grabek v. Dickinson, No. CIV S–10–  
20 2892 GGH P., 2012 WL 113799, at \*1 (E.D.Cal. Jan. 13, 2012); Ellis v. Cambra, No. 1:02–cv–  
21 05646–AWI–SMS (PC), 2008 WL 860523, at \*4 (E.D.Cal. Mar. 27, 2008). This requires the  
22 moving party to inform the Court which discovery requests are the subject of the motion to  
23 compel, and, for each disputed response, why the information sought is relevant and why the  
24 responding party’s objections are not meritorious. Grabek, 2012 WL 113799, at \*1; Womack v.  
25 Virga, No. CIV S–11–1030 MCE EFB P., 2011 WL 6703958, at \*3 (E.D.Cal. Dec. 21, 2011).

26 **B. Parties’ Positions**

27 Plaintiff requests an order under 28 U.S.C § 1915(d) and Federal Rules of Civil Procedure  
28 26(b)(1), 34, and 45, compelling Defendants to produce medical records and documents from

1 Plaintiff's current physicians in Fayetteville, North Carolina. Plaintiff states that these medical  
2 records have not been previously requested from Defendants through a request for production of  
3 documents. In opposition to the motion to compel, Defendants Bairamian and Betz each argue  
4 that because Plaintiff has not made any prior request for production of documents from either of  
5 them, there is nothing to compel. Defendants are correct. Under Rule 37, a party may move for  
6 an order compelling production of documents **if** a party fails to produce documents or fails to  
7 respond that inspection will be permitted – or fails to permit inspection – as requested under Rule  
8 34. Fed. R. Civ. P. 37(a)(3)(B)(iv). (emphasis added). Here, neither of the responding  
9 Defendants has failed to produce documents pursuant to Plaintiff's request and therefore it is  
10 premature for a motion to compel. For this reason, Plaintiff's motion to compel shall be denied.

11 Plaintiff also requests the issuance of subpoenas commanding his current physicians to  
12 produce medical documents. Plaintiff provides copies of letters dated February 8, 2021, to two  
13 of his physicians in which he requested them to forward copies of his medical records to the  
14 courthouse in the Eastern District. Plaintiff has not indicated whether he received responses to  
15 either of these letters.

16 The Court will consider granting a request for issuance of a subpoena only if the  
17 documents sought from the non-party are not equally available to Plaintiff. It appears to the  
18 Court that the documents sought by Plaintiff may be available to Plaintiff through a written  
19 request to his current doctors, to the Neurology and Pain Management Center, or to any other of  
20 Plaintiff's medical providers. Plaintiff should request the records to be sent to him, not to the  
21 court. Until Plaintiff can provide evidence that he has made an effort to obtain the records himself  
22 and his requests have been denied, the court shall not issue subpoenas. Therefore, Plaintiff's  
23 request for issuance of subpoenas to his physicians shall be denied, without prejudice to renewal  
24 of the motion.

### 25 **III. CONCLUSION**

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

- 27 1. Plaintiff's motion to compel, filed on March 18, 2021, is DENIED; and

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2. Plaintiff's request for the issuance of subpoenas, filed on March 18, 2021, is DENIED, without prejudice.

IT IS SO ORDERED.

Dated: May 14, 2021

/s/ Gary S. Austin  
UNITED STATES MAGISTRATE JUDGE