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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

FRANCISCO SIERRA,

Plaintiff,

v.

T. THOMPSON and J. CASTELLANOS,

Defendants.

No. 1:17-cv-01691-DAD-EPG (PC)

ORDER GRANTING DEFENDANT’S
MOTION TO COMPEL

(ECF No. 47)

ORDER DENYING PLAINTIFF’S ORAL
MOTION TO APPOINT COUNSEL

(ECF No. 48)

ORDER DIRECTING PRODUCTION OF
WITNESS STATEMENTS AND EVIDENCE
OR SUBMISSION FOR IN CAMERA
REVIEW

ORDER DIRECTING CLERK OF COURT TO
UPDATE DOCKET TO REFLECT
REMAINING DEFENDANTS

On November 4, 2020, Defendants T. Thompson and J. Castellanos filed a motion to compel Plaintiff Francisco Sierra, a state inmate proceeding *pro se*, documents in response to a discovery request. (ECF No. 47). On December 2, 2020, the Court held a telephonic discovery and status conference. Counsel Alan Romero appeared for Defendants, and Plaintiff appeared *pro se*. Following the conference and after a further review of the record, the Court orders as follows:

I. DEFENDANTS’ MOTION TO COMPEL

Defendants filed a motion to compel on November 4, 2020, (ECF No. 47), seeking to compel Plaintiff to respond to their requests for production because Plaintiff’s response to Defendants’ request indicated he had withheld documents. Plaintiff did not file an opposition.

1 On September 2, 2020, Defendants served a set of requests for production of documents to
2 Plaintiff. (ECF No. 47-1 at 5). Plaintiff's reply to Defendants indicated he was withholding
3 certain documents because he was unwilling to part with his only copies and did not have access
4 to the law library to make any copies. (*Id.* at 15). On the record, Plaintiff stated that the withheld
5 documents were 602 grievance forms and an affidavit. Defendants responded that the paging
6 system remains available and, given the pandemic, law library access is restricted.

7 The Court made further inquiries during the conference. Although Plaintiff noted that he
8 has not received the correct documents he requested through the paging process, Plaintiff stated
9 that he has not lost any documents as part of that process. Plaintiff reiterated his request to be
10 allowed limited access to the law library to make his copies.

11 In light of the safety concerns associated with the pandemic, the availability of the paging
12 service to accomplish Plaintiff's copying, and the lack of specific evidence that such a service
13 would result in the loss of originals, the Court grants Defendant's motion to compel and requires
14 Plaintiff to produce the requested documents within thirty days.

15 If Plaintiff is unable to do so within thirty days due to problems with the paging system,
16 Plaintiff may file a motion for extension of time or otherwise seek relief. Such a motion should
17 detail what steps Plaintiff has taken with respect to obtaining copies of the documents and any
18 responses from Plaintiff's institution of confinement. The Court cautions Plaintiff that failure to
19 comply with this order to compel may result in sanctions. *See Fed. R. Civ. P. 37.*

20 **II. MOTION TO APPOINT COUNSEL**

21 On the record, Plaintiff moved to appoint counsel. Plaintiff explained that he was not
22 trained in the law. Plaintiff also stated that he has had no access to the law library during the
23 discovery period due to the limitations addressing the current pandemic.

24 Plaintiff does not have a constitutional right to appointed counsel in this action, *Rand v.*
25 *Rowland*, 113 F.3d 1520, 1525 (9th Cir. 1997), *withdrawn in part on other grounds*, 154 F.3d 952
26 (9th Cir. 1998), and the Court cannot require an attorney to represent Plaintiff pursuant to 28
27 U.S.C. § 1915(e)(1). *Mallard v. United States District Court for the Southern District of Iowa*,
28 490 U.S. 296, 298 (1989). However, in certain exceptional circumstances the Court may request

1 the voluntary assistance of counsel pursuant to section 1915(e)(1). *Rand*, 113 F.3d at 1525.

2 Without a reasonable method of securing and compensating counsel, the Court will seek
3 volunteer counsel only in the most serious and exceptional cases. In determining whether
4 “exceptional circumstances exist, a district court must evaluate both the likelihood of success of
5 the merits [and] the ability of the [plaintiff] to articulate his claims *pro se* in light of the
6 complexity of the legal issues involved.” *Id.* (citation and internal quotation marks omitted).

7 Plaintiff’s case is not so exceptional as to merit the request for pro bono counsel by the
8 Court at this stage. In addition, based on Plaintiff’s filings and his abilities at the telephonic
9 hearing, Plaintiff appears able to articulate his claims *pro se* in light of the complexity of the legal
10 issues involved. However, as the Court informed Plaintiff, he may renew his motion for
11 appointment of pro bono counsel at a later stage of the proceedings. Therefore, the Court will
12 deny Plaintiff’s motion to appoint counsel.

13 **III. EVIDENCE AND WITNESS STATEMENTS**

14 At the conclusion of the hearing, Defendants’ counsel pointed to the portion of the Court’s
15 scheduling order, (ECF No. 46), that discusses witness statements and evidence gathered from
16 investigation into the incident at issue. That order states, in relevant part:

17 Additionally, if a party is claiming a right to withhold witness statements and/or
18 evidence gathered from investigation(s) into the incident(s) at issue in the
19 complaint based on the official information privilege, the withholding party shall
20 submit the withheld witness statements and/or evidence to the Court for in camera
review, along with an explanation of why the witness statements and/or evidence
is privileged.

21 (*Id.* at 2-3). The order cites, among other authority, *Woodford v. Ngo*, 548 U.S. 81, 94-95 (2006):
22 “[P]roper exhaustion improves the quality of those prisoner suits that are eventually filed because
23 proper exhaustion often results in the creation of an administrative record that is helpful to the
24 court. When a grievance is filed shortly after the event giving rise to the grievance, witnesses can
25 be identified and questioned while memories are still fresh, and evidence can be gathered and
26 preserved.”

27 Defendants’ counsel asked whether Defendants had to submit the witness statements for
28 *in camera* review if they were not subject to a specific discovery request. The Court reviewed the

1 scheduling order and stated that it did not provide an independent order to produce the
2 documents.

3 Following the discovery and status conference, the Court reviewed Defendants’
4 scheduling conference statement, which states, in relevant part:

5 As referenced above, a confidential memorandum dated October 17, 2017 was
6 prepared in connection with some of the facts or circumstances at issue in the
7 amended complaint. Furthermore, a use of force critique package was prepared in
8 connection with some of the facts or circumstances at issue in the amended
9 complaint. Defendants intend to withhold the confidential memoranda and use of
force critique documents, as well as any derivative confidential documents, under
the official information privilege.

10 (ECF No. 40 at 4). While this statement was prepared in anticipation of a scheduling conference,
11 such a conference was not held because, at Defendants’ request, it was cancelled in light of the
12 pandemic. (ECF No. 42).

13 Given defense counsel’s question to the Court, combined with Defendants’ statement in
14 their scheduling conference statement, it appears possible, if not likely, that Defendants witness
15 statements and/or other evidence were generated from investigation of the incident at issue.
16 However, Defendants have decided to withhold such documents wholesale on the ground that
17 they were not subject to a discovery request by Plaintiff. Moreover, despite Defendants’
18 statement in their scheduling conference statements that “Defendants intend to withhold the
19 confidential memoranda and use of force critique documents, as well as any derivative
20 confidential documents, under the official information privilege,” it appears that Defendants
21 decided to not even claim that the documents are privileged. Rather they are withhold them
22 without providing any privilege log or other identification of such documents, and without
23 following the Court’s procedures for the official information privilege.

24 The above-mentioned motions and circumstances combine to put the Court in an
25 untenable position. Due to Plaintiff’s incarceration and limitations from the pandemic, Plaintiff is
26 litigating this case not only without legal training or counsel, but without any access to the law
27 library. The Court is also compelling him to provide his sole witness affidavit to opposing
28 counsel, despite his concerns with doing so. Despite these severe limitations on Plaintiff, and

1 despite the direction from the Supreme Court that documents generated in the exhaustion process
2 will assist the Court in litigation, Defendants appear to be withholding their own witness
3 statements and evidence, without any identification of such documents or claim of privilege.

4 Pursuant to Federal Rule of Civil Procedure 16, “[a]t any pretrial conference, the court
5 may consider and take appropriate action on the following matters: . . . controlling and scheduling
6 discovery, including orders affecting disclosures and discovery under Rule 26 and Rules 29
7 through 37” and “facilitating in other ways the just, speedy, and inexpensive disposition of the
8 action.” Fed. R. Civ. P. 16(c)(2)(F), (P). *See also Little v. City of Seattle*, 863 F.2d 681, 685 (9th
9 Cir. 1988) (“The district court has wide discretion in controlling discovery.”). Federal Rule of
10 Civil Procedure 16 vests the district court with early control over cases “toward a process of
11 judicial management that embraces the entire pretrial phase, especially motions and discovery.”
12 *In re Arizona*, 528 F.3d 652, 655 (9th Cir. 2008) (affirming district court’s requiring that prison
13 officials prepare a *Martinez* report to give detailed factual information involving a prisoner’s suit
14 under 42 U.S.C. § 1983 and stating “district courts have wide latitude in controlling discovery.”).
15 *See also* Advisory Committee Notes to 1993 Amendment to Federal Rules of Civil Procedure
16 regarding Rule 26(a) (“The enumeration in Rule 26(a) of items to be disclosed does not prevent a
17 court from requiring by order or local rule that the parties disclosed additional information
18 without a discovery request.”). *See also United States v. W.R. Grace*, 526 F.3d 499, 508–09 (9th
19 Cir. 2008) (“We begin with the principle that the district court is charged with effectuating the
20 speedy and orderly administration of justice. There is universal acceptance in the federal courts
21 that, in carrying out this mandate, a district court has the authority to enter pretrial case
22 management and discovery orders designed to ensure that the relevant issues to be tried are
23 identified, that the parties have an opportunity to engage in appropriate discovery and that the
24 parties are adequately and timely prepared so that the trial can proceed efficiently and
25 intelligibly.”).

26 Accordingly, after consideration of all the circumstances in this case including the
27 limitations on law library access imposed by the pandemic, the Court will order Defendants to
28 produce any witness statements and evidence gathered from investigations into the incidents at

1 issue in the complaint. If Defendants wish to withhold any such documents pursuant to the
2 official information privilege, they shall follow the procedures set forth in the Court's scheduling
3 order.

4 **IV. CONCLUSION AND ORDERS**

5 Accordingly, it is HEREBY ORDERED THAT:

- 6 1. Defendants' motion to compel (ECF No. 47) is GRANTED. Within thirty (30) days of
7 the date of this order, Plaintiff shall produce the documents requested in Defendants'
8 first set of requests for production of documents, including any affidavits Plaintiff has
9 related to this case. Plaintiff is instructed to use the institution's paging service to
10 make any needed copies.
- 11 2. Plaintiff's motion for appointment of counsel (ECF No. 48) is DENIED without
12 prejudice.
- 13 3. Within forty-five (45) days of the date of service of this order, Defendants shall
14 produce to Plaintiff witness statements and evidence gathered from investigation(s)
15 into the incident(s) at issue in the complaint, if any. This order does not extend to
16 internal reviews or internal critiques, although it does include any witness statements
17 or evidence contained within such reviews or critiques, which may be provided in
18 redacted form. If any witness statements or evidence is withheld pursuant to the
19 official information privilege, the withheld statements and evidence shall be submitted
20 to the Court for *in camera* review pursuant to the procedures laid out in the Court's
21 scheduling order.
- 22 4. The Clerk of Court is respectfully directed to update the docket to reflect the dismissal
23 of all defendants other than Defendants Thompson and Castellanos.

24 IT IS SO ORDERED.

25 Dated: December 4, 2020

26 /s/ Eric P. Gray
27 UNITED STATES MAGISTRATE JUDGE
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