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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BARRY LAMON,

Plaintiff,

No. CIV S-06-156 GEB KJM P

vs.

DIRECTOR, CALIFORNIA
DEPARTMENT OF CORRECTIONS
AND REHABILITATION, et al.,

Defendants.

ORDER

Plaintiff is a state prison inmate proceeding pro se with a civil rights action under 42 U.S.C. §1983. He has filed a motion to compel, a motion to hold defendants' summary judgment motion in abeyance, and a motion to file single copies of his documents.

I. Motion To Compel

Plaintiff alleges that the court's order of June 30, 2009 is too narrowly tailored to be effective with respect to defendant Walker's personnel file, that defendants Downing, Johnson and Lorusso's answers to plaintiff's second set of interrogatories are evasive, that defendants Downing, Moghaddas, Johnson and Paizis's amended response to plaintiff's interrogatory number three is evasive, that defendant Ellis's responses to plaintiff's interrogatories and request for production of documents are evasive, and that plaintiff's second set of requests for

1 admissions were not addressed in the court's ruling on plaintiff's first motion to compel. He also
2 alleges that the CD of a hearing provided to him was blank and that he has not been given
3 sufficient access to materials from his central file. Defendants have opposed the motion.

4 A. Defendant Walker's Amended Responses

5 Plaintiff revisits his claim that there must be information in defendant Walker's
6 personnel file about his recruiting of inmates to act as peacekeepers and refers to the material
7 supporting his amended traverse (docket no. 146). Nothing in this document causes the court to
8 amend its previous rulings.

9 B. Defendants Downing, Johnson and Lorusso's Response to Second Set of
10 Interrogatories

11 On the first page of the motion to compel, plaintiff contends that defendants
12 Downing, Johnson and Lorusso's amended responses to plaintiff's second set of interrogatories
13 are evasive. Docket No. 154 at 1. He does not address this contention in the body of the motion
14 by explaining which answers he finds evasive or why he deems them to be evasive. Moreover,
15 he has not attached copies of the responses he deems inadequate. See Local Rule 250.2 (c). He
16 has not borne his burden of demonstrating he is entitled to an order compelling further discovery.

17 C. Defendants' Downing, Moghaddis, Johnson And Paizis's Amended Responses
18 To Interrogatory Three

19 The court directed defendants Downing, Moghaddis, Johnson and Paizis to
20 respond to interrogatory three, which asked whether certain sections of the California
21 Administrative Code require them to obtain an inmate's informed consent before treating him
22 with drugs. The defendants responded that the sections did not specifically require informed
23 consent; that they must secure informed consent before administering certain psychotropic
24 medications; but that these medications may be administered in an emergency without consent
25 until a Keyhea¹ is requested. See, e.g., Docket No. 160-3 ¶ 3.

26 ¹ In Keyhea v. Rushen, 178 Cal.App.3d 526 (1986), the court held that prisoners were
entitled to a judicial determination of their competence to refuse treatment before they can be

1 Plaintiff says that this answer is simply one more example of the defendants'
2 "game-playing" because the defendants earlier maintained that these code sections governed the
3 requirement to secure informed consent. Docket No. 154 at 3. If there are contradictions in the
4 defendants' positions, plaintiff may be able to exploit them to his advantage. Defendants have
5 answered plaintiff's question; plaintiff cannot compel them to answer in a manner satisfactory to
6 him.

7 In the order of June 30, 2009, the court directed these same defendants to provide
8 documents relating to claims by other inmates that these defendants misled the inmates about
9 prescribed drugs and that these defendants improperly prescribed drugs. Defendants answered
10 that they conducted a diligent search but do not have grievances in their possession or control
11 raising these claims apart from grievances submitted by plaintiff. See, e.g. Docket No. 160-4 ¶ 2.
12 Plaintiff argues that this answer is "fraudulent" because he knows of other inmates who have
13 filed grievances alleging abuse by these defendants. Docket No. 154 at 4. He asks for a hearing
14 "to address the continued efforts of defendants to suppress culpable evidence against
15 themselves," but provides nothing but his own assertion that such documents exist. Id.

16 Plaintiff has not borne his burden of showing the existence of the documents he
17 seeks or that the defendants have control over any such documents. See United States v.
18 International Union Of Petroleum Workers, 870 F.2d 1450, 1452 (9th Cir. 1989); Alexander v.
19 Federal Bureau of Investigation, 186 F.R.D. 128 (D.D.C. 1998).

20 Plaintiff also complains that he has been unable to play the CD of his Keyhea
21 hearing because of delays in getting a CD player and because when a CD player was provided
22 for him, the disc was blank. Docket No. 163 at 2-3. The court will ask counsel for defendants
23 to ensure that plaintiff is given access to a disc that plays properly.

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26 subjected to long-term, involuntary psychotropic medication.

1 D. Defendant Ellis

2 In interrogatory 12, plaintiff asked defendant Ellis whether CSP-Sac Operating
3 Procedures require the presence of a supervisor before a calculated use of force. Docket No.
4 160-5 ¶ 12. Defendant responded that he is not aware of any such operating procedure and then
5 referred plaintiff to a section of the California Code of Regulations.

6 Plaintiff contends that this answer is evasive; he provides an index of operational
7 procedures from CSP-Corcoran which, he alleges, show that there is such a policy. Nothing in
8 that index, however, shows a policy on “calculated use of force,” whether confidential or public.
9 Plaintiff has pointed to nothing concrete that casts doubt on Ellis’s answer and so has not borne
10 his burden to compel discovery.

11 In Interrogatory 17, plaintiff asked whether Ellis alleged in the report of
12 September 7, 2005, that he was scared of plaintiff or that plaintiff posed a threat to anyone or to
13 institutional security. Defendant Ellis replied that he alluded to his fear by writing that he used
14 pepper spray until he felt it was safe to enter. Docket No. 160-5 ¶ 17. This is sufficient:
15 “alleged” means “asserted to be true as described.” Black’s Law Dictionary (7th ed.) at 74.
16 Plaintiff has not shown that an allegation must be straightforward. This is sufficient.

17 E. Second Set Of Requests For Admissions

18 Plaintiff alleges that his motion to compel answers to his second set of requests
19 for admissions was not addressed in the court’s order of June 30, 2009, but that he did not realize
20 this earlier.

21 Plaintiff has filed five motions to compel discovery, including the one currently
22 under consideration.

23 In the motion to compel filed July 30, 2008 (docket no. 77), plaintiff complained
24 that defendants had not responded adequately to his three sets of requests for admissions.

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1 In the motion to compel filed October 15, 2008 (docket no. 94), plaintiff took
2 issue with defendants Walker, Parks and Lorusso's responses to plaintiff's first set of
3 interrogatories and request for production of documents.

4 In his motion to compel filed October 30, 2008 (docket no. 103), plaintiff took
5 issue with defendants' responses to plaintiff's first request for the production of documents and
6 to the defendants' failure to answer some of his interrogatories and respond to another request for
7 the production of documents.

8 In the motion to compel filed December 8, 2008 (docket no. 110), plaintiff
9 challenged the defendants' responses to his first and second sets of interrogatories and requests
10 for production of documents.

11 On November 25, 2008, the court denied the motions docketed as numbers 77 and
12 94 without prejudice because defendants had requested and received additional time in which to
13 respond. The court advised plaintiff that if the requests were not answered to his satisfaction, he
14 could file a request to have the matters reopened. His current request, filed after the October 2,
15 2010, deadline for filing dispositive motions has passed, is too late.

16 F. Documents From Plaintiff's Prison File

17 In its earlier order, the court asked defendants' counsel to report on plaintiff's
18 access to his central file. Counsel has submitted a declaration from G. Nichols, who avers that
19 plaintiff reviewed his central file on July 2, 2009, and that Nichols provided plaintiff with copies
20 of documents on September 16, 2009. Docket No. 168-2. Plaintiff "specifically and
21 vehemently" denies that he has been provided with any documents. Docket No. 163 at 4 ¶ 19.
22 He alleges that had he been given documents, a trust account withdrawal form would have been
23 prepared to pay for the materials and that none was prepared. *Id.* ¶¶ 20-21. Nichols avers, in
24 contrast, that plaintiff was given the documents free of charge. Docket No. 168-2 ¶¶ 4-5.

25 Plaintiff has attached a number of documents that appear to be from his central
26 file to his declaration and to his motion to hold the proceedings in abeyance. See, e.g., Docket

1 No. 163 at 16-18; Docket No. 164 at 16, 19. These suggest that plaintiff has received the access
2 he desired.

3 II. Motion To File Single Copies

4 Plaintiff has asked to file single copies of documents and to be excused from the
5 requirement that he serve documents on defendants' counsel because of difficulties accessing the
6 law library to make copies; defendants have not opposed the request. It will be granted.

7 III. Motions To Stay Summary Judgment Proceedings

8 Plaintiff has filed two requests to stay proceedings on summary judgment. In the
9 first motion, plaintiff claims that the discovery he believes is outstanding will permit him to
10 defeat summary judgment. Docket No. 164. To the extent that this motion is based on Federal
11 Rule of Civil Procedure 56(f), it is insufficient. Brae Transp., Inc. v. Coopers & Lybrand, 790
12 F.2d 1439, 1443 (9th Cir. 1986) ("Rule 56(f) requires affidavits setting forth the particular facts
13 expected from the movant's discovery. Failure to comply with the requirements of Rule 56(f) is a
14 proper ground for denying discovery and proceeding to summary judgment.").

15 In the second motion, plaintiff alleges that he has been transferred to CSP-Sac for
16 trial in Lamon v. Lytle, Civ. No. S-03-0423 AK, which "is scheduled to last throughout March
17 29, 2010," and that he was allowed to bring only materials relating to the scheduled trial. Docket
18 No. 173. The court's docket reflects that trial in Lamon v. Lytle is scheduled to begin on March
19 29 and to last two days and that plaintiff's only remaining deadline in that case is the filing of
20 proposed voir dire questions seven days before trial. Plaintiff has not described any steps he has
21 taken to have his additional legal materials sent to him at CSP-Sac.

22 IT IS THEREFORE ORDERED that:

- 23 1. Plaintiff's motion to compel (docket no. 154) is denied;
24 2. Plaintiff's motion to submit single copies (docket no. 165) is granted;
25 3. Plaintiff's motion for an extension of time in which to file a motion to hold
26 hearing in abeyance (docket no. 157) is denied as moot;

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4. Plaintiff's motions to hold proceedings in abeyance (docket nos. 164 and 173) are denied;

5. Counsel for the defendants is directed to ensure that plaintiff is given access to an audible disc of the Keyhea hearing within thirty days of the date of this order; and

6. Plaintiff's opposition to the motion for summary judgment is due within forty-five days of the date of this order. Defendants' reply, if any, is due thirty days after the opposition is filed.

DATED: January 28, 2010.



U.S. MAGISTRATE JUDGE