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

JAMES OLIVER,

Plaintiff,

No. CIV S-06-0390 MCE EFB P

vs.

TOM CAREY, et al.,

Defendants.

ORDER

_____ /

Plaintiff is a state prisoner proceeding without counsel in an action brought under 42 U.S.C. § 1983. Currently pending before the court are plaintiff’s Motion for Substitution of Parties (Docket No. 71), defendant Mahmoud’s Motion to Modify the Discovery and Scheduling Order (Docket No. 76), and defendant Solomon’s Motion to Compel and to Modify Scheduling Order (Docket No. 77). For the reasons provided below, plaintiff’s motion will be denied, defendant Mahmoud’s motion will be granted, and defendant Solomon’s motion will be granted in part.

I. Background

This action proceeds on the December 20, 2006 amended complaint in which plaintiff alleges that defendants were deliberately indifferent to his serious medical needs by failing to appropriately respond to and treat a condition in his elbow and triceps. Dckt. No. 12, Am.

1 Compl. at 3-5. The court ordered service of the complaint on defendants Noriega, Mahmoud,
2 Solomon, and Thor on May 5, 2009. Dckt. No. 29. On March 10, 2010, the court ordered
3 defendants Solomon, Thor, and Noriega to file an answer within 30 days of that date. Dckt. No.
4 59. The same day, the court again ordered service on defendant Mahmoud, who had not yet
5 been served. Dckt. No. 60. Defendant Solomon filed an answer on March 22, 2010, and
6 defendants Noriega and Thor filed an answer on April 8, 2010. Dckt. Nos. 64, 65.

7 On April 12, 2010, the court issued a discovery and scheduling order, setting the
8 following deadlines: (1) for requesting written discovery at May 7, 2010, (2) for completing
9 discovery and filing discovery motions at July 9, 2010, and (3) for filing dispositive motions at
10 October 1, 2010. Dckt. No. 67. Defendant Mahmoud returned an executed waiver of service on
11 May 12, 2010. Dckt. No. 69.

12 **II. Plaintiff's Motion for Substitution of Parties**

13 On April 28, 2010, defendant Noriega filed a Suggestion of Death pursuant to Federal
14 Rule of Civil Procedure 25(a)¹, notifying all parties of the death of defendant Thor. Dckt. No.
15 68. Plaintiff responds by seeking to substitute in defendant Thor's place "the successor or
16 representative CSP-Solano Chief Medical Officer Alvaro C. Traquina M.D. who at all times is
17 responsible for making policy, supervising medical staff employees, [and] is responsible for
18 conditions and operations at the prison." Dckt. No. 71 at 1. Defendants Noriega and Mahmoud
19 oppose the motion, arguing that defendant Thor was sued in an individual, rather than official,
20 capacity, and thus Dr. Traquina is not a proper party for substitution. Dckt. No. 74.

21 Rule 25 provides:

22 (a) Death.

23 (1) Substitution if the Claim Is Not Extinguished. If a party dies and the claim is
24 not extinguished, the court may order substitution of the proper party. A motion
25 for substitution may be made by any party or by the decedent's successor or

26 ¹ All future references to a "Rule" herein refers to a rule contained in the Federal Rules of Civil Procedure unless otherwise noted.

1 representative. If the motion is not made within 90 days after service of a
2 statement noting the death, the action by or against the decedent must be
dismissed.

3 ***

4 (d) Public Officers; Death or Separation from Office. An action does not abate
5 when a public officer who is a party in an official capacity dies, resigns, or
6 otherwise ceases to hold office while the action is pending. The officer's
7 successor is automatically substituted as a party. Later proceedings should be in
the substituted party's name, but any misnomer not affecting the parties'
substantial rights must be disregarded. The court may order substitution at any
time, but the absence of such an order does not affect the substitution.

8 A "proper party" under Rule 25(a)(1) is the legal representative of the deceased party; e.g., an
9 executor of the deceased's will or an administrator of his or her estate. *Mallonee v. Fahey*, 200
10 F.2d 918, 920 (9th Cir. 1952). Thus, substitution of Dr. Traquina is not appropriate under Rule
11 25(a)(1).

12 To determine whether Dr. Traquina may be substituted for defendant Thor under Rule
13 25(d), the court must determine whether plaintiff sued defendant Thor in his official capacity, as
14 Rule 25(d) only provides for substitution of a successor in office where the original defendant
15 was sued in his official capacity. Plaintiff's complaint is silent as to whether the defendants are
16 sued in their personal and/or official capacities. Thus, the court must look at the content of the
17 complaint and the course of the proceedings to make the personal vs. official capacity
18 determination. *See Ashker v. Cal. Dep't of Corr.*, 112 F.3d 392, 395 (9th Cir. 1997);
19 *Shoshone-Bannock Tribes v. Fish & Game Comm'n*, 42 F.3d 1278, 1284-85 (9th Cir. 1994).

20 To establish a claim against a state actor in his or her official capacity under 28 U.S.C.
21 § 1983, a plaintiff must show that the entity employing the actor had some policy or custom that
22 played a part in the alleged violation of federal law. *Hafer v. Melo*, 502 U.S. 21, 25 (1991).
23 "Personal-capacity suits, on the other hand, seek to impose individual liability upon a
24 government officer for actions taken under color of state law," and thus a plaintiff may establish
25 personal liability in a § 1983 case simply by showing that the state actor, acting under color of
26 state law, caused the deprivation of a federal right, without any requirement of a connection to a

1 governmental policy or custom. *Id.* In addition, a suit against a state official in her official
2 capacity is considered a suit against the state itself, and thus claims for money damages in such
3 suits are barred by the Eleventh Amendment. *Ashker*, 112 F.3d at 395 & n.3. Accordingly,
4 where money damages are sought against a state official, it is presumed that the official is sued
5 in her individual capacity. *Shoshone-Bannock Tribes*, 42 F.3d at 1284.

6 Here, plaintiff's complaint seeks only monetary damages. Dckt. No. 12, Am. Compl. at
7 3. In addition, the complaint makes no reference to any policy or custom, much less alleges that
8 such a policy or custom played a part in defendant Thor's alleged constitutional violation(s).
9 Thus, it is apparent from plaintiff's complaint that he sued defendant Thor in his individual, and
10 not official, capacity. Accordingly, substitution of Dr. Traquina under Rule 25(d) is
11 inappropriate.

12 As Dr. Traquina is not the proper party for substitution under Rule 25(a) and may not be
13 substituted under the successor-official provision of Rule 25(d), and as plaintiff points to no
14 other authority under which substitution of Dr. Traquina for defendant Thor would be
15 appropriate, the court will deny plaintiff's motion to substitute Dr. Traquina for defendant Thor.
16 The denial of plaintiff's motion is without prejudice to plaintiff filing a new substitution motion
17 under Rule 25 seeking to substitute a proper party for defendant Thor.

18 **III. Defendant Mahmoud's Motion to Modify the Discovery and Scheduling Order**

19 The October 1, 2010 deadline for filing dispositive motions was established by the April
20 12, 2010 discovery and scheduling order. Dckt. No. 67. Requests to modify a deadline
21 established by the scheduling order are governed by Rule 16 of the Federal Rules of Civil
22 Procedure. A schedule may be modified upon a showing of good cause. Fed. R. Civ. P. 16(b).
23 Good cause exists when the moving party demonstrates he cannot meet the deadline despite
24 exercising due diligence. *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir.
25 1992).

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1 According to defendant Mahmoud, good cause exists to modify the discovery and
2 scheduling order because he was not a party to that order, as his response to the complaint was
3 not due until after the order was entered and, in fact, after the cut-off for serving requests for
4 written discovery provided in the order had passed. Plaintiff has filed no opposition to defendant
5 Mahmoud's motion. The court agrees that the facts presented by defendant Mahmoud establish
6 good cause for modifying the order. Accordingly, the court will grant defendant Mahmoud's
7 motion to modify the discovery and scheduling order to permit him to propound written
8 discovery and file any necessary motions to compel until October 7, 2010. The court will further
9 modify the order to allow all defendants until January 7, 2011 to file dispositive motions.

10 **IV. Defendant Solomon's Motion to Compel and Modify the Scheduling Order**

11 Defendant Solomon moves for an order compelling plaintiff to provide further responses
12 to certain discovery requests. Specifically, defendant Solomon contends that plaintiff provided
13 deficient responses to: (1) his first set of requests for admissions ("RFAs"), numbers 1-3; (2) his
14 first set of interrogatories, numbers 1-4, 10-12, 17, 19-20, 22-25; and (3) his first set of requests
15 for production of documents ("RFPs"), numbers 4, 8, and 9-11. The court will address each
16 alleged deficient response in turn.

17 **A. Requests for Admissions**

18 Defendant takes issue with the following RFA responses provided by plaintiff:

19 Request No. 1: Defendant, Dr. Solomon never acted at any time with deliberate
20 indifference with respect to any serious medical need by YOU.

21 Response: Yes.

22 Request No. 2: Defendant, Dr. Solomon did not interfere with the delivery of the
23 orthopedic consult that defendant Dr. Mahmoud ordered for YOU on November
24 17, 2004.

25 Response: Dr. Solomon was "deliberate indifferent" [sic] by failing to
26 provide adequate care to expedite plaintiff need for (urgent) treatment.

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1 Request No. 3: Defendant, Dr. Solomon had no authority or control over
2 the time of delivery of the orthopedic consult that defendant Dr. Mahmoud
 ordered for YOU on November 17, 2004.

3 Response: Dr. Solomon failed to act upon the physicians order 5-4-04.
4 (see Exhibit “J” Health Care Services Physicians request for Service.

5 Def. Solomon’s Mot. to Compel, Ex. D, Decl. of Francis D. Conway. Defendant Solomon
6 argues that these responses are vague, evasive and unresponsive.

7 Rule 36(a)(4) provides the proper procedure for responding to RFAs:

8 If a matter is not admitted, the answer must specifically deny it or state in detail
9 why the answering party cannot truthfully admit or deny it. A denial must fairly
10 respond to the substance of the matter; and when good faith requires that a party
11 qualify an answer or deny only a part of a matter, the answer must specify the part
12 admitted and qualify or deny the rest. The answering party may assert lack of
 knowledge or information as a reason for failing to admit or deny only if the party
 states that it has made reasonable inquiry and that the information it knows or can
 readily obtain is insufficient to enable it to admit or deny.

13 While the court recognizes that plaintiff, as a pro se litigant, may not be well-learned in the art of
14 responding to civil discovery, it agrees that his response to defendant’s RFA number 1 is
15 unclear, as it is not clear whether plaintiff “admits” or “denies” the statement. If plaintiff wishes
16 to admit the truth of the statement, he should respond to the RFA by stating “admit.” If, on the
17 other hand, plaintiff wishes to deny the statement, he should respond to the RFA by stating
18 “deny” or stating in detail why he cannot truthfully admit it or deny it and further complying
19 with the procedure set forth in Rule 36(a)(4). Accordingly, the court will grant defendant
20 Solomon’s motion to compel further response to his RFAs, set one, number 1.

21 As to RFA numbers 2 and 3, while plaintiff did not specifically state “deny,” his
22 responses make it reasonably clear that he denies the RFAs by providing the reason(s) why he
23 believes those statements are untrue. However, for the sake of clarity and because plaintiff must
24 supplement his RFA responses in any event to respond to RFA number 1, the court will grant
25 defendant Solomon’s motion to compel further responses to his RFAs, set one, numbers 2 and 3
26 so that plaintiff may state expressly whether such statements are admitted or denied and

1 otherwise comply with the procedure set forth in Rule 36(a)(4).

2 **B. Interrogatories**

3 Defendant Solomon first argues that plaintiff should be ordered to serve a verification of
4 his interrogatory responses pursuant to Rule 33(b)(3), which provides that “[e]ach interrogatory
5 must, to the extent it is not objected to, be answered separately and fully in writing and under
6 oath.” Plaintiff signed his interrogatory responses but failed to verify that such responses were
7 made under oath. Conway Decl., Ex. E. Accordingly, the court will grant defendant Solomon’s
8 request and order plaintiff to serve on defendant Solomon a signed verification that the
9 interrogatory responses provided on May 18, 2010 were made under oath.

10 Defendant Solomon next argues that plaintiff’s response of “See Plaintiff’s Amended
11 Complaint” to his Special Interrogatories, Set One, numbers 1-4, 10-12, 17, 19-20, and 22-25
12 was deficient. Having reviewed the interrogatories, the court finds that plaintiff’s response to
13 numbers 1-3, 10, and 11 was adequate. These interrogatories sought specific facts regarding the
14 alleged denial of medical care by defendant Solomon, and plaintiff’s amended complaint
15 provides such facts.² See Dckt. No. 12, Am. Compl. at 5. Contrary to Dr. Solomon’s assertion

16 ² Special Interrogatories, numbers 1-3, 10, and 11 stated:

17 Interrogatory no. 1: Please state all facts which support YOUR contention that
18 defendant Dr. Solomon violated YOUR civil or constitutional rights.

19 Interrogatory no. 2: Please identify each civil or constitutional right that YOU
20 contend was violated by defendant Dr. Solomon.

21 Interrogatory no. 3: Please describe each and every act or omission by defendant
22 Dr. Solomon that YOU contend was a violation of YOUR civil or constitutional
rights.

23 Interrogatory no. 10: For each occasion identified in YOUR response to
24 Interrogatory No. 9 above [providing: State the date of every occasion on which
YOU allege that Dr. Solomon denied YOU adequate medical care.], describe in
25 detail each and every act or omission by Dr. Solomon that YOU allege to have
been a denial of adequate medical care.

26 Interrogatory no. 11: Describe every injury that YOU allege was caused by any
act or omission set forth in YOUR response to Interrogatory 10 above.

1 that the responses will force him to “comb the complaint and guess which allegations, if any,
2 plaintiff believes to contain” responsive information (Def. Solomon’s Mot. to Compel at 6), the
3 allegations in the amended complaint involving Dr. Solomon are straightforward and contained
4 in four simple paragraphs. Accordingly the court will deny defendant Solomon’s motion to
5 compel plaintiff’s further response to his Special Interrogatories, Set One, numbers 1-3, 10, and
6 11.

7 The court finds that plaintiff’s response by reference to the complaint was deficient as to
8 Special Interrogatories, numbers 4, 12, 22, and 24-25, however. These interrogatories requested
9 identification of documents or witnesses and such information was not included in the amended
10 complaint.³ Accordingly, the responses were evasive or incomplete and thus an order
11 compelling further responses is appropriate under Rules 37(a)(3)(B)(iii) and (a)(4). In addition,
12 because interrogatories 17, 20, and 23 were tied to plaintiff’s responses to defendant Solomon’s
13 RFA numbers 1-3 and the court has ordered plaintiff to supplement those responses, *infra*, the
14 court will also order plaintiff to supplement his responses to interrogatories 17, 20, and 23 in

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16 _____
17 Conway Decl., Ex. B.

18 ³ Special Interrogatories, numbers 4, 12, 22, and 24-25 stated:

19 Interrogatory no. 4: Please DESCRIBE all WRITINGS that support YOUR
20 contention that defendant Dr. Solomon violated YOUR civil or constitutional
rights.

21 Interrogatory no. 12: Please DESCRIBE all WRITINGS that refer or relate to
22 each and every act or omission described in YOUR response to Interrogatory No.
10 above.

23 Interrogatory no. 22: DESCRIBE all WRITINGS that refer or relate to the facts
stated in YOUR response to interrogatory 20 above.

24 Interrogatory no. 24: IDENTIFY all witnesses with knowledge of the facts stated
25 in YOUR response to interrogatory 23 above.

26 Interrogatory no. 25: DESCRIBE all WRITINGS that refer or relate to the facts
stated in YOUR response to interrogatory 23 above.

1 accordance with his supplemented responses to RFA numbers 1-3.⁴

2 Defendant Solomon also argues that plaintiff's response to Special Interrogatory number
3 19 was deficient, in that he responded to a request for a description of writings by referring to a
4 list of witnesses provided in response to an earlier interrogatory.⁵ The court agrees that
5 plaintiff's response to interrogatory number 19 was evasive or incomplete under Rules
6 37(a)(3)(B)(iii) and (a)(4) and thus will grant defendant Solomon's motion to compel a further
7 response to that interrogatory.

8 **C. Requests for Production**

9 Defendant Solomon contends that plaintiff's responses to several RFPs (numbers 4, 8,
10 and 9-11) were deficient because they did not state that inspection and related activities will be

11 ⁴ Special Interrogatories, numbers 17, 20, and 23 stated:

12 Interrogatory no. 17: If in YOUR response to Dr. Solomon's Request for
13 Admissions, Set no. One, request no. 1, you deny that defendant, Dr. Solomon
14 never acted at any time with deliberate indifference with respect to any serious
15 medical need by YOU, state all facts upon which YOU base YOUR response.

16 Interrogatory no. 20: If in YOUR response to Dr. Solomon's Request for
17 Admissions, Set no. One, request no. 2, you deny that defendant, Dr. Solomon did
18 not interfere with the delivery of the orthopedic consult that defendant Dr.
19 Mahmoud ordered for YOU on November 17, 2004, state all facts upon which
20 YOU base YOUR response.

21 Interrogatory no. 23: If in YOUR response to Dr. Solomon's Request for
22 Admissions, Set no. One, request no. 3, you deny that defendant, Dr. Solomon
23 had no authority or control over the time of delivery of the orthopedic consult that
24 defendant Dr. Mahmoud ordered for YOU on November 17, 2004, state all facts
25 upon which YOU base YOUR response.

26 Conway Decl., Ex. B.

⁵ Special Interrogatories, Set One, number 19 and plaintiff's response:

Interrogatory no. 19: DESCRIBE all WRITINGS that refer or relate to the facts
stated in YOUR response to interrogatory 17 above.

Response: See Plaintiff's response to no. 5: witnesses. [Plaintiff's
response to interrogatory number 5 was a list of witnesses]

Conway Decl., Ex. E.

1 permitted, as required by Rule 34(b)(2)(B). Defendant Solomon also finds the content of the
2 responses inadequate. The court will address each RFP in turn.

3 Request No. 4: All WRITINGS described in YOUR response to defendant Dr.
4 Solomon’s Special Interrogatories, Set One, interrogatory 4.

5 Response: See Plaintiff’s exhibit “A” through “O.”

6 Conway Decl., Ex. F. Defendant Solomon argues that plaintiff’s response to RFP number 4
7 “makes no sense given his response to interrogatory number 4” (which was: “See Plaintiff’s
8 Amended Complaint.”). This court has determined, *infra*, that plaintiff’s response to
9 interrogatory number 4 was inadequate because he failed to describe writings as the
10 interrogatory requested. However, in response to RFP number 4, plaintiff provided defendant
11 Solomon with exhibits A through O. Defendant Solomon raises no argument that these
12 documents are not relevant – in interrogatory number 4, defendant Solomon asked for a
13 description of documents supporting plaintiff’s contention that defendant Solomon violated his
14 civil or constitutional rights, and exhibits A through O appear to be such documents. To the
15 extent that plaintiff, in supplementing his response to interrogatory number 4, identifies
16 additional documents not included in exhibits A through O as supporting his contention that
17 defendant Solomon violated his civil or constitutional rights, the court will order plaintiff to also
18 supplement his response to RFP number 4. However, if no further documents are described in
19 response to interrogatory number 4, plaintiff need not supplement his response to RFP number 4.

20 Request No. 8: All WRITINGS described in YOUR response to defendant Dr.
21 Solomon’s Special Interrogatories, Set One, interrogatory 19.

22 Response: James Oliver, Dr. Noriega, Dr. Samir Mahmoud, Dr. Solomon.

23 Conway Decl., Ex. F. Here, plaintiff has responded to a request for production of documents by
24 listing witnesses. This response is accordingly incomplete or evasive. For this reason, and
25 because plaintiff further failed to state that inspection of responsive documents not provided will
26 be permitted, an order compelling plaintiff to provide a further response to defendant Solomon’s

1 RFPs, Set One, number 8 is appropriate.

2 As to RFPs 9-11, plaintiff provided argument in response to defendant Solomon's
3 requests for documents.⁶ Plaintiff's responses are inadequate in that plaintiff fails to provide
4 responsive documents (if he has them), or state that inspection will be allowed of such
5 documents. Accordingly, an order compelling plaintiff to provide a further response to
6 defendant Solomon's RFPs, Set One, numbers 9-11 is appropriate.

7 Defendant Solomon seeks 45 days from the receipt of plaintiff's supplemental discovery
8 responses to file another motion to compel, if necessary, and an extension of the dispositive
9 motion deadline provided in the April 12, 2010 discovery and scheduling order. The court will
10 order plaintiff to provide the supplemental responses within 30 days of the date of this order and
11 will grant defendant Solomon 30 days from the receipt of the supplemental responses to file any
12 necessary motion to compel. As the court has determined that the dispositive motion deadline

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14 ⁶ RFPs 9-11, and plaintiff's responses:

15 Request No. 9: All WRITINGS described in YOUR response to defendant Dr.
Solomon's Special Interrogatories, Set One, interrogatory 22.

16 Response: Dr. Solomon failed to act on Dr. Mahmoud's request for
17 Medical services (urgent) treatment See Civil Amended Complaint page 5.

18 Request No. 10: All WRITINGS described in YOUR response to defendant Dr.
Solomon's Special Interrogatories, Set One, interrogatory 25.

19 Response: Dr. Solomon was supposed to follow Dr. Mahmoud's
20 Recommendation for Medical Services, relating to (urgent) treatment of
Plaintiff.

21 Request No. 11: All WRITINGS evidencing, referring, or relating to any facts
22 that support, evidence, justify, show the basis of, and/or provide the manner in
23 which YOU calculated the \$350,000 of monetary damages alleged in your
complaint.

24 Response: Pain and suffering, the value of plaintiffs arm (limited range of
25 motion) irreparable physical functioning which can not be replaced or
restored, future medical bills, future medications, future therapy, chronic
26 pain

Conway Decl., Ex. F.

1 should be extended until January 7, 2011 in response to defendant Mahmoud's motion to modify
2 the discovery and scheduling order, *infra*, it is the court's hope that sufficient time has been
3 provided to complete discovery and prepare any dispositive motions. The court will not extend
4 the dispositive motion deadline further absent a showing of good cause.

5 **V. Order**

6 Accordingly, it hereby is ORDERED that:

7 1. Plaintiff's May 18, 2010 Motion to Substitute, Docket No. 71, is denied without
8 prejudice to plaintiff bringing a new motion to substitute identifying a proper party to be
9 substituted in place of defendant Thor;

10 2. Defendant Mahmoud's July 2, 2010 Motion to Modify the Discovery and Scheduling
11 Order, Docket No. 76, is granted, and the schedule is modified as follows:

12 a. Defendant Mahmoud shall have up to and including October 7, 2010 to
13 propound written discovery on plaintiff and to file any necessary discovery motions; and

14 b. All defendants shall have up to and including January 7, 2011 to file
15 dispositive motions;

16 3. Defendant Solomon's July 9, 2010 Motion to Compel and Modify Scheduling Order
17 is granted in part as follows, and is otherwise denied:

18 a. Within 30 days of the date of this order, plaintiff shall provide to defendant
19 Solomon supplemental responses to the following discovery requests as provided in this order
20 and in compliance with Federal Rules of Civil Procedure 26, 33, 34, 36, and 37 and Eastern
21 District of California Local Rules 33-250.2, 34-250.3, and 36-250.4:

22 i. Defendant Solomon's Request for Admissions, Set One, numbers 1-3;

23 ii. Defendant Solomon's Special Interrogatories, Set One, numbers 4, 12,
24 17, 19, 20, and 23-25;

25 iii. Defendant Solomon's Request for Production of Documents, Set One,
26 numbers 8-11, and number 4 to the extent plaintiff identifies documents in addition to Exhibits A


1 through O in supplementing his response to Defendant Solomon's Special Interrogatories, Set
2 One, number 4;

3 b. Within 30 days of the date of this order, plaintiff shall provide to defendant
4 Solomon a signed verification that the responses he provided to defendant Solomon's Special
5 Interrogatories, Set One, on May 18, 2010 were made under oath;

6 c. Within 30 days of receipt of plaintiff's supplemental discovery responses
7 ordered herein, defendant Solomon shall file any necessary motion to compel with regard to such
8 supplemental responses.

9 SO ORDERED.

10 Dated: August 27, 2010.


EDMUND F. BRENNAN
UNITED STATES MAGISTRATE JUDGE