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

ARTAY SCRUGGS,

Plaintiff,

No. 2:06-cv-0633 KJM KJN P

vs.

S. VANCE, et al.,

Defendants.

ORDER AND REVISED

SCHEDULING ORDER

_____ /

Plaintiff, currently housed at Atascadero State Hospital, is proceeding through counsel¹ with a civil rights complaint pursuant to 42 U.S.C. § 1983. Pending before this court are two motions: (1) plaintiff’s motion to compel the nonparty California Department of Corrections and Rehabilitation (“CDCR”) to comply with a subpoena duces tecum, and for sanctions, noticed for hearing on December 1, 2011; and (2) nonparty CDCR’s motion to continue the hearing on plaintiff’s motion to compel and for sanctions.

Plaintiff’s Motion to Compel

In the November 11, 2011 motion to compel, counsel describes difficulties plaintiff has allegedly encountered in obtaining responsive and legible documents sought by an

¹ Counsel was appointed to represent plaintiff on May 2, 2011.

1 August 25, 2011 subpoena duces tecum. Specifically, plaintiff alleges the CDCR, during the last
2 two months, has:

3 (1) objected to the Subpoena well after the compliance deadline;
4 (2) asserted that it has no obligation to search its “sub-institutions,”
5 a position which it subsequently retracted; (3) asserted that it does
6 not have certain responsive documents, which turned out to be
7 untrue; (4) sent the files containing responsive documents to the
8 Defendants instead of implementing a search in response to the
9 Subpoena; and (5) admitted that it did not know what documents it
10 had previously produced; and (6) finally admitted as recently as
11 November 3, 2011, that it failed to conduct a search for all relevant
12 documents and intentionally excluded categories of relevant
13 documents from its production.

14 (Dkt. No. 144 at 2.) Plaintiff seeks an award of \$4,500.00 in monetary sanctions against
15 nonparty CDCR based on the CDCR’s alleged “unreasonable failure to produce the documents
16 requested by the Court’s August 23² Order.” (Dkt. No. 144 at 3.) Plaintiff also seeks evidentiary
17 sanctions against defendants based on their alleged “collu[sion] with CDCR to coordinate its
18 woefully inadequate and delayed response to the Subpoena.” (Id.) Plaintiff alleges the CDCR
19 sent the original documents to defendants, who:

20 simultaneously feigned ignorance of CDCR’s failure to comply
21 with the Subpoena and, while in possession of documents being
22 sought from CDCR and apparently preventing them from being
23 produced to Plaintiff, Defendants attempted to use the CDCR’s
24 failure as an excuse to delay Defendants’ depositions until CDCR
25 actually produced all responsive documents.

26 (Dkt. No. 144 at 3-4.) Finally, plaintiff’s counsel provided initial notice of plaintiff’s intent to
file a motion to compel on October 4, 2011, after which plaintiff’s counsel attempted to resolve
the discovery dispute both verbally and in writing. (Dkt. No. 144 at 4.)

CDCR’s Motion for Continuance

In the November 21, 2011 motion, the CDCR seeks an extension of time in which
to file the joint statement required by Local Rule 251, and a continuance of the December 1,

² This order addressed plaintiff’s request to conduct limited discovery. (Dkt. No. 140.)

1 2011 hearing on the motion to compel to December 8, 2011. Nonparty CDCR provided a
2 declaration of counsel, who avers the following:

3 1. CDCR counsel was retained on October 6, 2011. (Dkt. No. 146 at 6.)

4 2. Since October 6, 2011, CDCR counsel states he has been
5 working diligently with plaintiff's counsel in an attempt to rectify
6 any issues with those documents. (Id.) Counsel states that as of
7 November 17, 2011, plaintiff's counsel was "in possession of all
8 documents responsive to the subpoena duces tecum,³ a majority of
9 those documents he had from the September 15, 2011 production
10 by Case Records." (Id.)

11 3. On November 3, 2011, CDCR counsel learned for the first time
12 that plaintiff may be filing a motion to compel. CDCR counsel
13 indicated to plaintiff's counsel that they had been working together
14 to resolve issues and that a motion to compel was unnecessary and
15 a waste of money and time. Plaintiff's counsel gave notice of the
16 motion to compel after business hours on November 10, 2011, the
17 evening before the Veteran's Day holiday. (Dkt. No. 146 at 6.)

18 4. On November 11, 2011, CDCR counsel emailed plaintiff's
19 counsel and requested that if the motion to compel was not taken
20 off calendar, that the hearing on the motion to compel be continued
21 for a week or two so that a proper joint stipulation could be
22 completed. (Dkt. No. 146 at 7, 10.)

23 5. CDCR counsel notified plaintiff's counsel on November 15 that
24 CDCR counsel "would be overnighting documents to his office
25 resolving any outstanding issues" and requested that the motion to
26 compel be taken off the court's calendar. (Dkt. No. 146 at 7.)

6. CDCR counsel received plaintiff's Local Rule 251 joint
statement after business hours on November 15, 2011. (Dkt. No.
146 at 6.)

7. On November 21, 2011, after no response to the November 11
email, CDCR counsel emailed plaintiff's counsel and again
requested that he stipulate to a continuance of the hearing. (Dkt.
No. 146 at 7, 12.)

8. CDCR gave plaintiff's counsel and defense counsel notice of
the ex parte request for continuance on November 18 and 21, 2011.
(Dkt. No. 146 at 8.)

³ It appears the CDCR also contends that the August 25, 2011 subpoena duces tecum was "served improperly pursuant to FRCP 45." (Dkt. No. 146 at 4.) No further details in connection with this claim were provided. However, no motion to quash or motion for protective order has been filed in the instant action by the CDCR.

1 CDCR counsel maintains the motion to compel “is moot (all documents have been produced).”
2 (Dkt. No. 146 at 4.) In support of the request for continuance, CDCR counsel states that
3 declarations need to be obtained from CDCR employees to address plaintiff’s claims that several
4 CDCR employees failed to comply with the subpoena duces tecum, and finally,

5 [p]laintiff’s portion of his joint statement and declaration are
6 extremely lengthy and contain substantial allegations that the
7 CDCR will need to respond to. In addition, Plaintiff has served
8 voluminous exhibits in support of his joint statement and
9 declaration. In order to respond with the defense CDCR’s position,
10 a short continuance to file CDCR’s response is respectfully
11 requested.

12 (Dkt. No. 146 at 7.)

13 On November 22, 2011, plaintiff filed an opposition to the motion for
14 continuance, claiming that no good cause exists for the continuance, and arguing that the CDCR
15 seeks only to further delay compliance with the August 2011 subpoena duces tecum, and to
16 “hinder plaintiff’s ability to prepare for trial, which is now only two months away.” (Dkt. No.
17 147 at 2.) Plaintiff avers that the joint statement was due on November 23, 2011, prior to the
18 Thanksgiving holiday, so CDCR’s request based on the short Thanksgiving week is unavailing.

19 Plaintiff disputes CDCR counsel’s declaration that all documents have been
20 produced, citing CDCR counsel’s November 16, 2011 email in which CDCR counsel states:
21 “we are in possession of ‘confidentials’ that will not be released to you or even defense counsel
22 without a Court order as noted in my e-mail correspondence to you dated 11/15/11.” (Dkt. No.
23 147-1 at 20.)

24 Analysis

25 It appears that certain documents were overnighted to plaintiff’s counsel after
26 plaintiff’s counsel forwarded the proposed joint statement to CDCR counsel. Given the lengthy
nature of the 251 stipulation, as described by CDCR counsel, it appears that providing both
parties additional time will assist the court in ruling on the motion to compel, inasmuch as the
late-provided documents may well obviate the need for at least some portion of the motion to

1 compel to be addressed by the court. Additional time will also assist the parties in clarifying the
2 alleged contradiction between CDCR counsel's declaration that all documents have been
3 provided, and CDCR counsel's statement in the November 15, 2011 email that certain
4 "confidentials" have been withheld.

5 Review of these recent filings make clear that the delay in providing discovery to
6 plaintiff necessitates continuing upcoming deadlines to avoid prejudice to plaintiff, which will,
7 unfortunately, further delay the trial in this matter. However, plaintiff's counsel must have
8 sufficient time to review discovery prior to preparing the joint pretrial statement which is
9 presently due on November 30, 2011.

10 Accordingly, the court will grant nonparty CDCR's motion for continuance.⁴
11 However, CDCR counsel is admonished that the continuation of deadlines by this order shall in
12 no way be construed as an extension of time in which to comply with the subpoena duces tecum,
13 particularly in light of this court's August 24, 2011 order allowing plaintiff to obtain this
14 discovery. The hearing on plaintiff's motion to compel and for sanctions is continued from
15 December 1, 2011, to December 8, 2011. The parties' joint stipulation, as required under Local
16 Rule 251, shall be filed at least seven days prior to the hearing. Counsel for all interested parties
17 shall meet and confer in good faith, and attempt to resolve the differences that are subject to this
18 motion. Counsel for plaintiff shall take into account the discovery responses provided after the
19 initial proposed stipulation was sent on November 15, 2011, and shall revise the Local Rule 251
20 stipulation accordingly.

21 Good cause appearing, the November 30, 2011 deadline for filing a joint pretrial
22 statement is continued to February 1, 2012. The December 7, 2011 trial confirmation hearing is
23 continued to March 21, 2012, and jury trial is continued from January 30, 2012, to May 21, 2012.

25 ⁴ This order shall in no way be construed as indicative of the court's ruling on plaintiff's
26 motion to compel.

1 Accordingly, IT IS HEREBY ORDERED that:

2 1. Nonparty CDCR's November 21, 2011 motion for continuance (dkt. no. 146)
3 is granted;


4 2. The December 1, 2011 hearing on plaintiff's motion to compel (dkt. no. 144) is
5 continued to December 8, 2011, at 10:00 a.m. before the undersigned;

6 3. The November 30, 2011 deadline for filing a joint pretrial statement is
7 continued to February 1, 2012;

8 4. The trial confirmation hearing set for December 7, 2011, is continued to March
9 21, 2012, at 11:00 a.m., in Courtroom 3, before the Honorable Kimberly J. Mueller; and

10 5. The jury trial date, set for January 30, 2012, is continued to May 21, 2012, at
11 9:00 a.m., in Courtroom 3, before the Honorable Kimberly J. Mueller.

12 DATED: November 22, 2011

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15 KENDALL J. NEWMAN
16 UNITED STATES MAGISTRATE JUDGE

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