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

IVAN KILGORE,

Plaintiff,

No. 2:07-cv-2485 GEB KJN P

vs.

RICHARD MANDEVILLE, et al.,

Defendants.

ORDER

I. BACKGROUND

Plaintiff is a state prisoner at California State Prison-Sacramento (“CSP-SAC”). Plaintiff is proceeding without counsel and in forma pauperis, in this civil rights action filed pursuant to 42 U.S.C. § 1983. This action is premised on plaintiff’s allegations that defendants provided constitutionally inadequate medical care in responding to plaintiff’s complaints of sinus problems, thereby allegedly causing plaintiff unnecessary pain and suffering, and resulting in permanent nerve damage and disfigurement after surgical removal of an inverted sinus papilloma. Plaintiff is proceeding with an Amended Complaint (Dkt. No. 5) against the following defendants, all employed during the relevant period at CSP-SAC: Chief Medical Officer Karen Kelly; Dr. Jasdeep Bal; Dr. Gabriel Borges; Dr. James R. Wedell; Registered Nurse Nancy Dunne; Vocational Nurse Gloria Forshay; Vocational Nurse Marcus Winton; and

1 Correctional Officer Gregory Hampton.

2 By order filed June 21, 2010, the undersigned resolved several discovery matters
3 and extended the deadlines for filing discovery and dispositive motions. Those deadlines were
4 vacated subject to the court's resolution of the following pending matters: (1) plaintiff's motion
5 for discovery sanctions and to compel discovery (Dkt. No. 79); (2) plaintiff's motion for leave to
6 file a Second Amended Complaint (Dkt. No. 84); (3) plaintiff's motion for injunctive relief (Dkt.
7 No. 85); and (4) plaintiff's requests for discovery directed to third parties (Dkt. Nos. 87, 88).

8 II. DISCUSSION

9 A. Plaintiff's Motion for Discovery Sanctions and for Further Discovery

10 Plaintiff moves for discovery sanctions, in the form of terminating sanctions, issue
11 and/or evidence preclusion, and costs, based on his contention that defendants failed to comply
12 with the June 21, 2010 order of this court. That order directed in pertinent part that: (1)
13 defendants Kelly, Bal and Dunne each provide supplemental responses to plaintiff's
14 Interrogatories, Set One, as construed by the court; and (2) defendants Kelly, Bal, Dunne,
15 Hampton, Borges and Wedell each respond to plaintiff's further discovery requests, to be
16 subsequently served on defendants as authorized by the court.

17 1. Plaintiff's Interrogatories, Set One (Defendants Bal, Kelly and Dunne)

18 In addressing plaintiff's first request to compel further answers to his
19 Interrogatories, Set One, the court ruled in pertinent part that defendants Kelly, Bal and Dunne
20 were each required to provide supplemental responses to plaintiff's Interrogatories, Set One, as
21 construed by the court. (Dkt. No. 73.) The court twice extended the time for defendants to
22 comply with the court's order, to July 30, 2010. (Dkt. Nos. 74, 77.)

23 On September 3, 2010, plaintiff filed the instant motion for sanctions, asserting
24 that defendants had willfully violated the court's order in the following ways: (1) that defendant
25 Kelly had failed to identify the individual members of CSP-SAC's "Specialty Clinic Staff"
26 ("schedulers"), responsible for scheduling plaintiff's referrals to, and appointments with, U.C.

1 Davis' Ear, Nose, Throat ("ENT") Clinic; and (2) that defendant Bal had failed to provide the
2 name of the individual he contacted at the Specialty Clinic Office on September 26, 2006.
3 Plaintiff argues in part that institutional policies require the designation of staff members to
4 maintain a "Specialty Referral Tracking Log" that should indicate which members were
5 responsible for contacting the ENT Clinic on behalf of plaintiff.

6 The court finds that the information sought by plaintiff is not encompassed by the
7 subject discovery requests, and that the amended responses of defendants Kelly and Bal are
8 adequate. Defendant Kelly was directed by the court to identify all "providers" (not
9 "schedulers") of plaintiff's medical treatment in a detailed chronology,¹ and she did so. (See
10 Dkt. No. 83-1 at 5-10.) Defendant Bal was directed, in pertinent part, to identify all "medical
11 providers" involved in plaintiff's treatment, testing or referrals, "including Speciality Referral
12 Staff members."² The court's inclusion of the latter category was intended to capture the
13 identities of all medical providers, whether or not employed by CSP-SAC, not "schedulers." The
14 portion of Defendant Bal's amended response with which plaintiff now takes issues provides
15 (Dkt. No. 83-1 at 17-18 (emphasis added)):

16 With regard to Plaintiff's medical care, I ordered an axial and
17 coronal CT scan (facial sheath protocol with contra[s]t) on
18 September 22, 2006. The request was received on September 22,
19 2006, and approval for the procedure was noted by Nurse Dunne
20 on October 3, 2006. On September 26, 2006, the U.S. Davis ENT

21 ¹ The court directed Kelly to "serve one amended answer responsive to plaintiff's
22 Interrogatory Nos. 15-18 that succinctly and chronologically identifies, for the period April 17,
23 2006, through December 2006, plaintiff's medical treatment, the providers of each treatment, and
24 the completion and forwarding of any CDCR referral forms, including the identity of the
25 providers making the referrals and to whom, and the identity of the providers responsible for
26 responding to such referrals." (Dkt. No. 73 at 17.)

² The court directed Bal, in pertinent part, to "identify the date(s) and substance of any
CDCR 7243 Form ["Request for Service" or "RFS" Form] or relevant 602 Form filed by
plaintiff, and any referrals or recommendations by you and/or other medical providers that
plaintiff receive further diagnostic testing or procedures relative to his otolaryngological
complaints; provide the date(s) and substance of your response to any such referrals or
recommendations, and/or the response of other identified medical providers, including Speciality
Referral Staff members." (Dkt. No. 73 at 18.)

1 clinic was awaiting a CT scan for evaluation of Plaintiff's nasal
2 polyps/mass. *I contacted the consult desk for status of the*
3 *appointment, and was informed that they were awaiting a schedule*
from the U.C. Davis ENT clinic. I documented that staff would
follow-up in thirty days.

4 Bal's general reference to the "consult desk" is consistent with the court's direction that Bal
5 identify only "medical providers." Plaintiff's Eighth Amendment claims will not turn on the
6 identity of non-treatment staff, but on the assessments and decisions of treatment staff over the
7 passage of time. Plaintiff has or should have this information. Moreover, as the court previously
8 ruled, plaintiff's specific request to obtain a printout of the "read only" program that may reveal
9 "all speciality clinic request(s), etc. for the UC Davis ENT Clinic dating from April of 2006 to
10 present time," was denied because the information is unavailable. (Dkt. No. 73 at 7-8.)

11 Plaintiff also asserts that defendant Bal failed to identify all of the administrative
12 grievances that plaintiff filed while Bal was serving as plaintiff's primary care physician. (Dkt.
13 No. 79 at 6-7.) Bal identified only the administrative grievance that required his direct response.
14 (Dkt. No. 83-1 at 20.) The court notes that the requested information is likely not of the type
15 routinely maintained by a medical provider, but should instead be available through the CSP-
16 SAC Litigation Office, and is likely already within plaintiff's possession. Accordingly, that
17 portion of the court's prior order directing defendant Bal to "identify the date(s) and substance of
18 any CDCR 7243 Form or relevant 602 Form filed by plaintiff" during the course of Bal's
19 treatment (Dkt. No. 73 at 18 (see n.2, supra)) is vacated.

20 Plaintiff also contends that defendant Dunne failed to comply with the court's
21 order to provided an amended answer to plaintiff's Interrogatory No. 8. (Dkt. No. 73 at 16.)
22 Defendants state that the supplemental response was served on plaintiff on July 22, 2010, and re-
23 served on plaintiff on October 5, 2010. (Dkt. No. 83 at 5; and Exh. C.) The court finds that
24 Dunne's answer is adequate.

25 Therefore, the court denies as moot plaintiff's motion for an extension of time
26 (Dkt. No. 86) within which to respond to defendants' opposition, as well as plaintiff's request for

1 additional time to file a “reply argument” (Dkt. No. 92 at 5).

2 2. Plaintiff’s Further Discovery Requests Addressed to the Parties

3 When the court last addressed these matters, plaintiff contended that defendants
4 had failed entirely to respond to plaintiff’s Interrogatories, Set Two. Defendants responded that
5 they had never been served with the discovery requests. The court authorized plaintiff to serve or
6 re-serve upon each defendant his Second Set of Interrogatories, and further allowed that
7 additional interrogatories could be served on defendant Kelly. (Dkt. No. 73 at 19.) Plaintiff now
8 contends that he re-served his Second Set of Interrogatories on defendants Kelly, Bal, Dunne,
9 Hampton and Borges, and also served on defendant Borges a Second Set of Requests for
10 Admissions, and on defendant Wedell a First Set of Requests for Admissions and one Production
11 Request, but that no defendant has provided any responses. (Dkt. No. 79 at 8.)

12 Defendants now inform the court that the only additional discovery they received
13 was plaintiff’s Fourth Request for Production of Documents (set forth at Exh. F, Dkt. No. 83),
14 and that their response would be served on plaintiff no later than October 15, 2010 (Dkt. No. 83
15 at 6). As to the other discovery requests, defendants assert, with supporting declarations from D.
16 Higginbotham, CSP-SAC Acting Central Services Captain, and L. Young, CSP-SAC Litigation
17 Coordinator, that they likely failed to receive plaintiff’s additional requests because CSP-SAC’s
18 mail system was significantly flawed during this period of time. (Dkt. No. 83 at 5-7; Exhs. D, E.)

19 Given the passage of time, defendants’ counsel will be required to file a
20 declaration stating that defendants have indeed responded to plaintiff’s Fourth Request for
21 Production of Documents. In addition, defendants shall, within thirty days after the filing date of
22 this order, serve plaintiff with answers to plaintiff’s Interrogatories, Set Two, propounded on
23 defendants Kelly, Bal, Dunne, Hampton and Borges. If defendants have not yet been served with
24 these interrogatories, apparently due to the CSP-SAC mailroom problems, then defendants shall
25 utilize the copies of the interrogatories set forth as attachments to plaintiff’s motion (Dkt. No. 79
26 at 36-79). (Although additional discovery is included in plaintiff’s motion, such discovery was

1 not authorized by the court and therefore will not be compelled.)³ Defendants' counsel shall
2 thereafter file a declaration of compliance, including proof of service on plaintiff.

3 Plaintiff may not propound any further discovery in this action.

4 Accordingly, subject to defendants' compliance with this order, plaintiff's motion
5 for discovery sanctions against defendants Kelly, Bal, Dunne, Hampton, Borges, and Wedell is
6 denied without prejudice, while his motion to compel further discovery responses is granted in
7 part.

8 B. Plaintiff's Discovery Motions Directed to Third Parties

9 Plaintiff moves for an order directing non-parties D. Higginbotham, CSP-SAC
10 Acting Central Services Captain, and L. Young, CSP-SAC Litigation Coordinator, to answer
11 special interrogatories verifying and explaining in detail the circumstances of CSP-SAC's
12 mailroom problems (Dkt. No. 87), and moves to compel Young to timely provide plaintiff with a
13 copy of his "Mail Card" (CDC Form 119), which itemizes plaintiff's in-coming and out-going
14 legal mail (Dkt. No. 88). Plaintiff's first motion is not authorized by the Federal Rules of Civil
15 Procedure and, moreover, is unnecessary in light of the court's order that defendants must
16 respond to plaintiff's additional authorized discovery requests. However, plaintiff's second
17 motion is reasonable in light of the many alleged service problems in this case, and is reasonably
18 directed, by defendants' counsel, to a qualified official within CDCR, to produce a copy of
19 plaintiff's CDC Form 119 for the period September 1, 2010, to the present. Although this
20 information may not be relied upon to obtain or challenge further discovery, it will address
21 plaintiff's many frustrations throughout the discovery process, will serve in the organization of
22 plaintiff's papers, and may later prove relevant to issues of credibility. Defendants shall serve
23 plaintiff with a copy his "Mail Card" (CDC Form 119) within thirty days after the filing date of
24 this order.

25 ³ An exception is made for plaintiff's Fourth Request for Production of Documents, to
26 which defendants represent they intended to respond.

1 C. Plaintiff's Motion to File a Second Amended Complaint

2 Plaintiff requests leave to file a Second Amended Complaint and has submitted a
3 proposed Second Amended Complaint. (Dkt. No. 84.) “Although five factors generally are
4 considered when assessing the propriety of a motion to amend [bad faith, undue delay, prejudice
5 to the opposing party, futility of amendment, and whether the plaintiff has previously amended
6 the complaint], futility of amendment alone can justify the denial of a motion.” Ahlmeyer v.
7 Nevada System of Higher Education, 555 F.3d 1051, 1055 (9th Cir. 2009) (fn. omitted), citing
8 Johnson v. Buckley, 356 F.3d 1067, 1077 (9th Cir. 2004).

9 Plaintiff already proceeds on an Amended Complaint, filed as a matter of course
10 on December 7, 2007, prior to this court’s screening of his initial complaint filed on November
11 19, 2007. See Fed. R. Civ. P. 15(a)(1) (authorizing amendment through twenty-first day after
12 service of initial pleading). To allow further amendment at this juncture would cause undue
13 delay and prejudice defendants. This case is nearly three-and-one-half years old, challenging
14 conduct that allegedly commenced in December 2005, more than five-and-one-half years ago.
15 When the court screened the operative Amended Complaint (36 pages in length), it found that
16 service was appropriate for eight defendants, all of whom have now appeared in this action and
17 have been actively engaged in discovery. The proposed Second Amended Complaint is 76 pages
18 in length, with attachments totaling an additional 377 pages. The proposed complaint seeks to
19 add 25 additional named defendants, including 5 defendants associated with U.C. Davis Medical
20 Center, and six defendants who were previously screened out by this court. (Cf. Dkt. No. 84 at
21 5-18, with Dkt. No. 7 at 7-8.) In addition, plaintiff seeks to add over 200 “Doe” defendants. To
22 permit even a fraction of these changes would significantly alter the course of this litigation and
23 detract from the central legal claims which the court has found to be potentially cognizable.

24 Further amendment of the complaint would also unduly prolong the already-
25 extended deadlines in this case. Defendants filed a motion for summary judgment on February
26 16, 2010 (Dkt. No. 63), which the court vacated pursuant to plaintiff’s motion to stay this action,

1 construed as a motion to amend the scheduling order, and in order to resolve plaintiff's motions
2 for discovery (Dkt. Nos. 68, 73.) On June 21, 2010, this court carefully reviewed all pending
3 discovery matters and extended the deadlines for discovery and for filing a dispositive motion.
4 The instant motions ensued; their resolution will enable the imminent filing of dispositive
5 motions and a determination whether this case should proceed to trial on its fundamental claims.

6 For these reasons, plaintiff's motion for leave to file a Second Amended
7 Complaint is denied. The court will entertain no further motions to amend the operative
8 complaint.

9 D. Plaintiff's Motion for Injunctive Relief

10 Plaintiff contends that this court should order his immediate release from prison
11 because all factors supporting the granting of such preliminary injunctive relief are present. "The
12 proper legal standard for preliminary injunctive relief requires a party to demonstrate 'that he is
13 likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of
14 preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the
15 public interest.'" Stormans, Inc. v. Selecky, 586 F.3d 1109, 1127 (9th Cir. 2009), quoting Winter
16 v. Natural Res. Def. Council, Inc., 555 U.S. 7, 129 S. Ct. 365, 375-76 (2008).

17 Plaintiff contends that there is a strong likelihood that he will succeed on the
18 merits of this action; that plaintiff is likely to suffer irreparable injury if preliminary relief is not
19 granted;⁴ that a balancing of hardships weighs in plaintiff's favor because his release "will not
20 cause defendants any real harm" (Dkt. No. 85 at 13); and that the granting of such relief would
21 further the public interest in safeguarding the constitutional rights and basic human needs of its
22 citizenry.

23 The motion is denied. The instant civil rights action seeks damages for the

24
25 ⁴ Plaintiff asserts that his "sinus lesion has exhibited a likelihood to recur," that "each
26 time it recurs (or goes untreated) the likelihood of it becoming cancerous increases," and so he
"will require continual follow up ENT care" (Dkt. No. 85 at 12); and that continued incarceration
exposes plaintiff to "an ongoing substantial risk of serious harm" (id. at 13).

1 alleged violation of plaintiff's constitutional rights and, if appropriate, injunctive relief limited to
2 plaintiff's further treatment. Challenges to the fact of plaintiff's incarceration or to matters
3 affecting the duration of his confinement are the province of habeas corpus. Preiser v.
4 Rodriguez, 411 U.S. 475, 500 (1973).

5 III. CONCLUSION

6 For the foregoing reasons, IT IS HEREBY ORDERED that:

7 1. Plaintiff's motion for discovery sanctions (Dkt. No. 79) is denied; plaintiff's
8 motion for an extension of time to reply to defendants' opposition to this motion (Dkt. No. 86) is
9 denied as moot.

10 2. Plaintiff's related motion to compel responses to his further discovery requests
11 (Dkt. No. 79) is granted in part; defendants shall, within thirty days after the filing date of this
12 order, and consistent with the instructions set forth in this order, serve plaintiff with responses to
13 his Second Set of Interrogatories; defendants' counsel shall, within ten days thereafter, file with
14 the court a statement of compliance, which shall also include verification that defendants served
15 responses to plaintiff's Fourth Production Request.

16 3. Plaintiff's motion compelling third parties Higginbotham and Young to answer
17 special interrogatories (Dkt. No. 87) is denied.

18 4. Plaintiff's motion compelling the production of his "Mail Card" (CDC Form
19 119) (Dkt. No. 88) is granted; defendants shall, within thirty days after the filing date of this
20 order, serve plaintiff with a copy of such document, for the period September 1, 2010 to the
21 present.

22 5. Plaintiff's motion for leave to file a Second Amended Complaint (Dkt. No. 84)
23 is denied.

24 6. Plaintiff's motion for injunctive relief (Dkt. No. 85) is denied.

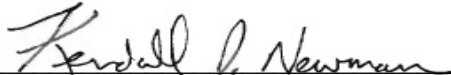
25 7. Discovery shall remain closed in this action with the exception that defendants
26 shall timely serve plaintiff with the additional discovery items ordered herein.

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8. The deadline for filing dispositive motions is hereby scheduled for Friday, July 29, 2011.

SO ORDERED.

DATED: May 3, 2011


KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

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