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

JOSEPH BECKER,

Plaintiff,

No. CIV S-10-0519 FCD EFB P

vs.

DAHL, et. al.,

Defendants.

ORDER

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Plaintiff is a state prisoner proceeding without counsel in an action brought under 42 U.S.C. § 1983. Currently pending before the court are defendants Dahl, Lisle, Martel and Moazam’s (“defendants”) motion to compel (Dckt. No. 32), plaintiff’s motions for a protective order (Dckt. No. 37), and to modify the scheduling order and for leave to amend (Dckt. No. 33). For the reasons provided below, defendants’ motion is granted in part, and plaintiff’s motions are denied.

**I. Background**

This action proceeds on the March 3, 2010 complaint in which plaintiff alleges that defendants were deliberately indifferent to his serious medical needs by removing him from the Enhanced Outpatient Program (“EOP”), despite the fact that plaintiff is suicidal and at risk if removed from that program. Dckt. No. 1, Comp., § IV. The court ordered service of the

1 complaint on defendants on April 12, 2010. Dckt. No. 19. Defendants filed an answer on July  
2 13, 2010. Dckt. No. 23. On August 2, 2010, the court issued a discovery and scheduling order,  
3 setting the following deadlines: (1) for requesting written discovery at September 10, 2010; (2)  
4 for completing discovery and filing discovery motions at November 12, 2010; (3) for filing a  
5 motion to amend the complaint at November 12, 2010; and (4) for filing dispositive motions at  
6 February 4, 2011. Dckt. No. 27.

7 **II. Defendants' Motion to Compel**

8 Defendants move for an order compelling plaintiff to provide further responses to certain  
9 discovery requests and for \$1,330.00 as the reasonable costs and attorneys fees incurred in  
10 connection with their motion. Defendants contend that plaintiff provided deficient responses to:  
11 (1) their first set of requests for production of documents ("RFPs"); and (2) their first set of  
12 requests for admissions ("RFAs"). The court will address each alleged deficient response in  
13 turn.

14 **A. Requests for Production**

15 If a party, in response to a request for production served under Rule 34 of the Federal  
16 Rules of Civil Procedure, fails to produce or permit inspection, the discovering party may move  
17 for an order compelling production. Fed. R. Civ. P. 37(a)(3)(B)(iv). Defendants argue that  
18 plaintiff's responses are incomplete and evasive and are tantamount to no response at all, as  
19 plaintiff produced no documents in response to defendants' requests for production of  
20 documents. Defendants take issue with the following RFP responses provided by plaintiff:

21 RFP No. 1: If you contend that DR. DAHL[, LISLE, MARTEL OR MOAZAM] had you  
22 removed from the EOP mental health program, please produce any and all documents  
which support your contention.

23 Response to RFP No. 1: Objection. Plaintiff objects to this request for production  
24 of documents on the ground that it seeks duplicative information sought for by  
25 Defendant Dr. Dahl[, Lisle, Martel and Moazam] in the interrogatories to  
26 plaintiff, set one, No. 1. Without waiving said objection, plaintiff responds as  
follows: Defendants have an obligation to duly provide official documentation to  
plaintiff, yet never have done so. Plaintiff irregardless never averred in the  
complaint of being "removed," and this request is otherwise unintelligible and

1 vague as to time.

2 RFP No. 2: If you contend that you have been removed from the EOP mental health  
3 program since transferring to the Mule Creek State Prison, please produce any and all  
4 documents which support your contention.

4 Response to RFP No. 2: Objection. Plaintiff objects to this request for production  
5 of documents on the ground that it seeks duplicative information sought for by  
6 Defendant Dr. Dahl[, Lisle, Martel and Moazam] in the interrogatories to  
7 plaintiff, set one, No. 2. Plaintiff objects also on the ground that it is vague and  
8 unintelligible, and sets forth a misconstrued allegation.

7 Defs.' Mot. to Compel, Decl. of Kathleen J. Williams in Supp. Thereof ("Williams Decl."), Exs.  
8 A-H.

9 For the reasons that follow, plaintiff's objections to RFPs 1 and 2 are overruled.

10 Plaintiff's objection on the ground that these requests are duplicative lacks merit. As  
11 defendants note, a request for production of documents seeks documents, while an interrogatory  
12 is a question seeking a written response. While the nature of the information sought may in  
13 some respect be "duplicative," the responses sought take different forms, and defendants are  
14 entitled to use both vehicles for conducting discovery.

15 Plaintiff's objection that these requests are unintelligible and vague as to time, also lacks  
16 merit, as the court finds the requests to be rather clear and straightforward. Plaintiff apparently  
17 takes issue with the word "removed" as used in the request, on the ground that plaintiff never  
18 alleged he had been "removed" from the EOP program. Plaintiff's quibble over the phrasing of  
19 the requests, however, does not excuse him from responding. The requests condition responses  
20 upon whether plaintiff contends that he has been "removed from the EOP mental health  
21 program." If plaintiff so contends, he must produce documents that support this contention.  
22 Likewise, if plaintiff does not contend that he was removed from EOP, then he likely has no  
23 responsive documents to these requests, but must say so in his responses.

24 Plaintiff also fails to explain his statement that defendants "have an obligation to duly  
25 provide official documentation to plaintiff, yet never have done so." Even assuming defendants  
26 have not met some unspecified obligation to provide "documentation" to plaintiff, this would not

1 excuse plaintiff from properly responding to defendants' discovery requests. Accordingly,  
2 defendants' motion is granted as to RFPs 1 and 2.

3 RFP No. 3: If you contend that you exhausted your administrative remedies as to a claim  
4 against DR. DAHL[, LISLE, MARTEL OR MOAZAM] based on the allegations set  
5 forth in your complaint, please produce any and all documents which support your  
6 contention.

7 Response to RFP No. 3: Objection. Plaintiff objects to this request for production  
8 of documents on the ground that Defendant Dr. Dahl[, Lisle, Martel and Moazam  
9 are] attempting to shift the onus of defendant's responsibility upon plaintiff, and  
10 extends to issues of pure law ultimately for the court to determine. Without  
11 waiving said objection, plaintiff responds as follows: One (1) of four (4)  
12 exhaustion[] of administrative remedies can be located in plaintiff's current  
13 central file which contains microfiche of such exhaustion under plaintiff's former  
14 prison number H-16467.

15 Williams Decl., Exs. A-H.

16 Plaintiff objects to this request on the ground that it is defendants' burden to raise and  
17 prove the absence of exhaustion. While this is an accurate statement of the law, its effect is not  
18 to bar discovery on the matter. *See Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003).  
19 Defendants are not forcing plaintiff to plead and/or prove that he exhausted his administrative  
20 remedies by seeking discovery from plaintiff regarding exhaustion. Because the burden of  
21 raising and proving the absence of exhaustion lies with defendants, defendants are entitled to  
22 move for dismissal on this basis. *See id.* Accordingly, defendants may seek discovery from  
23 plaintiff in an effort to determine whether such a motion would be meritorious. *See Fed. R. Civ.*  
24 *P. 26(b)(1)* ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to  
25 any party's claim or defense . . ."). Therefore, an order compelling plaintiff to respond to RFP  
26 3, is appropriate.<sup>1</sup>

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<sup>1</sup> Likewise, a protective order pursuant to Rule 26(c), based on plaintiff's mistaken belief that defendants "are abusing the process of the Federal Rules of Civil Procedure" by seeking discovery regarding exhaustion, is not appropriate. Plaintiff's motion for a protective order (Dckt. No. 37), will therefore be denied. *See Fed. R. Civ. P. 26(c)* ("The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . .").

1           **B.       Requests for Admissions**

2           Unless the court finds that a responding party’s objection to a request for admission is  
3 justified, it must order that an answer be served. Fed. R. Civ. P. 36(a)(6). Defendants contend  
4 that following RFA responses provided by plaintiff are not justified:

5           RFA No. 1: DR. DAHL[, LISLE, MARTEL and MOAZAM] never had you removed  
6 from the EOP mental health program.

7                     Response to RFA No. 1: Objection. Plaintiff objects to this request for admission  
8 on the ground that it seeks duplicative information sought for by Defendant Dr.  
9 Dahl[, Lisle, Martel, and Moazam] in the interrogatories to plaintiff, set one, No.  
10 1.

11           RFA No. 2: You have not been removed from the EOP mental health program since  
12 transferring to the Mule Creek State Prison.

13                     Response to RFA No. 2: Objection. Plaintiff objects to this request for admission  
14 on the ground that it seeks duplicative information sought for by Defendant Dr.  
15 Dahl[, Lisle, Martel, and Moazam] in the interrogatories to plaintiff, set one, No.  
16 2.

17           RFA No. 3: You did not exhaust your administrative remedies as to a claim against DR.  
18 DAHL[, LISLE, MARTEL and MOAZAM] based on the allegations set forth in your  
19 complaint.

20                     Response to RFA No. 3: Objection. Plaintiff objects to this request for admission  
21 on the ground that it seeks duplicative information sought for by Defendant Dr.  
22 Dahl[, Lisle, Martel, and Moazam] in the interrogatories to plaintiff, set one, No.  
23 3.

24 Williams Decl., Exs. Q-X.

25           As explained above, plaintiff’s “duplicative” objection lacks merit and does not justify  
26 plaintiff’s failure to respond. Therefore, plaintiff must serve defendants with his answers to the  
RFAs. *See* Fed. R. Civ. P. 36(a)(6). Accordingly, the court will grant defendants’ motion to  
compel answers to RFAs 1-3. Plaintiff is hereby informed that Rule 36(a)(4) provides the proper  
procedure for responding to RFAs:

If a matter is not admitted, the answer must specifically deny it or state in detail  
why the answering party cannot truthfully admit or deny it. A denial must fairly  
respond to the substance of the matter; and when good faith requires that a party  
qualify an answer or deny only a part of a matter, the answer must specify the part  
admitted and qualify or deny the rest. The answering party may assert lack of

1 knowledge or information as a reason for failing to admit or deny only if the party  
2 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.

3 **C. Request for Attorneys' Fees**

4 Defendants request reimbursement of expenses, including attorney's fees, incurred in  
5 filing the motion to compel. *See* Fed. R. Civ. P. 37(a)(5). In support of their motion, defendants  
6 contend that they made a good faith effort to obtain the discovery without court order, and that  
7 plaintiff has offered no justification for his failure to provide full and complete responses to their  
8 discovery requests. In their reply, defendants contend further that plaintiff has admitted, through  
9 his filings in this action, that he has not exhausted his administrative remedies and that he is still  
10 in the EOP and was never removed.<sup>2</sup> Dckt. No. 35 at 7-9. According to defendants, these  
11 purported admissions "demonstrate[] substantial justification that defendants should be awarded  
12 attorneys' fees and shows that plaintiff had no justification for not complying with the discovery  
13 requests." *Id.* at 8, 9.

14 Rule 37(a)(5) provides, that if "the motion [to compel] is granted . . . , the court must,  
15 after giving an opportunity to be heard, require the party . . . whose conduct necessitated the  
16 motion . . . to pay the movant's reasonable expenses incurred in making the motion, including  
17 attorney's fees" unless "circumstances make an award of expenses unjust." Fed. R. Civ. P.  
18 37(a)(5)(A)(iii). In this instance, the court declines to award expenses. Initially, it must be  
19 noted that plaintiff, who is uneducated in the law proceeds pro se and in forma pauperis.  
20 Additionally, although defendants argue that plaintiff could have responded to their discovery  
21 requests, plaintiff did not ignore or completely fail to respond to the requests or intentionally  
22 provide evasive or misleading answers. Rather, it appears that he attempted to comply with the  
23 discovery rules by promptly objecting to defendants' discovery requests. Under these

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25 <sup>2</sup> Although defendants request that the court take judicial notice of these documents, the  
26 court finds that judicial notice is unnecessary given that such documents are already a part of the  
record in this action. *See* Dckt. No. 35 at 7; *see also* Dckt. Nos. 33, 34.

1 circumstances, the court finds that an award of expenses, \$1,330.00, would be unjust. However,  
2 plaintiff is admonished that his objections have been overruled and that he must serve responses  
3 to defendants' RFPs 1-3 and RFAs 1-3. Should plaintiff fail to fully respond to the RFPs and  
4 RFAs as directed herein, however, defendants may file a motion to enforce this order and/or seek  
5 sanctions.

6 **III. Plaintiff's Motion to Modify the Scheduling Order and for Leave to Amend**

7 The discovery and scheduling order established November 12, 2010 as the deadline for  
8 filing a motion to amend the complaint. Dckt. No. 27. In a motion dated November 12, 2010,  
9 plaintiff timely requested leave to file an amended complaint. Dckt. No. 33.

10 Rule 15(a)(1) provides that "[a] party may amend its pleading once as a matter of course  
11 within: (A) 21 days after serving it, or (B) if the pleading is one to which a responsive pleading  
12 is required, 21 days after service of a responsive pleading or 21 days after service of a motion  
13 under Rule 12(b), (e), or (f), whichever is earlier." Because defendants filed a responsive  
14 pleading on July 13, 2010, plaintiff's opportunity to amend "as a matter of course" expired 21  
15 days thereafter.

16 Nonetheless, Rule 15(a)(2) provides that "[i]n all other cases, a party may amend its  
17 pleading only with the opposing party's written consent or the court's leave. The court should  
18 freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). The policy of freely  
19 granting leave to amend should be applied with "extreme liberality." *DCD Programs, Ltd. v.*  
20 *Leighton*, 833 F.2d 183, 186 (9th Cir. 1987). When determining whether to grant leave to amend  
21 under Rule 15(a), a court should consider the following factors: (1) undue delay; (2) bad faith;  
22 (3) futility of amendment; and (4) prejudice to the opposing party. *Foman v. Davis*, 371 U.S.  
23 178, 182 (1962). Granting or denying leave to amend rests in the sound discretion of the trial  
24 court, and will be reversed only for abuse of discretion. *Swanson v. U.S. Forest Serv.*, 87 F.3d  
25 339, 343 (9th Cir. 1996).

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1 Plaintiff seeks leave to amend for the following reasons: 1) defendants will be replaced  
2 with new mental health care staff, who will consider removing plaintiff from EOP; and 2)  
3 plaintiff expects a final decision that will exhaust his administrative remedies within 60 days,  
4 and if that decision is adverse, plaintiff intends to name J. Clark Kelso, the Receiver, as a  
5 defendant. Dckt. No. 33. Defendants argue that plaintiff's proposed amendments would be  
6 futile because: 1) plaintiff lacks standing to sue these unknown defendants, because plaintiff  
7 alleges only a speculative, future injury that is not concrete and particularized; 2) that because no  
8 injury has yet to occur, plaintiff could not have exhausted his administrative remedies as to  
9 future claims against the new unnamed defendants; and 3) that plaintiff's future claim against J.  
10 Clark Kelso, the Receiver, would fail because plaintiff has not alleged Kelso was personally  
11 involved in violating plaintiff's federal rights. Dckt. No. 36 at 3-6.

12 Having reviewed plaintiff's proposed amendments, the court finds that plaintiff's motion  
13 must be denied, without prejudice, as futile. At this time, plaintiff has no new claims or  
14 identifiable defendants to add to the complaint, as his proposed amendments are based on events  
15 that may or may not happen in the future. Until plaintiff has new defendants and/or claims to  
16 add to the complaint, amendment is futile.

17 Plaintiff is hereby informed that any motion to amend filed in the future must be  
18 accompanied by a proposed amended complaint, that is complete in itself, without reference to  
19 the original complaint. Plaintiff is further informed that the court's consideration of any future  
20 motion to amend will necessarily require modification of the discovery and scheduling order.  
21 Requests to modify a deadline established by the scheduling order are governed by Rule 16 of  
22 the Federal Rules of Civil Procedure. A schedule may be modified upon a showing of good  
23 cause. Fed. R. Civ. P. 16(b). Good cause exists when the moving party demonstrates he could  
24 not meet the deadline despite exercising due diligence. *Johnson v. Mammoth Recreations, Inc.*,  
25 975 F.2d 604, 609 (9th Cir. 1992).

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1 **IV. Order**


2 Accordingly, it hereby is ORDERED that:

3 1. Defendants' motion to compel, Docket No. 32, is denied to the extent it seeks costs,  
4 but granted to the extent that, within 30 days of the date of this order, plaintiff shall provide to  
5 defendants further responses to defendants' first set of requests for production of documents, and  
6 first set of requests for admissions;

7 2. Plaintiff's motion for a protective order, Docket No. 37, is denied; and

8 3. Plaintiff's motion to modify the scheduling order and for leave to amend, Docket No.  
9 33, is denied.

10 Dated: January 12, 2011.

  
EDMUND F. BRENNAN  
UNITED STATES MAGISTRATE JUDGE