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

TRI D. NGUYEN,

Plaintiff,

No. 2: 10-cv-1461 WBS KJN P

vs.

BARTOS, et al.,

Defendants.

ORDER

_____/

Plaintiff is a state prisoner proceeding without counsel with a civil rights action pursuant to 42 U.S.C. § 1983. Pending before the court is defendants’ motion to compel filed August 24, 2011. For the following reasons, defendants’ motion is granted.

Defendants contend that plaintiff failed to adequately respond to interrogatories, set two, nos. 2, 3, 5, 8, 9, 11, 12, 13, 14, 15, 16, 18-25, on grounds that his responses were fully or partially written in Vietnamese. Defendants also contend that plaintiff failed to adequately respond to interrogatories, set two, nos. 1, 2, 4, 5, 6, 7, 9, 10, 11, 13, 15, 16, 17, 19 and 25, on grounds that incorporation by reference is not the proper way to respond to interrogatories.

Responses in Vietnamese

In the motion to compel, defendants observe that their previous correspondences with plaintiff as well as plaintiff’s motions and past discovery responses were in English.

1 Defendants also state that they provided a Vietnamese interpreter for plaintiff at his deposition.
2 However, the interpreter was used only twice, both times to spell names. Defendants suggest that
3 plaintiff's claim that he cannot adequately read and write English is not sincere.

4 In his opposition to the motion to compel, plaintiff first alleges that defendants
5 told him that they would not file a motion to compel if he signed a release authorizing them to
6 review his prison records. The record reflects that this "agreement" concerned defendants'
7 willingness not to file a motion to compel regarding a request for production of documents,
8 rather than interrogatories.

9 In his declaration submitted in support of his opposition, plaintiff states that he
10 has very limited understanding of the English language. Plaintiff contends that he cannot read,
11 write or understand English very well. Plaintiff alleges that he has obtained assistance from other
12 prisoners in preparing his pleadings, including the opposition to defendants' motion to compel.
13 Plaintiff also states that on June 26, 2011, he was stabbed by another inmate and placed in
14 administrative segregation. While in administrative segregation, he could not contact anyone or
15 ask for inmate assistance in preparing his pleadings.

16 While plaintiff may have some difficulty with communicating in English, either
17 verbally or in writing, he is obligated to litigate this action in English.¹ Plaintiff apparently relies
18 on legal assistance from other inmates, to whom he apparently did not have access when he
19 prepared his responses to the interrogatories. According to his declaration submitted in
20 opposition to defendants' motion, plaintiff now has access to inmates who can assist him in
21 preparing his pleadings. Accordingly, plaintiff is directed to serve defendants with supplemental
22 responses to the at-issue interrogatories in English.

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25 ¹ While appointment of counsel may alleviate some of the alleged language issues in this
26 case, the undersigned has determined that appointment of counsel is not warranted at this time.

1 *Incorporation by Reference*

2 Defendants argue that incorporation by reference is not permitted in responding to
3 interrogatories. In support of this argument, defendants cite Asyst Technologies, Inc. v. Empak,
4 Inc., 2006 WL 1749592 (N.D. Cal. June 22, 2006). In Asyst, District Judge Fogel commented
5 that “[t]he Court remains of the opinion that incorporation by reference is not permitted under
6 Rule 33(b), as noted in Federal Civil Procedure Before Trial, ¶ 11: 1731 (The Rutter Group
7 2005.” 2006 WL 1749592 at * 1.

8 Other courts have found that incorporation by reference may be permitted in
9 certain circumstances. For example, in Howard v. Urban Inv. Trust, Inc., 2011 WL 976767
10 (N.D. Ill. March 18, 2011), the district court found that incorporation by reference was proper:

11 “Ordinarily, responses to interrogatories should not incorporate
12 outside material by reference. Answers to interrogatories must be
13 responsive to the question, complete in themselves, and should not
14 refer to pleadings, depositions, other documents, or other
15 interrogatories, at least when a reference to another interrogatory
16 makes it difficult to ascertain if the original interrogatory has been
17 answered completely without a detailed comparison of answers.”
18 7-33 Moore’s Federal Practice-Civil § 33.103. While referencing
19 outside documents is disfavored, it is not prohibited. Courts have
20 allowed outside reference where the reference is clear and not
21 meant to evade answering. See e.g. Williams v. Sprint/United
22 Management Co., 235 F.R.D. 494, 501 (D.Kan. 2006) (“Plaintiffs
23 may not answer the interrogatory by generally referring Defendant
24 to the ... documents produced ... but rather must indicate with
25 specificity where the information can be found.”); Kenney v. Shaw
26 Industries, Inc., 764 F.Supp. 1501, 1503 (N.D.Ga. 1991)
27 (“Plaintiff’s incorporation by reference in this case is not an
28 attempt to obscure its response to Defendant’s interrogatory, but
29 instead is an attempt to respond.”).

30 Here, we find that plaintiff’s response to Interrogatory No. 4 serves
31 as a sufficient response to Interrogatory No. 5, both of which seek
32 the factual support for Gardner’s alleged misconduct. Plaintiff’s
33 references to the documents are unmistakably specific.
34 Additionally, plaintiff’s responses include parenthetical
35 descriptions of the facts that she purports supports the allegations
36 against Gardner. While plaintiff’s response is not in narrative
37 form, the Court finds that it satisfies the requirements of Rule 33.

2011 WL 976767 at * 1-2.

1 Plaintiff incorporated by reference documents which were attached to his response
2 to defendants' request for production of documents. Plaintiff's references to documents appear
3 to be fairly specific. For example, in response to interrogatory no. 4 which asked "How did
4 Bartos deny you dental treatment on September 2, 2009?", plaintiff wrote, "Please see supporting
5 fact at exhibit 'C' at (pp. 3-3 at count I) see also at Exhibit 'I' my witness declaration dated: 9-9-
6 11 and exhibit B." (Dkt. No. 42-4 at 14.)

7 Plaintiff's incorporations by reference may be appropriate responses if plaintiff
8 includes some parenthetical descriptions in support of the responses, as did the plaintiff in
9 Howard v. Urban Inv. Trust, Inc., supra. Accordingly, if plaintiff's supplemental responses
10 incorporate documents by reference, plaintiff must still provide written responses to the
11 interrogatories.

12 *Sanctions*

13 Defendants also move for sanctions based on plaintiff's failure to adequately
14 answer the interrogatories. Federal Rule of Civil Procedure 37(a)(5) provides that if a motion to
15 compel is granted, the losing party shall pay the movant's reasonable attorney's fees. However,
16 the court must not order payment if "other circumstances make an award of expenses unjust."
17 Fed. R. Civ. P. 37(a)(5)(C).

18 In the instant case, plaintiff's ability to adequately respond to the interrogatories
19 was apparently impacted by his inability to obtain inmate assistance while he was in
20 administrative segregation. Under these circumstances, awarding expenses against plaintiff
21 would be unjust. For this reason, defendants' motion for sanctions is denied.

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1 Accordingly, IT IS HEREBY ORDERED that defendants' motion to compel (No.
2 42) is granted; within twenty-eight days, plaintiff shall serve defendants with supplemental
3 responses to the at-issue interrogatories discussed above.

4 DATED: September 20, 2011

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6 
7 KENDALL J. NEWMAN
8 UNITED STATES MAGISTRATE JUDGE

8 nguy1461.com(3)

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