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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CHARLES G. REECE,
Plaintiff,
v.
AMRICK BASI, et al.,
Defendants.

No. 2:11-cv-2712 TLN AC P

ORDER

Plaintiff, a state prisoner proceeding pro se, seeks relief pursuant to 42 U.S. § 1983. Pending before the court are: (1) plaintiff’s requests for a default judgment against defendants Villote and Lahey, ECF Nos. 51, 57; (2) plaintiff’s motion to compel production of documents from defendant Basi, ECF No. 52; and (3) defendants Villote’s and Lahey’s motion to withdraw admissions arising from failure to serve timely responses and for a nunc pro tunc extension of time to respond to plaintiff’s discovery requests, ECF No. 58. The motions have been fully briefed.

BACKGROUND

This matter proceeds on plaintiff’s claims for money damages against defendants Dr. Amrik Basi and Nurses Lahey and Villote, on grounds that they provided him with inadequate medical care in violation of the Eighth Amendment at California State Prison-Solano (CSP)-

1 Solano.¹ Plaintiff alleges that defendant Basi prescribed a medication called Terazosin for
2 plaintiff's enlarged prostate, without advising plaintiff of the medication's risks or explaining the
3 surgical alternatives. As a side-effect of the Terazosin, plaintiff developed a blood clot that
4 caused blindness in his left eye. Defendants Basi, Lahey and Villote failed to treat the blindness,
5 which therefore become permanent. See ECF Nos. 1, 31 at 2.

6 PLAINTIFF'S MOTION TO COMPEL

7 Background

8 Plaintiff moves to compel production of documents from defendant Basi. Motion to
9 Compel ("MTC"), ECF No. 52. He appends the eighteen requests that were contained in his
10 requests for production of documents (RFPs), Set One, and contends that defendant has objected
11 to each and failed to produce any responsive documents. The court construes the motion as
12 seeking compelled responses to each of the eighteen requests. Plaintiff has not provided
13 defendant's objections to the requests, but defendant has submitted his responses. Opposition
14 ("Opp."), ECF No. 56.

15 The court's review of this dispute is complicated by the fact that each of plaintiff's
16 requests for production begins with a reference to a concurrently served request for admission,
17 e.g., "If your response to Request for Admission No. 1, served concurrently with these
18 interrogatories, is anything other than an unqualified admission, please produce all documents
19 that support your [contrary] contentions. . ." RFP No. 1, ECF No. 52, at 14. Plaintiff has not
20 provided the requests for admissions that correlate with his requests for production, however.
21 The court has attempted to discern the subject matter at issue in each request for production,
22 based on the parties' submissions related to the motion. As the moving party, however, plaintiff
23 must bear the consequences if his motion to compel inadequately described the information he
24 seeks.

25 Standards Governing Motion

26 The scope of discovery under Fed.R.Civ.P. 26(b)(1) is broad. Discovery may be obtained
27

28 ¹ Defendants Naku and Traquina have been dismissed. ECF Nos., 31, 36.

1 as to “any nonprivileged matter that is relevant to any party’s claim or defense -- including the
2 existence, description, nature, custody, condition and location of any documents or other tangible
3 things and the identity and location of persons who know of any discoverable matter.” Id.
4 Discovery may extend to relevant information not admissible at trial “if the discovery appears
5 reasonably calculated to lead to the discovery of admissible evidence.” Id.; see also Oppenheimer
6 Fund v. Sanders, 437 U.S. 340, 351 (1978). “Relevance for purposes of discovery is defined very
7 broadly.” Garneau v. City of Seattle, 147 F.3d 802, 812 (9th Cir.1998).

8 The court, however, may limit discovery if it is “unreasonably cumulative or duplicative,”
9 or can be obtained from another source “that is more convenient, less burdensome, or less
10 expensive”; or if the party who seeks discovery “has had ample opportunity to obtain the
11 information by discovery”; or if the proposed discovery is overly burdensome. Fed.R.Civ.P.
12 26(b)(2)(C)(I), (ii) and (iii).

13 “The party seeking to compel discovery has the burden of establishing that its request
14 satisfies the relevancy requirements of Rule 26(b)(1). The party opposing discovery then has the
15 burden of showing that the discovery should be prohibited, and the burden of clarifying,
16 explaining or supporting its objections.” Bryant v. Ochoa, 2009 WL 1390794 at * 1 (S.D.Cal.
17 May 14, 2009). The part opposing discovery is “required to carry a heavy burden of showing”
18 why discovery should be denied. Blankenship v. Hearst Corp., 519 F.2d 418, 429 (9th Cir.1975).

19 Federal Rule of Civil Procedure 34(a) permits each party to serve the opposing party with
20 document requests within the scope of Rule 26(b) that are “relevant to the subject matter involved
21 in the action.” Fed.R.Civ.P. 26(b). In responding to Rule 34 requests, “the response must either
22 state that inspection and related activities will be permitted as requested or state an objection to
23 the request, including the reasons.” Fed.R.Civ.P. 34(b)(2)(B). Under Rule 37(a)(3)(B)(iv), “[a]
24 party seeking discovery may move for an order compelling an answer, designation, production, or
25 inspection” if “a party fails to respond that inspection will be permitted—or fails to permit
26 inspection—as requested under Rule 34.” Fed.R.Civ.P. 37(a)(3)(B)(iv).

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1 The Requests for Production of Documents

2 Request for Production No. 1

3 RFP No. 1: If your response to Request for Admission No. 1,
4 served concurrently with these interrogatories, is anything other
5 than an unqualified admission, please produce all documents that
6 support your contentions that you Amrick [sic] Basi and the second
 unknown doctor did not work on 2-14, 15-2007 in the four yard
 annex clinic.

7 MTC, ECF No. 52, at 14.

8 Response to Request for Production No. 1

9 Response: Objection. This Request lacks foundation and is vague
10 and ambiguous in its entirety, as defendant is not making any such
 contention. Discovery continues.

11 Opp., ECF No. 56, at 5.

12 Discussion

13 It is unclear from the documents plaintiff has provided whether the defendant has denied
14 working in the specified area on the specified dates, with or without another unidentified doctor.
15 Defendant's response indicates that he has not. Accordingly, no further response can be ordered.
16 Plaintiff's motion is denied as to RFP No. 1.

17 Request for Production No. 2

18 RFP No. 2: If your response to Request for Admission No. 1,
19 served concurrently with these interrogatories, is anything other
20 than an unqualified admission, please produce all documents with
 the name of the unknown second doctor who worked with you on
 Feb. 14, 15, 2007, in the four yard annex clinic.

21 MTC at 14.

22 Response to Request for Production No. 2

23 Response: Objection. This request lacks foundation, calls for speculation and is
24 vague and ambiguous in its entirety, as defendant is not making any such
 contention. Discovery continues.

25 Opp. at 5.

26 Discussion

27 Plaintiff is plainly seeking the identity of another doctor who was involved in his care (or
28 lack of care) on February 14 and 15, 2007. An interrogatory would have been a more efficient

1 way of seeking the information, which is discoverable. Defendant Basi is ordered to produce any
2 documentation within his possession, custody or control identifying any other doctor who worked
3 on the four yard annex clinic at any time on February 14 and/or 15 of 2007.

4 Request for Production No. 3

5 RFP No. 3: If your response to Request for Admission No. 2, served concurrently
6 with these interrogatories, is anything other than an unqualified admission, please
7 produce all documents that support your contention that you were not the Plaintiff
8 [sic] primary care provider on 12-26-2006, and that you Amrick [sic] Basi did not
prescribed [sic] (Terazosin) to the Plaintiff and any document that proves you fully
explained the serious side effects of taking Terazosin to Plaintiff.

9 MTC at 14.

10 Response to Request for Production No. 3

11 Response: Objection. This Request is improperly compound, lacks
12 foundation and is vague and ambiguous in its entirety, as defendant
13 is not making any such contention. Without waiving said objects,
14 and subject thereto, after conducting a diligent search and
reasonable inquiry, defendant does not have any such documents in
his possession. Discovery continues.

15 Opp. at 6.

16 Discussion

17 Because plaintiff has not provided his Requests for Admission or defendant's responses,
18 the court cannot determine to what extent, if any, defendant Basi (1) has denied being plaintiff's
19 primary care provider on December 26, 2006, (2) has denied prescribing plaintiff Terazosin, or
20 (3) has claimed that he did or did not explain potential serious side effects. The objections imply
21 that this defendant does not deny being plaintiff's primary care provider or prescribing him
22 Terazosin. It is likely that plaintiff already has such documentation as exists regarding the
23 December 26, 2006, interaction. See, e.g., ECF No. 1-1 at 7, 18. In any case, despite his
24 objections, defendant Basi represents that he has conducted a diligent search and reasonable
25 inquiry and has no documents responsive to plaintiff's request.

26 Nonetheless, to ensure that plaintiff is not denied necessary discovery because he has
27 inartfully crafted his requests, the court will order defendant Basi to produce any and all records
28 that document his prescription of Terazosin to the plaintiff in December of 2006 and/or in January

1 of 2007, and any document(s) that reflect discussion of side-effects and/or alternatives.
2 Defendant Basi must produce any such documents within his possession, custody or control,
3 regardless of whether plaintiff has or has had access to such records by other means. The motion
4 as to RFP No. 3, as modified herein, is granted.

5 Requests for Production Nos. 4 through 6

6 The following requests received the identical objection:

7 RFP No. 4: If your response to Request for Admission No. 3,
8 served concurrently with these interrogatories, is anything other
9 than an unqualified admission, please produce all documents that
support your contention that you Amrick [sic] Basi fully explained
the prostate surgery procedure to Plaintiff on 12-26-2006.

10 RFP No. 5: If your response to Request for Admission No. 4,
11 served concurrently with these interrogatories, is anything other
12 than an unqualified admission, please produce all documents that
13 support your contention that you Amrick [sic] Basi did not have a
constitutional duty to provide Plaintiff with prompt, proper, or any
medical treatment upon request by Plaintiff or other prisoners on 2-
14,15, 2007.

14 RFP No. 6: If your response to Request for Admission No. 5,
15 served concurrently with these interrogatories, is anything other
16 than an unqualified admission, please produce all documents that
17 support your contention that you Amrick [sic] Basi did not take the
cheap way out by prescribing Terazosin on 12-26-2006 instead of
prescribing or recommending the prostate surgery.

18 MTC at 15.

19 Response to Requests for Production Nos. 4 through 6

20 Response to RFP Nos. 4-6: Objection. This Request is vague and
21 ambiguous in its entirety, as defendant is not making any such
contention.

22 Opp. at 6-7.

23 Discussion

24 Defendant Basi's objection to these RFPs is reasonable in light of the argumentative
25 nature of the requests, the evidently unfounded assumptions on which they are based, and the
26 overall lack of clarity in the phrasing. The substance of RFP No. 4 has been addressed in relation
27 to RFP No. 3 No further response with respect to RFP Nos. 4-6 will be compelled.

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1 Requests for Production Nos. 7 through 9

2 The following RFPs were received the same response (as set forth below):

3 RFP No. 7: If your response to Request for Admission No. 6,
4 served concurrently with these interrogatories, is anything other
5 than an unqualified admission, please produce all documents that
6 support your contention that you Amrick [sic] Basi, did care about
 providing Plaintiff with prompt, proper medical care on 12-26-2006
 and that your actions were not deliberate indifference to Plaintiff
 [sic] most serious medical condition.

7 RFP No. 8: If your response to Request for Admission No. 7,
8 served concurrently with these interrogatories, is anything other
9 than an unqualified admission, please produce all documents that
10 support your contention that you Amrick [sic] Basi, did not refuse
 to provide Plaintiff with medical treatment on 2-14, 15, 2007, and
 the you did provide Plaintiff with medical treatment in 2-14, 15-
 2007.

11 RFP No. 9: If your response to Request for Admission No. 8,
12 served concurrently with these interrogatories, is anything other
13 than an unqualified admission, please produce all documents that
14 support your contention that you Amrick [sic] Basi, and the
 unknown second doctor did not stand four feet away from Plaintiff
 on 2-14, 15, 2007 listening to him explain his medical condition to
 first LVN Mallari and then nurse Lahey then you and the unknown
 second doctor refused to provide Plaintiff with any medical
 treatment.

15 MTC at 16-17.

16 Response to Requests for Production Nos. 7 through 9

17 Response to RFP Nos. 7-9: After conducting a diligent search and
18 reasonable inquiry, defendant does not have any such documents in
19 his possession. Discovery continues.

20 Opp. at 7-8.

21 Discussion

22 If defendant Basi has possession, custody or control of any documentation demonstrating
23 that he did provide medical treatment to plaintiff on February 14-15, 2007 (rather than
24 documentation showing he did not), he must produce it to plaintiff. Defendant Basi must produce
25 such documents regardless of whether plaintiff has or has had access to such records by other
26 means. In all other respects, the motion as to these requests must be denied.

27 Request for Production No. 10

28 RFP No. 10: If your response to Request for Admission No. 9,

1 served concurrently with these interrogatories, is anything other
2 than an unqualified admission, please produce all documents that
3 support your contention that you Amrick [sic] Basi were not the
4 Plaintiff [sic] primary care provider on 2-14, 15, 2007.

5 MTC at 17.

6 Response to Request for Production No. 10

7 Response: Objection. This Request is incomplete and unintelligible in its entirety.
8 In addition, it is vague and ambiguous, as defendant is not making any such
9 contention.

10 Opp. at 8.

11 Discussion

12 As defendant Basi evidently does not contend that he was not plaintiff's primary care
13 provider on February 14-15, 2007, he is unlikely to have documents proving that negative.
14 Further discovery cannot be compelled with respect to these requests as framed. However,
15 defendant Basi is ordered to produce any and all documents within his possession, custody or
16 control that demonstrate he was plaintiff's primary care provider in February of 2007.

17 Request for Production No. 11

18 RFP No. 11: If your response to Request for Admission No. 10,
19 served concurrently with these interrogatories, is anything other
20 than an unqualified admission, please produce all documents that
21 support your contention that you Amrick [sic] Basi did your
22 constitutional duty and declared a medical emergency on either 2-
23 14, 15, 2007 and sent Plaintiff to the prison primary clinic on 2-14-
24 2007 where the prison ophthalmologist was working and who
25 would have examined Plaintiff left eye and sent plaintiff to U.C.
26 Davis Medical [C]enter in Sacramento, that the outcome would
27 have been the same, Plaintiff lost [sic] of his vision.

28 MTC at 17.

Response to Request for Production No. 11

Response: Objection. This Request is vague and ambiguous in its
entirety, as defendant is not making that contention at this time.
Discovery continues.

Opp. at 9.

Discussion

Since defendant Basi does not contend that he took any of the action specified in this

1 request, documentation showing that he did is unlikely to exist. The motion as to this request is
2 denied.

3 Request for Production No.12

4 RFP No. 12: If your response to Request for Admission No. 11,
5 served concurrently with these interrogatories, is anything other
6 than an unqualified admission, please produce all documents that
7 support your contention that because of your inaction in not
8 providing Plaintiff with any medical treatment on 2-14, 15, 2007
9 Plaintiff injuries associated with his eye condition from 2-14, 15,
10 2007 onward [sic].

11 MTC at 17-18.

12 Response to Request for Production No. 12

13 Response: Objection. This Request is unintelligible in its entirety.

14 Opp. at 9.

15 Discussion

16 Defendant is correct that this request is unintelligible. Accordingly, the motion as to RFP
17 No. 12 is denied.

18 Request for Production No.13

19 RFP No. 13: If your response to Request for Admission No. 12,
20 served concurrently with these interrogatories, is anything other
21 than an unqualified admission, please produce all documents that
22 support your contention that you Amrick [sic] Basi did not have
23 two opportunities on 2-14, 15, 2007 to provide Plaintiff with
24 prompt, proper medical treatment for his serious left eye condition.
25 That you did not refuse Plaintiff medical treatment and therefore
26 you are not responsible for his blindness.

27 MTC at 18.

28 Response to Request for Production No. 13

Response: Objection. This Request is vague and ambiguous, as
defendant is not making any such contention. After conducting a
diligent search and reasonable inquiry, defendant does not have
documents in his possession that support his contention that he did
not refuse to provide medical treatment to plaintiff at any time.
Discovery continues.

Opp. at 9.

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Discussion

Defendant Basi has responded that he does not have any responsive documents. However, to ensure that plaintiff is not denied necessary discovery because he has inartfully crafted his requests, the court will order defendant Basi to produce any documentation in his possession, custody or control that demonstrates any medical treatment he did provide to plaintiff related to plaintiff's prostate or eye, including documentation of the dates, times and nature of the medical treatment provided. The motion as to this request, as modified, is granted.

Requests for Production No.14 through 16, and Responses

RFP No. 14: If your response to Request for Admission No. 13, served concurrently with these interrogatories, is anything other than an unqualified admission, please produce all documents that support your contention that there were no register[ed] nurse [sic] working in the four yard annex clinic on 2-14-2007 with you and the unknown second doctor.

MTC at 18.

Response: This Request is vague and ambiguous in its entirety, as defendant is not making any such contention. Discovery continues.

Opp. at 10.

RFP No. 15: If your response to Request for Admission No. 14, served concurrently with these interrogatories, is anything other than an unqualified admission, please produce all documents that support your contention that you Amrick [sic] Basi did not refuse to provide Plaintiff with medical treatment on 2-15-2007 while Plaintiff and [N]urse Lahey discussed his medical condition while you and the second unknown doctor stood four feet away and did nothing to help Lahey and the you did not refuse Plaintiff medical treatment two days in a row, 2-14, 15-2007.

MTC at 18-19.

Response: This Request is vague and ambiguous, as defendant is not making any such contention. After conducting a diligent search and reasonable inquiry, defendant does not have documents in his possession that support his contention that he did not refuse to provide medical treatment to plaintiff at any time. Discovery continues.

Opp. at 10.

RFP No. 16: If your response to Request for Admission No. 15, served concurrently with these interrogatories, is anything other

1 than an unqualified admission, please produce all documents that
2 support your contention that Plaintiff did not have a Constitutional
3 right to know all of the serious side effects to the medication
4 (TERAZOSIN) you prescribed nor to be fully informed about the
procedure concerning prostate surgery and that it was not your job
to provide Plaintiff with such information.

5 MTC at 19.

6 Response: Objection. This Request is vague and ambiguous in its
7 entirety, as defendant is not making any such contention.
Discovery continues.

8 Opp. at 11.

9 Discussion

10 No further responses can be compelled to the very awkwardly framed RFP Nos. 14-16.

11 Requests for Production No 17 and 18, and Responses

12 RFP No. 17: If your response to Request for Admission No. 13,
13 served concurrently with these interrogatories, is anything other
14 than an unqualified admission, please produce all documents with
the name of the unknown nurse who worked in the four yard annex
clinic on 2-14-2007.

15 MTC at 19.

16 Response: After conducting a diligent search and reasonable
17 inquiry, defendant does not have any such documents in his
18 possession referencing the names of the nurses that cared for
plaintiff on any date, other than plaintiff's medical records which
are equally available to plaintiff.

19 Opp. at 11.

20 RFP No. 18: Produce any and all documents containing the names
21 of the unknown doctor and unknown nurse who worked on 2-14-
2007 (Nurse) and 2-14, 15-2007 (Doctor).

22 MTC at 20.

23 Response: After conducting a diligent search and reasonable
24 inquiry, defendant does not have any such documents in his
25 possession referencing the names of the physicians that treated
plaintiff on any date, other than plaintiff's medical records which
are equally available to plaintiff.

26 Discussion

27 Defendant Basi contends in response to RFP Nos. 17 and 18 that documents identifying
28 other medical personnel who worked at the clinic on February 14 and 15, 2007, are equally

1 available to plaintiff. Defendant has already been instructed, however, to produce any such
2 documentation in his possession, custody or control with respect to other physicians. See
3 discussion re RFP No. 2. In the interests of consistency and completeness, Defendant Basi is also
4 ordered to produce any documents containing the names of any nurses working at that clinic on
5 February 14, 2007. The motion as to RFP No. 17 is granted to that extent. The motion as to RFP
6 No. 18 is denied as duplicative of RFP Nos. 2 and 17.

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8 **PLAINTIFF’S REQUEST FOR RECONSIDERATION**

9 On February 13, 2014, plaintiff filed an affidavit requesting entry of default as to
10 defendants Lahey and Villote. ECF No. 47. The Clerk declined to enter default, as the
11 defendants had answered. ECF No. 48. Plaintiff seeks reconsideration of the Clerk’s action.
12 ECF No. 51.

13 Rule 55(a) of the Federal Rules of Civil Procedure instructs the Clerk to enter a party’s
14 default “[w]hen a party against whom a judgment for affirmative relief is sought has failed to
15 plead or otherwise defend, and that failure is shown by affidavit, or otherwise” Defendants
16 Lahey and Villote filed an answer on November 20, 2013. Docket Entry No. 42. The answer
17 was a pleading that demonstrated the defendants’ intention to defend the lawsuit. Because the
18 defendants had appeared and responded to the complaint, an entry of default was unavailable.
19 See Direct Mail Specialists v. Eclat Computerized Technologies, Inc., 840 F.2d 685, 689 (9th Cir.
20 1988). Accordingly, the Clerk acted correctly and the request for reconsideration must be denied.

21 It appears from plaintiff’s motion for reconsideration and briefing of the discovery
22 disputes that he has misunderstood the difference between a request for entry of default, which is
23 governed by Rule 55, and a motion for terminating sanctions under Rule 37(b)(2). Plaintiff seeks
24 a default *judgment* (not entry of default) on grounds that defendants failed to respond to discovery
25 requests. Because the relief plaintiff seeks is properly understood as a discovery sanction, the
26 court will return to the issue after addressing defendants’ motion for withdrawal of admissions
27 and for an extension of time to respond to plaintiff’s discovery requests.

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1 DEFENDANTS' REQUEST TO WITHDRAW ADMISSIONS

2 Background

3 Plaintiff served his interrogatories, requests for admission (RFA), and requests for
4 production of documents (RFP) on defendants Villote and Lahey on December 9, 2013. Pursuant
5 to an extension of time granted by the undersigned, respondents were to serve their responses no
6 later than February 26, 2014. ECF No. 50. The responses were not served until April 25, 2014.
7 ECF No. 58, Jamison Dec. ¶ 10 & Exhibits A, C. Defendants move for a nunc pro tunc extension
8 of time that would render the responses timely, and to withdraw admissions effected by operation
9 of Rule 36(a)(3).

10 Standards

11 Fed. R. Civ. P. 36 provides in relevant part as follows:

12 [(a)](3) A matter is admitted unless, within 30 days after being
13 served, the party to whom the request is directed serves on the
14 requesting party a written answer or objection addressed to the
15 matter and signed by the party or its attorney. A shorter or longer
16 time for responding may be stipulated to under Rule 29 or be
17 ordered by the court.

18 . . .

19 (b) A matter admitted under this rule is conclusively established
20 unless the court, on motion, permits the admission to be withdrawn
21 or amended. Subject to Rule 16(e), the court may permit
22 withdrawal or amendment if it would promote the presentation of
23 the merits of the action and if the court is not persuaded that it
24 would prejudice the requesting party in maintaining or defending
25 the action on the merits. An admission under this rule is not an
26 admission for any other purpose and cannot be used against the
27 party in any other proceeding.

28 Fed. R. Civ. P. 6(b)(1) provides that when an act is to be done within a specific time, “the
court may, for good cause, extend the time: . . . (B) on motion made after the time has expired if
the party failed to act because of excusable neglect.” The U.S. Supreme Court has established a
four-part balancing test to determine “excusable neglect.” See Pioneer Investment Services Co.
v. Brunswick Associates Ltd. Partnership, 507 U.S. 380, 395 (1993). The Pioneer test applies to
all excusable neglect inquiries presented under the Federal Rules of Civil Procedure. Pincay v.
Andrews, 389 F.3d 853, 855 (9th Cir. 2004) (en banc), cert. denied, 541 U.S. 961 (2005). The

1 Pioneer factors include: (1) the danger of prejudice to the non-moving party, (2) the length of
2 delay and its potential impact on judicial proceedings, (3) the reason for the delay, including
3 whether it was within the reasonable control of the movant, and (4) whether the moving party's
4 conduct was in good faith. Id. The weighing of these factors is left to the discretion of the
5 district court. Id. at 860.

6 Discussion

7 Defendants have submitted a declaration of counsel which states that the discovery
8 responses were completed and signed on February 7, 2014 and provided to counsel's secretary to
9 be served on or about February 10, 2014. ECF No. 58, Jamison Dec. ¶5. When counsel received
10 notice of plaintiff's February 14, 2014 "affidavit for entry of default," which alleged that plaintiff
11 had not received the discovery, counsel emailed his secretary and was assured that the responses
12 had been served on February 12, 2014. Id. ¶¶ 6-7 & Ex. B (email exchange). Counsel assumed
13 that plaintiff simply had not yet received the responses that had been served. Id. ¶ 7. When
14 counsel received and reviewed plaintiff's second request for entry of default, which was filed on
15 April 21, 2014, he checked the file himself and was unable to locate any proofs of service. Id. ¶
16 9. Counsel's further inquiries with his secretary revealed that the responses had not been served
17 after all, but inadvertently had been filed away with the case materials. Id. ¶¶ 8-9. The discovery
18 responses, which are indeed dated February 7, 2014, were then served by mail on April 25, 2014.
19 Id. ¶ 10 & Ex. A (discovery responses), Ex. C (proof of service).

20 These facts present a classic case of excusable neglect. In Pincay, supra, the Ninth Circuit
21 found excusable neglect where a paralegal responsible for calendaring filing deadlines misread
22 the applicable rule, accordingly miscalculated the deadline, and incorrectly told the attorney that a
23 notice of appeal did not need to be filed for sixty days. Pincay, 389 F.3d at 855. The Ninth
24 Circuit, sitting en banc, held that the lawyer's delegation of the matter to a paralegal did not
25 constitute inexcusable neglect. The court went on to affirm the finding that the attorney's error
26 was excusable because there had been no prejudice and only a small delay, the delay was caused
27 by carelessness, and there was no evidence of bad faith. Pincay, 389 F.3d at 855-56. This case
28 presents analogous facts. The delay in service of the discovery requests was caused by

1 carelessness and not by bad faith. The lawyer reasonably relied on his secretary to serve the
2 responses, and made reasonable inquiries to ensure that the discovery obligation had been met.
3 Counsel served the outstanding discovery promptly after discovering the error.

4 Any possible prejudice to plaintiff is cured by providing him an opportunity to challenge
5 the substantive sufficiency of the discovery responses and to supplement his pending motion for
6 summary judgment. Under the circumstances, the court finds good cause to modify the
7 scheduling order accordingly. The resulting delay, while unfortunate, is not atypical of prisoner
8 cases and will not have a negative impact on litigation of this case. For all these reasons, the
9 defendants have demonstrated excusable neglect within the meaning of Fed. R. Civ. P. 6(b).
10 Moreover, it would be unfair to defendants Villote and Lahey if their counsel's error, which is
11 attributable to excusable neglect, resulted in admissions that relieved plaintiff of his burden of
12 proof. Withdrawal of the admissions will promote the presentation of the merits of the claims
13 and, in light of the lack of prejudice to plaintiff, is therefore appropriate under Fed. R. Civ. P.
14 36(b).

15 For all these reasons, defendants' motion to withdraw admissions and for a nunc pro tunc
16 extension of time to served discovery responses is granted.

17 PLAINTIFF'S REQUEST FOR TERMINATING SANCTIONS

18 As noted above, plaintiff seeks default judgment against defendants Villote and Lahey for
19 non-compliance with the rules of discovery and the operative scheduling order. Fed. R. Civ. P.
20 37(d)(1)(A)(ii) provides that the court may impose sanctions on a party for failing to respond to
21 properly served discovery requests. Potential sanctions include "rendering a default judgment
22 against the disobedient party. . . ." Fed. R. Civ. P. 37(b)(2)(A)(vi). A motion for discovery
23 sanctions must be accompanied by certification that the movant has in good faith conferred or
24 attempted to confer with the party failing to act in an attempt to obtain the responses without
25 court action. Fed. R. Civ. P. 37(d)(1)(B). Plaintiff has not filed the required certification.

26 Default judgment is the harshest of the Rule 37(b) sanctions, and due process requires that
27 it may not be imposed unless noncompliance with discovery procedures is due to willfulness or
28 bad faith. Baker v. Limber, 647 F.2d 912, 918 (9th Cir. 1981). Because there is no indication of

1 willfulness or bad faith here, the court need not consider the other factors that must be considered
2 before declaring a default as a discovery sanction.² The undersigned has already determined that
3 defendants' failure to timely serve discovery responses was the product of excusable neglect.
4 Counsel did not willfully refuse to provide responses, he prepared and signed them and thought
5 they had been served. The error was cured as soon as it was discovered, and plaintiff has now
6 received responses to his discovery requests.

7 Plaintiff's frustration with the defendants in this matter is understandable, but the only
8 prejudice he has suffered is some delay. Delay is an insufficient basis for imposition of default as
9 a discovery sanction. Adriana Int'l. Corp. v. Thoeren, 913 F.2d 1406, 1412 (9th Cir. 1990).
10 Plaintiff's motion for a default judgment against defendants Villote and Lahey, construed as a
11 motion for sanctions under Rule 37, is therefore denied. Plaintiff will be granted additional time
12 to bring any motion to compel with respect to the discovery responses at issue.

13 Accordingly, IT IS ORDERED that:

14 1. Plaintiff's motion to compel discovery, ECF No. 52, is granted in part to the extent
15 specified above regarding Requests for Production Nos. 2-3, 7-10, 13, and 17, and is otherwise
16 denied. Defendant Basi shall serve further responses and any responsive documents in
17 accordance with this order within fourteen (14) days;

18 2. Plaintiff's motion for reconsideration, ECF No. 51, is denied;

19 3. Defendants Villote and Lahey's motion to withdraw admissions arising from failure to
20 serve timely discovery responses, ECF No. 49, is granted and the deadline for moving defendants
21 to serve responses to discovery requests is extended to April 25, 2014, nunc pro tunc;

22 4. Plaintiff's motion for a default judgment against defendants Villote and Lahey as a
23 discovery sanction, ECF No. 57, is denied;

24
25 _____
26 ² The Ninth Circuit has set forth five factors a district court must consider before declaring a
27 default or ordering dismissal of a case: (1) the public's interest in expeditious resolution of
28 litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the other party; (4)
the public policy favoring the disposition of cases on their merits; and (5) the availability of less
drastic sanctions. Adriana Int'l. Corp. v. Thoeren, 913 F.2d 1406, 1412 (9th Cir. 1990) (citations
omitted).

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5. Discovery is re-opened for the limited purpose of permitting plaintiff to bring a motion to compel discovery within sixty days of the date of this order, should he choose to, with respect to the discovery responses provided by defendants Villote and Lahey;

6. The dispositive motion deadline is hereby re-set for October 16, 2014. Plaintiff will have until that date to supplement his motion for summary judgment at ECF No. 49, should he so choose, and defendants must file any cross-motion for summary judgment no later than October 16, 2014. Oppositions by all parties will be due thirty days after the dispositive motion deadline and replies will be due within twenty-one days of the service of the parties' oppositions.

DATED: June 5, 2014



ALLISON CLAIRE
UNITED STATES MAGISTRATE JUDGE