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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

WALTER HOWARD WHITE,
Plaintiff,
v.
SMYERS, et al.,
Defendants.

No. 2:12-cv-2868 MCE AC P

ORDER

I. Introduction

This prisoner civil rights action proceeds on plaintiff’s First Amended Complaint (FAC) filed July 15, 2013, ECF No. 23, challenging conditions of plaintiff’s prior confinement at High Desert State Prison (HDSP). After initiating this action, plaintiff was transferred to the California Substance Abuse Treatment Facility and State Prison (CSATF), where he remained from April 2013 to April 2015. Plaintiff was transferred back to HDSP in April 2015. This court previously determined that the FAC states cognizable claims for deliberate indifference to plaintiff’s serious medical needs under the Eighth Amendment and 42 U.S.C. § 1983, against defendants Miranda, Mayes, Schmidt, Lee, Pomazal, Rofling, Lankford, and Swingle in their individual capacities; and a claim for violation of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132 et seq., against defendant Swingle in his official capacity. See ECF Nos. 24, 32.

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1 Defendants are represented by three different defense counsel.¹ Presently pending before
2 the court are the following matters: (1) Defendants' motions and requests to modify the
3 discovery and scheduling order for the purpose of propounding additional discovery requests and
4 completing plaintiff's deposition, ECF Nos. 93, 117, 144-46; (2) Plaintiff's motion to suppress
5 his deposition and request for sanctions, ECF No. 119; (3) Plaintiff's motion to stay this action so
6 that he may move for reconsideration of the undersigned's April 16, 2015 discovery order, and
7 his ex parte request to extend time to file such motion, ECF Nos. 143, 151.

8 II. Motions to Extend Discovery

9 The court obtained supplemental briefing by all parties on their respective motions to
10 modify the discovery deadlines and concerning plaintiff's continued deposition. See ECF No.
11 120. All parties responded. See ECF Nos. 125, 132. Plaintiff's transfer from CTSAF to HDSP
12 delayed resolution of these matters. See ECF No. 133 et seq. Meanwhile, in an effort to
13 conclude discovery in this action, the court ordered further briefing by all parties' concerning
14 their remaining discovery needs.² See ECF No. 133. Responsive briefing was filed by all
15 defendants, ECF Nos. 144-6, and by plaintiff, ECF No. 148.

16 The prior discovery deadline expired on February 2, 2015, see ECF No. 120 at 3, and the
17 extended deadline for filing dispositive motions (June 1, 2015) was vacated on April 8, 2015, see
18 ECF No. 133 at 2.

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21 ¹ Defendant Miranda is represented by Mr. Cregger; defendant Pomazal is represented by Mr.
22 Blechman; and defendants Lankford, Rofling, Mayes, Schmidt, Lee and Swingle are represented
23 by Deputy Attorney General Ms. Hung.

24 ² This briefing is also responsive to the concerns earlier expressed by the district judge assigned
25 this case. As summarized in this court's April 16, 2015 order, see ECF No. 126 at 2:

26 On January 26, 2015, the district judge granted plaintiff's motion
27 for reconsideration of the undersigned's December 17, 2014 order,
28 ECF No. 78, which had denied as moot plaintiff's request for
further extension of the discovery deadline, ECF No. 77. See ECF
No. 87. The undersigned has considered the merits of plaintiff's
432-page motion, ECF No. 77, in tandem with the parties' other
numerous discovery matters, and finds it appropriate to deny
plaintiff's request without prejudice until resolution of the parties'
current discovery disputes.

1 A. Further Discovery Requested by Defendants

2 The only remaining discovery sought by defendants Mayes, Schmidt, Lee, Rofling,
3 Lankford and Swingle (hereafter the “AG defendants”), and defendant Miranda is the completion
4 of plaintiff’s deposition. See ECF No. 145-46. These requests are made subject to each
5 defendant’s reservation of right to seek leave of court if plaintiff fails to fully cooperate in the
6 completion of his deposition.

7 Defendant Pomazal also seeks completion of plaintiff’s deposition. In addition, Pomazal
8 requests leave to serve plaintiff with up to 20 special interrogatories and 20 requests for
9 admission, in order to clarify plaintiff’s contentions against him. See ECF No. 144. Defendant
10 requests that this discovery be completed before the continuation of plaintiff’s deposition so that
11 he can adequately question plaintiff on these matters. Counsel states that the discovery
12 propounded by the Attorney General’s office on behalf of Pomazal and the other AG defendants
13 was not sufficiently specific as to Pomazal. Counsel explains that he was belatedly substituted
14 into this case in October 2014 and, “by the time counsel . . . was able to glean an understanding of
15 the key litany of allegations in this case versus Dr. Pomazal and the other Defendants, written
16 discovery had closed.” Id. at 2.

17 B. Plaintiff’s Response

18 In response to the court’s most recent inquiry concerning the parties’ remaining discovery
19 needs, plaintiff stated that he was unable to respond because he had not yet received all of his
20 legal materials following his transfer to HDSP. See ECF No. 148 (signed by plaintiff on May 20,
21 2015). This response mirrors plaintiff’s earlier motion to stay proceedings in this action pending
22 receipt of his legal materials. See ECF No. 143. Thereafter, at the direction of the court, see ECF
23 No. 140, Deputy Attorney General Hung filed a statement informing the court that she had been
24 informed by the HDSP Litigation Office “that Plaintiff previously received three out of his five
25 boxes of legal property, that he would be receiving the remaining two boxes of legal property on
26 June 5, 2015, and that Plaintiff would have unlimited access to his legal property in his cell.”
27 ECF No. 150 at 2. Consistently, in his most recently-filed document, signed by plaintiff on June
28 25, 2015, plaintiff states that he received a total five boxes of legal documents delivered on June 3

1 and June 8, although two boxes of “personal/legal properties (mixed together) that remained at
2 the CSATF-SP facility . . . have not been delivered and remain withheld or missing,” including
3 “at least three of his medical and legal books” relied on to pursue this action. ECF No. 151 at 2.
4 Plaintiff states that, nevertheless, with the delivered materials, he was able to prepare a motion for
5 reconsideration of this court’s extensive April 16, 2015 order, which he completed on June 20,
6 2015. (Nevertheless, plaintiff requests an extension of time within which to file this motion, see
7 discussion, infra.)

8 In light of plaintiff’s demonstrated current ability to draft legal documents in this action,
9 the court deems as moot plaintiff’s most recent to stay this action pending receipt of his legal
10 materials, ECF No. 143; plaintiff must pursue with HDSP officials, not this court, any further
11 issues related to the receipt of his “personal/legal property.”

12 Nevertheless, plaintiff has not yet responded to the court’s April 24, 2015 order, ECF No.
13 133, that he file and serve supplemental briefing that clearly identifies his remaining discovery
14 needs. In light of the comprehensiveness of this court’s April 16, 2015 discovery order, the court
15 will construe plaintiff’s request for reconsideration of that order, see discussion infra, as his
16 request for further discovery; if plaintiff wishes to identify yet further discovery that he seeks in
17 this case, he may do so in a separately filed motion that meets the requirements previously set by
18 the court,³ and thus establishes good cause for further modification of the scheduling deadlines in
19 this action, see Fed. R. Civ. P. 16(b)(4).

20 C. Rulings

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22 ³ Any further motion filed by plaintiff that requests additional discovery, responsive to this
23 court’s April 24, 2015 order, shall meet the requirements previously established by the court, ECF
24 No. 133 at 2 (paraphrased and emphasis added):

24 To file and serve a separate statement (no more than five pages in
25 length, with no attached exhibits or supplemental filings) that sets
26 forth the following information, excluding any reference to
27 plaintiff’s further deposition: (a) whether the responding party
28 seeks further discovery; (b) if so, a brief description of the intended
discovery, including the intended recipient(s), and **an explanation
why the discovery was not previously propounded; and (c) the
importance of the anticipated discovery to the facts and claims
in this action.** No party shall file any response to any of this
statement – any response or responsive motion will be stricken.

1 For good cause shown, defendant Pomazal's request to propound further discovery
2 requests on plaintiff, as described in ECF No. 144, is granted. Within fourteen (14) days after the
3 filing date of this order, defendant Pomazal may serve plaintiff with no more than 20 special
4 interrogatories and no more than 20 requests for admission, for the purpose of clarifying
5 plaintiff's contentions against defendant Pomazal. Plaintiff shall serve his responses within
6 twenty-one (21) days after service of the requested discovery; no extensions of time will be
7 granted.

8 Plaintiff requests an extension of time within which to file a motion for reconsideration of
9 this court's April 16, 2015 order, ECF No. 126, due to the inaccessibility of the law library for
10 copying. Plaintiff's motion, ECF No. 151, is granted; plaintiff shall file and serve this motion
11 within fourteen (14) days after the filing date of this order.

12 If plaintiff wishes to further respond to the court's April 24, 2015 order, ECF No. 133, he
13 may file and serve a supplemental brief that clearly identifies his remaining discovery needs, and
14 is in conformance with the requirements set forth in Footnote 3, supra; plaintiff must file and
15 serve such brief within fourteen (14) days after the filing date of this order.

16 III. Motions to Complete Plaintiff's Deposition

17 Plaintiff has filed numerous documents opposing defendants' requests that plaintiff be
18 further deposed. Plaintiff has previously appeared twice for his deposition. The initial session,
19 held November 10, 2014, was concluded after approximately two hours in response to plaintiff's
20 complaints of pain and difficulty concentrating. The second session, held January 22, 2015, was
21 concluded after approximately three hours for the same reasons, despite allowance for breaks so
22 that plaintiff could take his pain medication and lie down as needed. A third session was
23 provisionally scheduled at CSATF for April 29, 2015. In seeking leave to conduct that
24 deposition, defense counsel filed a joint statement indicating that, assuming plaintiff's
25 cooperation, defendant Miranda could complete his questioning in two hours, defendant Pomazal
26 could complete his questioning in another two hours, and the AG defendants anticipated thirty
27 minutes for follow-up questions. See ECF No. 125. However, plaintiff's April 2015 transfer
28 from CSATF to HDSP brought these matters to a halt.

1 Plaintiff opposes, for several reasons, defendants' requests that he be further deposed.
2 Plaintiff alleges that his participation causes him undue pain, stress and health risks; and that, due
3 to the side effects of his significant pain medications, his testimony (including testimony already
4 given) may be inaccurate and/or prejudicial. See generally ECF No. 119, 127. Plaintiff also
5 asserts an alleged conspiracy between Deputy Attorney General (DAG) Hung and the court
6 reporter to prepare false and misleading transcripts of plaintiff's deposition testimony, thus
7 engaging in spoliation of evidence. See ECF No. 119.

8 The court initially addresses plaintiff's motion for sanctions based on defendants' alleged
9 spoliation of evidence. Plaintiff states that "during the course of the [January 22, 2015]
10 deposition and upon examination of the transcript, plaintiff became aware of certain errors and
11 irregularities." ECF No. 119 at 2. These alleged irregularities include plaintiff allegedly
12 observing and overhearing "the deposition officer and Deputy Attorney General wispering [sic] to
13 one another while they were both looking at the content of the reporter's computer;" the DAG
14 making statements like "that needs to be taken out, delete that, change that to . . . ," and thus
15 "us[ing] the deposition reporter as a puppet to perpetuate misconduct. . . ." Id. at 3 (internal
16 quotation marks omitted). Plaintiff states that he later found the transcript of this session "fraught
17 with a multitude of misrepresentations of the truth." Id. at 3. Plaintiff has attached a copy of the
18 transcript; however, it contains no notations indicating the alleged misrepresentations. See id. at
19 24-66. Moreover, plaintiff concedes that even an accurate record of his testimony may not reflect
20 what he intended, due to the side effects of his medications. Plaintiff has submitted no evidence
21 that raises any reasonable inference of misconduct on the part of the DAG.⁴ On the contrary, the
22 court finds plaintiff's accusations both frivolous and harassing. Plaintiff is reminded of this
23 court's prior admonition concerning his excessive filings in this action and again informs plaintiff

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26 ⁴ "A party seeking sanctions for spoliation of evidence must prove the following elements: (1)
27 the party having control over the evidence had an obligation to preserve it when it was destroyed
28 or altered; (2) the destruction or loss was accompanied by a 'culpable state of mind;' and (3) the
evidence that was destroyed or altered was 'relevant to the claims or defenses of the party that
sought the discovery of the spoliated evidence.'" Surowiec v. Capital Title Agency, Inc., 790 F.
Supp. 2d 997, 1005 (D. Ariz. 2011) (citation omitted).

1 of the undersigned's authority to restrict his court access for the remainder of this litigation.⁵

2 The court construes plaintiff's opposition to his continued deposition as a motion for
3 protective order pursuant to Rule 26(c), Federal Rules of Civil Procedure. Pursuant to that rule, a
4 party may obtain a court order limiting or forbidding discovery, including a deposition, upon a
5 showing of good cause and for the purpose of protecting a party "from annoyance,
6 embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c)(1)(A), (B).

7 The court finds that plaintiff has failed to demonstrate good cause precluding his
8 continued deposition. Plaintiff's conspiracy and spoliation allegations lack evidentiary support.
9 Plaintiff's objections based on the side effects to his medications is a risk that plaintiff assumed
10 when he commenced this litigation. Defendants previously sought to accommodate plaintiff's
11 complaints of undue pain and stress by arranging for a gurney and pain medications during the
12 course of his continued deposition,⁶ and are instructed to do so for plaintiff's continued
13 deposition. Plaintiff may also request necessary accommodations from the HDSP Litigation
14 Coordinator and staff.

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16 ⁵ As this court previously informed plaintiff, ECF No. 126 at 25-6:

17 Plaintiff is admonished to refrain from filing documents in this
18 action unless they are specifically authorized by the Federal Rules
19 of Civil Procedure, the Local Rules, or by court order. Plaintiff's
20 excessive filings have encumbered this action, and required an
21 inordinate amount of the court's limited resources. Plaintiff is
22 cautioned that a litigant proceeding in forma pauperis may suffer
23 restricted access to the court if it is determined that his filings have
24 been unnecessarily excessive, frivolous or harassing. See DeLong
v. Hennessey, 912 F.2d 1144 (9th Cir. 1990); see also Tripathi v.
Beaman, 878 F.2d 351 (10th Cir. 1989). If plaintiff does not
25 exercise appropriate restraint in the future, by limiting his filings
26 only to authorized and necessary matters, the court will expressly
27 consider whether to restrict plaintiff's access to the court for the
28 remainder of this litigation.

24 ⁶ These arrangements were made by defense counsel. See ECF No. 125 at 2. The court
25 previously invited plaintiff to "identify specific and reasonable accommodations that would
26 support his participation in a continued deposition," and to submit his statement within seven
27 days after the filing date of the court's April 8, 2015 order. See ECF No. 120 at 3-4. Plaintiff's
28 only substantive response, filed May 26, 2015, ECF No. 148, again requests that no further
deposition be held. Plaintiff's statements that his current medical care is too inadequate for him
to function, and that he must first obtain surgery, are not persuasive in light of plaintiff's multiple
and detailed filings in this action.

1 Plaintiff is required to fully participate in the discovery process which he initiated. As a
2 prolific writer who has propounded extensive discovery requests and required this court to resolve
3 numerous and lengthy discovery disputes, plaintiff must recognize that defendants are equally
4 entitled to obtain relevant information. It would be unfair and prejudicial to defendants to allow
5 plaintiff to continue prosecuting this action while depriving defendants of their right to complete
6 their deposition of plaintiff. Defendants have already invested substantial time and expense in
7 repeatedly rescheduling plaintiff's deposition, and pursuing the matter in this court. Plaintiff is
8 informed that willful refusal to cooperate in discovery provides grounds for sanctions, including
9 dismissal of this action. See Fed. R. Civ. P. 37(d) (failure to attend one's own deposition); Fed.
10 R. Civ. P. 41(b) (involuntary dismissal for failure to prosecute).

11 For these reasons, the court grants defendants' requests to reconvene and conclude
12 plaintiff's deposition. Although, due to breaks, the deposition may last an entire day, the period
13 of time for questioning and answering shall be strictly limited to a total of five-and-one-half
14 hours, as previously estimated by defense counsel. All defense counsel shall coordinate with the
15 HDSP Litigation Coordinator in an effort to schedule plaintiff's third and final deposition, and to
16 make special arrangements to accommodate plaintiff's personal needs. Defense counsel should
17 attempt to scheduled plaintiff's deposition for one full day only, no earlier than August 31, 2015,
18 but no later than October 16, 2015, with the goal of defendant Pomazal obtaining his additional
19 discovery before the deposition, and in an effort to bring discovery to a close in this case at the
20 earliest reasonable opportunity.

21 IV. Further Discovery Matters

22 Plaintiff has now submitted three completed subpoenas duces tecum that conform to this
23 court's orders filed April 24, 2015 (ECF No. 133), May 12, 2015 (ECF No. 140), and May 21,
24 2015 (ECF No. 141). The court finds service of the subpoenas by the United States Marshal to be
25 appropriate, and so directs the Marshal by separate order filed concurrently with the instant order.

26 Plaintiff also contends, ECF No. 148 at 3, that "all defendants" did not comply with the
27 court's April 24, 2015 order directing defendants "to continue to provide any remaining discovery
28 ordered by this court on April 16, 2015," ECF No. 133 at 2. For the reasons set forth in the

1 responsive brief filed by defendant Miranda, ECF No. 149, the court finds this matter resolved
2 due to the timely compliance by the appropriate defendants.

3 VI. Conclusion

4 1. Plaintiff's most recent motion to stay proceedings in this action pending receipt of his
5 legal materials, ECF No. 143, is denied as moot.

6 2. Defendant Pomazal's request to propound further discovery requests on plaintiff, as
7 described in ECF No. 144, is granted; defendant shall serve his requests on plaintiff within
8 fourteen (14) days after the filing date of this order; plaintiff shall serve his responses within
9 twenty-one (21) days after service of the requests – no extensions of time will be granted.

10 3. Plaintiff's request for an extension of time, ECF No. 151, within which to file a motion
11 for reconsideration of this court's April 16, 2015 order (ECF No. 126), is granted; plaintiff shall
12 file and serve such motion within fourteen (14) days after the filing date of this order.

13 4. If plaintiff wishes to further respond to the court's April 24, 2015 order (ECF No. 133),
14 he shall, within fourteen (14) days after the filing date of this order, file and serve a supplemental
15 brief in conformance with the requirements set forth in Footnote 3, supra, that clearly identifies
16 his remaining discovery needs.

17 5. Plaintiff's motion for sanctions against the Deputy Attorney General, ECF No. 119, is
18 denied; plaintiff is again admonished to refrain from filing excessive, harassing or frivolous
19 matters in this case.

20 6. Plaintiff's motion for a protective order denying his further deposition, ECF No. 119
21 ("motion to suppress"), is denied.

22 7. Defendants' motions, ECF No. 93, 117, and requests, ECF No. 144-46, to extend
23 discovery in this case for the purpose of reconvening plaintiff's deposition for a third and final
24 time, are granted; plaintiff's deposition should be scheduled between August 31, 2015 and
25 October 16, 2015; defendants shall inform the court of such date with five days of its scheduling.


26 8. The discovery deadline is hereby extended to October 16, 2015, for the limited
27 purposes authorized herein. The court will endeavor to adhere to this deadline in reviewing
28 plaintiff's anticipated briefing concerning his further discovery requests.

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9. The deadline for filing pretrial motions is hereby continued to January 29, 2016, and shall be noticed and briefed in accordance with the Rand Notice provided herewith.

10. Pursuant to a separate order filed concurrently with this order, the court directs the United States Marshal to serve plaintiff's three authorized subpoenas duces tecum.

DATED: July 12, 2015



ALLISON CLAIRE
UNITED STATES MAGISTRATE JUDGE

Rand Notice to Plaintiff

This notice is provided to ensure that you, a pro se prisoner plaintiff, “have fair, timely and adequate notice of what is required” to oppose a motion for summary judgment. See Woods v. Carey, 684 F.3d 934 (9th Cir. 2012); Rand v. Rowland, 154 F.3d 952, 957 (9th Cir. 1998). The court requires that you be provided with this notice regarding the requirements for opposing a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

When a defendant moves for summary judgment, the defendant is requesting that the court grant judgment in defendant’s favor without a trial. If there is no real dispute about any fact that would affect the result of your case, the defendant who asked for summary judgment is entitled to judgment as a matter of law, which will end your case against that defendant. A motion for summary judgment will set forth the facts that the defendant asserts are not reasonably subject to dispute and that entitle the defendant to judgment.

To oppose a motion for summary judgment, you must show proof of your claims.⁷ To do this, you may refer to specific statements made in your complaint if you signed your complaint under penalty of perjury and if your complaint shows that you have personal knowledge of the matters stated. You may also submit declarations setting forth the facts that you believe prove your claims, as long as the person who signs the declaration has personal knowledge of the facts stated. You may also submit all or part of deposition transcripts, answers to interrogatories, admissions, and other authenticated documents. For each of the facts listed in the defendant’s Statement of Undisputed Facts, you must admit the facts that are undisputed, and deny the facts that are disputed. If you deny a fact, you must cite to the proof that you rely on to support your denial. See L.R. 260(b). If you fail to contradict the defendant’s evidence with your own evidence, the court may accept the defendant’s evidence as the truth and grant the motion.

The court will consider a request to postpone consideration of the defendant’s motion if you submit a declaration showing that for a specific reason you cannot present such facts in your opposition. If you do not respond to the motion, the court may consider your failure to act as a waiver of your opposition. See L.R. 230(1). If the court grants the defendant’s motion, whether opposed or unopposed, judgment will be entered for that defendant without a trial and the case will be closed as to that defendant.

⁷ If the motion for summary judgment concerns the exhaustion of administrative remedies, you must submit proof of specific facts regarding the exhaustion of administrative remedies. See Stratton v. Buck, 697 F.3d 1004, 1008 (9th Cir. 2012); Albino v. Baca, 747 F.3d 1162 (9th Cir. April 3, 2014).