

1 Currently pending before the undersigned¹ are the following matters filed by plaintiff:

2 (1) Motion to be Present at Any Deposition of Any Witnesses Being Deposed by the Defendants
3 (ECF No. 37); and (2) Request for Blank Subpoena[s] to Command Production of Documents on
4 a Third Party (ECF No. 38).

5 Pursuant to his first motion, plaintiff seeks general authorization to attend any deposition
6 noticed by defendants; plaintiff identifies no specific deposition. Plaintiff states, alternatively,
7 that he “is willing to offer the alternative of being allowed to attend depositions by phone, or any
8 other method as the court deems fit.” (ECF No. 37 at 3.)

9 However, incarcerated parties do not have a constitutional right to attend depositions
10 noticed by opposing parties. More specifically, “an incarcerated plaintiff has no constitutional
11 right to attend the depositions taken in his civil action.” In re Wilkinson, 137 F.3d 911, 914 (6th
12 Cir. 1998) (citing In re Collins, 73 F.3d 614, 615 (6th Cir. 1995). As the court in Wilkinson
13 explained:

14 The reasoning supporting the rule was articulated by the Supreme
15 Court nearly a half century ago: “Lawful incarceration brings about
16 the necessary withdrawal or limitation of many privileges and
17 rights, a retraction justified by the considerations underlying our
18 penal system. Among those so limited is the otherwise unqualified
19 right given by § 272 of the Judicial Code, 28 U.S.C. § 394 [now 28
20 U.S.C. § 1654] to parties in all courts of the United States to “plead
21 and manage their own causes personally.” Price v. Johnston, 334
22 U.S. 266, 285-86 (1948), overruled on other grounds by McCleskey
 v. Zant, 499 U.S. 467 (1991). We often have employed the
 Supreme Court's reasoning in the context of limits placed upon
 prison inmates' participation in their own civil litigation. In fact, in
 Holt v. Pitts, 619 F.2d 558 (6th Cir.1980), this court noted that
 “[g]enerally speaking, prisoners who bring civil actions, including
 prisoners who bring actions under the rights statute, 42 U.S.C. §
 1983, have no right to be personally present at any stage of the
 judicial proceedings.” See Holt, 619 F.2d at 560 (emphasis added).

23 In re Wilkinson, 137 F.3d at 914.

24 In Wilkinson, the Court of Appeals vacated the order of the district court authorizing the
25 inmate plaintiff's attendance at a pretrial deposition noticed by defendants. The appellate court
26 identified the following factors to be considered:

27 _____
28 ¹ Also pending, before the district judge, is plaintiff's motion for reconsideration of the
undersigned's order denying his request for appointment of counsel.

1 In order to attend a pretrial deposition . . . , the inmate has the
2 burden of producing evidence that . . . his attendance at this
3 particular deposition is required. This includes a demonstration that
4 his physical presence will contribute significantly to a fair
5 adjudication of his claim. Furthermore, when determining whether
6 the prisoner has made a specialized showing of need, the court must
7 consider the interests of prison officials as well as the inmate. . . .
8 [T]he relevant factors a district court should weigh in exercising its
9 discretion in making this determination . . . include: “[T]he costs
10 and security risks involved in transporting the inmate to the
11 deposition site and in maintaining his presence at the deposition, the
12 importance of the testimony of the deponent to the claims alleged,
13 the need for the inmate to be physically present during the
14 deposition, the inmate's individual security history, general security
15 issues, and the availability of alternative means to accommodate the
16 concerns of both the inmate and the prison officials.” This
17 formulation allows the district court to consider both the interests of
18 the inmate in attending the deposition and of the prison system in
19 maintaining security and safety in the prison.

11 In re Wilkinson, 137 F.3d at 915-16 (quoting In re Collins, 73 F.3d at 615); accord, Smith v.
12 Adam, 2013 WL 1283478 at *7 (N.D. Cal. 2013).

13 In the present case, plaintiff’s motion fails at the first step, because he has no particular
14 deposition in mind. Absent a specific request, the court is unable to consider the relevant factors.
15 Accordingly, plaintiff’s motion will be denied without prejudice.

16 Pursuant to his second request, plaintiff asks the court to send him four blank subpoenas,
17 with instructions, for the purpose of requesting the production of documents from third parties;
18 plaintiff identifies neither the third parties nor the documents requested. Although the court will
19 authorize plaintiff’s receipt of the requested blank subpoenas, to be completed by plaintiff, the
20 court will authorize service of the subpoenas by the United States Marshal only upon a showing
21 of good cause, as discussed forthwith.

22 Pursuant to Federal Rule of Civil Procedure 45(a)(2), a subpoena duces tecum may direct
23 a non-party to an action to produce documents or other tangible objects for inspection. A
24 subpoena must be personally served or it is null and void. Fed. R. Civ. P. 45(c); Gillam v. A.
25 Shyman, Inc., 22 F.R.D. 475 (D. Alaska 1958). Because plaintiff is proceeding in forma
26 pauperis, he is entitled to obtain personal service of an authorized subpoena duces tecum by the
27 United States Marshal. 28 U.S.C. § 1915(d). However, this court must consider the following
28 limitations before directing the United States Marshal to personally serve a prisoner’s proposed

1 subpoena duces tecum.

2 A subpoena duces tecum is subject to the relevance standards set forth in Federal Rule of
3 Civil Procedure 26(b)(1) (“[p]arties may obtain discovery regarding any nonprivileged matter that
4 is relevant to any party’s claim or defense”), and the considerations of burden and expense set
5 forth in Federal Rules of Civil Procedure 26(b)(2) and 45(c)(1). The “Federal Rules of Civil
6 Procedure were not intended to burden a non-party with a duty to suffer excessive or unusual
7 expenses in order to comply with a subpoena duces tecum.” Badman v. Stark, 139 F.R.D. 601,
8 605 (M.D. Pa. 1991) (requiring indigent plaintiff to demonstrate that he had “made provision for
9 the costs of such discovery”) (citing Cantaline v. Raymark Industries, Inc., 103 F.R.D. 447, 450
10 (S.D. Fla. 1984)); see also United States v. Columbia Broadcasting System, Inc., 666 F.2d 364
11 (9th Cir. 1982) (court may award costs of compliance with subpoena to non-party). Non-parties
12 are “entitled to have the benefit of this Court’s vigilance” in considering these factors. Badman,
13 139 F.R.D. at 605. In addition, a motion authorizing service of a subpoena duces tecum must be
14 supported by: (1) clear identification of the documents sought and from whom, and (2) a showing
15 that the records are obtainable only through the identified third party. See e.g. Davis v. Ramen,
16 2010 WL 1948560, *1 (E.D. Cal. 2010); Williams v. Adams, 2010 WL 148703, *1 (E.D. Cal.
17 2010).

18 Subject to these considerations, the court will direct the United States Marshal to
19 personally serve of one or more of plaintiff’s completed subpoenas only upon proper application.
20 Specifically, plaintiff must submit the proposed subpoena(s), in tandem with a separate request
21 for service that demonstrates compliance with the above-noted requirements and, therefore, good
22 cause to obtain the assistance of the United States Marshal.

23 Accordingly, IT IS HEREBY ORDERED that:

24 1. Plaintiff’s motion for general authorization to attend depositions noticed by defendants
25 (ECF No. 37), is denied without prejudice.

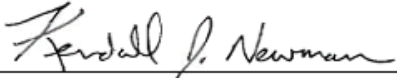
26 2. Plaintiff’s request to obtain four blank subpoenas duces tecum (ECF No. 38), is
27 granted; the Clerk of Court is directed to send plaintiff four blank subpoenas duces tecum, which
28 include instructions for their completion.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

3. Plaintiff's request for reconsideration (ECF No. 33) of the undersigned's order denying his request for appointment of counsel (ECF No. 30), remains pending before the district judge.

Dated: May 14, 2014

will2894.depo.sdt.


KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE