

1 defendants' discovery requests even before the court had issued its order granting defendants'
2 motion to compel. (ECF No. 68) He has attached to his opposition a copy of his discovery
3 responses and a copy of his prison mail log reflecting his outgoing mail to the Attorney General's
4 Office and this court. (Id., Attachs.) Defense counsel contends in reply that even if plaintiff had
5 properly served his responses, they are not "full and complete," he waived his objections, and he
6 did not verify the truth of his responses to defendants' interrogatories. (ECF No. 69)

7 DISCUSSION

8 First, the court will address defendants' request for terminating sanctions. Rule 37 of the
9 Federal Rules of Civil Procedure permits the court, in its discretion, to "dismiss[] the action or
10 proceeding in whole or part" if a party fails to comply with an order compelling discovery. Fed.
11 R. Civ. P. 37(b)(2)(A)(v). In determining whether to impose terminating sanctions, the court
12 must weigh the following five factors:

13 (1) the public's interest in expeditious resolution of litigation; (2)
14 the court's need to manage its dockets; (3) the risk of prejudice to
15 the party seeking sanctions; (4) the public policy favoring
16 disposition of cases on their merits; and (5) the availability of less
17 drastic sanctions. The sub-parts of the fifth factor are whether the
court has considered lesser sanctions, whether it tried them, and
whether it warned the recalcitrant party about the possibility of
case-dispositive sanctions.

18 Conn. Gen. Life Ins. Co. v. New Images of Beverly Hills, 482 F.3d 1091, 1096 (9th Cir. 2007)
19 (footnotes omitted). Terminating sanctions are drastic, and therefore, the court should only
20 impose them when a party's noncompliance with a discovery order is "due to willfulness, bad
21 faith, and fault." New Images of Beverly Hills, 482 F.3d at 1096; Computer Task Group v.
22 Brotby, 364 F.3d 1112, 1115 (9th Cir. 2004) (quoting Payne v. Exxon Corp., 121 F.3d 503, 507
23 (9th Cir. 1997)).

24 In this case, the court does not need to weigh the five factors listed above because there is
25 no indication that plaintiff willfully refused to respond to this court's discovery order or acted in
26 bad faith. Plaintiff prepared his responses and at least attempted to serve them on defense
27 counsel. Although counsel experienced a delay in receiving the responses, counsel now has them.
28 Accordingly, the court concludes that terminating sanctions are unwarranted.

1 As to defendants' alternative request for evidentiary sanctions, Rule 37 permits the court
2 to issue sanctions "prohibiting the disobedient party from supporting or opposing designated
3 claims or defenses, or from introducing designated matters in evidence." Fed. R. Civ. P.
4 37(b)(2)(A)(ii). Evidentiary sanctions may often constitute a lesser sanction. In this case,
5 however, the sanctions defendants seek would effectively preclude plaintiff from presenting any
6 evidence in support of his claims at trial. Imposing such sanctions would be tantamount to
7 granting a default judgment in defendants' favor.

8 In this case, for the reasons discussed above, the court declines to find that plaintiff has
9 failed to obey this court's discovery order. Plaintiff appears to have made a good-faith effort to
10 respond to defendants' discovery requests and to serve his responses on defense counsel. See
11 Valley Engineers Inc. v. Electric Engineering Co., 158 F.3d 1051, 1057 (9th Cir. 1998) ("[W]hat
12 is most critical for case-dispositive sanctions . . . is whether the discovery violations "threaten to
13 interfere with the rightful decision of the case."). Accordingly, the court concludes that
14 evidentiary sanctions are also unwarranted.

15 Defendants also alternatively request an additional forty-five days to take plaintiff's
16 deposition and possibly file a further motion to compel. Defense counsel contends that
17 defendants had been waiting to take plaintiff's deposition until after they received his responses
18 to their written discovery requests. Defendants also request an appropriate extension of time to
19 file a dispositive motion.

20 Good cause appearing, the court will grant defendants' requests for additional time to
21 conduct plaintiff's deposition and to file a dispositive motion in this action. As to defendants'
22 request for additional time to file a further motion to compel, however, if plaintiff answers
23 defense counsel's questions at his deposition there should be no need for defendants to conduct
24 additional written discovery, requiring further hand-written responses by plaintiff to defendants'
25 discovery requests. If, on the other hand, plaintiff is uncooperative or evasive at his deposition,
26 defense counsel may file a further motion to compel and attempt to persuade the court that
27 plaintiff has truly thwarted counsel's efforts to obtain discovery illuminating the precise nature of

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1 his claims.¹ See Hunt v. County of Orange, 672 F.3d 606, 616 (9th Cir. 2012) (“district courts
2 have broad discretion to manage discovery and to control the course of litigation”).

3 **OTHER MATTERS**

4 Plaintiff has filed a motion styled “Motion to Expand the Record Taking Judicial
5 Evidence.” In his motion, plaintiff contends that since he filed this cause of action defendants or
6 their co-workers have subjected him to negative retaliatory actions. He asks the court to “expand
7 the record” to include evidence of these purported actions. Plaintiff’s motion is difficult to
8 decipher, but since it appears he wishes to supplement his complaint with the retaliation
9 allegations he asserts in his motion, the court has construed plaintiff’s motion as a motion to file a
10 supplemental complaint.

11 Under Rule 15(d) of the Federal Rules of Civil Procedure, “the court may, on just terms,
12 permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event
13 that happened after the date of the pleading to be supplemented.” Fed. R. Civ. P. 15(d). “While
14 leave to permit supplemental pleading is favored, it cannot be used to introduce a separate,
15 distinct and new cause of action.” Planned Parenthood of Southern Arizona v. Neely, 130 F.3d
16 400, 402 (9th Cir. 1997) (internal quotation marks and citation omitted).

17 In this case, plaintiff is proceeding on Eighth Amendment claims based on defendant
18 Colosimo allegedly closing a mechanical door on him for several minutes despite plaintiff’s
19 screaming and shouting and defendant Beshears allegedly refusing to intervene on plaintiff’s
20 behalf to manually release the door with her key. Plaintiff’s proposed supplemental complaint
21 asserting First Amendment retaliation claims should therefore be the subject of a new and
22 separate cause of action from this one. See, e.g., Contreras v. Stockbridge, No. 1:06-cv-01817
23 LJO SKO PC, 2012 WL 396503 at *1 (E.D. Cal. Feb.7, 2012) (denying plaintiff’s motion to file

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25 ¹ Insofar as defense counsel argues in defendants’ reply that plaintiff’s responses to defendants’
26 discovery requests are insufficient or improper, the court notes that the issue raised by
27 defendants’ pending motion is whether plaintiff complied with the court’s order requiring him to
28 respond to defendants’ discovery requests. The court is satisfied that plaintiff attempted to serve
his discovery responses on defense counsel and will refrain from addressing whether plaintiff’s
responses to defendants’ discovery requests are proper, unless and until defendants raise these
arguments in a motion to compel.

1 supplemental complaint because his proposed supplement allegations gave rise to a new causes of
2 action); Gonzales v. Mason, No. C 07–180 SI (pr), 2008 WL 2079195 at *2 (N.D. Cal. May 15,
3 2008) (denying plaintiff’s motion to file supplemental complaint because the proposed
4 supplement included different defendants and new claims). Allowing plaintiff to proceed on any
5 supplemental retaliation claims would not promote judicial efficiency, the goal of Rule 15(d).
6 See Planned Parenthood, 130 F.3d at 402. Moreover, there are no “technical obstacles” to
7 plaintiff bringing a separate action based on his retaliatory allegations. Id. Accordingly, the court
8 will deny plaintiff’s motion to file a supplemental complaint.

9 CONCLUSION

10 In accordance with the above, IT IS HEREBY ORDERED that:

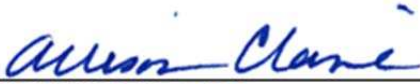
- 11 1. Defendants’ request for additional time to conduct plaintiff’s deposition (ECF No. 65)
12 is granted. Within forty-five days of the date of this order defendants shall conduct plaintiff’s
13 deposition;
- 14 2. Defendants’ request for additional time to file a further motion to compel (ECF No. 65)
15 is granted in part. Defendants may file a further motion to compel, if necessary, within thirty
16 days after having completed plaintiff’s deposition;
- 17 3. Defendants’ request for additional time to file a dispositive motion in this case (ECF
18 No. 65) is granted. Within ninety days of the date of this order defendants shall file any
19 dispositive motion; and
- 20 4. Plaintiff’s “Motion to Expand the Record Taking Judicial Evidence” construed as a
21 motion to file a supplemental complaint (ECF No. 67) is denied.

22 IT IS HEREBY RECOMMENDED that defendants’ motion for terminating sanctions or
23 alternatively, evidentiary sanctions (ECF No. 65) be denied.

24 These findings and recommendations are submitted to the United States District Judge
25 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
26 after being served with these findings and recommendations, any party may file written
27 objections with the court and serve a copy on all parties. Such a document should be captioned
28 “Objections to Magistrate Judge’s Findings and Recommendations.” Any response to the

1 objections shall be filed and served within seven days after service of the objections. The parties
2 are advised that failure to file objections within the specified time may waive the right to appeal
3 the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

4 DATED: January 26, 2016

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6 ALLISON CLAIRE
7 UNITED STATES MAGISTRATE JUDGE
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