

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

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

HENRY A. JONES,  
Plaintiff,  
v.  
P. KUPPINGER, et al.,  
Defendants.

No. 2:13-cv-0451 WBS AC P  
ORDER and  
AMENDED SCHEDULING ORDER

I. Introduction

Plaintiff is a state prisoner proceeding pro se and in forma pauperis in this civil rights action on his Second Amended Complaint (SAC), ECF No. 30, against defendant Kuppinger for deliberate indifference to plaintiff’s serious medical needs and excessive force; and against defendant Moore for deliberate indifference to plaintiff’s serious medical needs and failure to protect plaintiff from excessive force. See ECF No. 46 at 5. The discovery deadline expired on July 17, 2015, and the deadline for filing dispositive motions is currently October 16, 2015. See ECF No. 49.

Presently pending are the following matters: (1) plaintiff’s initial motion to compel discovery, filed June 15, 2015, ECF No. 54; (2) plaintiff’s motion for appointment of counsel, filed June 29, 2015, ECF No. 55; (3) plaintiff’s motion to obtain the case record, filed June 29, 2015, ECF No. 56; (4) plaintiff’s further motion to compel discovery, filed July 13, 2015, ECF

1 No. 58; and (5) plaintiff's request that a settlement conference be scheduled in this action, ECF  
2 No. 61. Defendants filed oppositions to plaintiff's discovery motions. See ECF Nos. 57, 59, 60.

3 II. Plaintiff's Discovery Motions and Extension of Deadlines

4 Plaintiff initially seeks further responses from defendant Kuppinger to plaintiff's  
5 Interrogatories, Set One, Numbers Four through Six, and plaintiff's corresponding Requests for  
6 Production, Set One, Numbers Four through Six.<sup>1</sup>

7 Defendant Kuppinger's initial responses, served May 15, 2015, asserted multiple  
8 objections and disclosed no responsive information or documents. See generally ECF No. 54 at  
9 9-53. After plaintiff filed this motion, new defense counsel (assigned to the case June 11, 2015)  
10 reviewed plaintiff's motion and defendant Kuppinger's discovery responses, and requested that  
11 officials at the California Department of Corrections and Rehabilitation (CDCR) assist in the  
12 identification of any additional information or documents responsive to plaintiff's discovery  
13 requests. See Declaration of David C. Goodwin, Deputy Attorney General (Goodwin Decl.),  
14 ECF No. 57-1 at 1-2, and attached exhibits. On June 25, 2011, defense counsel served plaintiff  
15 with supplemental responses to Interrogatory Nos. 4-6, and with documents responsive to  
16

---

17 <sup>1</sup> These discovery requests sought the following:

18 Interrogatory No. 4: During the time you were an officer at CSP-S  
19 have you ever been charged for, disciplined, investigated, or  
20 accused of excessive force toward an inmate.

21 Production Request No. 4: All documents which would identify,  
22 support, or relate to your response to Interrogatory No. 4, Set One,  
23 served and filed concurrently with this request.

24 Interrogatory No. 5: In the time you were an officer at CSP-S have  
25 you ever been charged for, disciplined, investigated, or accused of  
26 ignoring or disregarding an inmate's medical needs.

27 Production Request No. 5: All documents which would identify,  
28 support, or relate to your response to Interrogatory No. 5, Set One,  
served and filed concurrently with this request.

Interrogatory No. 6: Please inform as to whether you have ever  
been or are being sued by a prisoner for any claim made against you  
by Plaintiff in this lawsuit.

Production Request No. 6: All documents which would identify,  
support, or relate to your response to Interrogatory No. 6, Set One,  
served and filed concurrently with this request.

1 Production Request Nos. 4 and 6.<sup>2</sup> Defense counsel states under penalty of perjury that he  
2 “performed due diligence to identify any additional information or documents responsive to  
3 Plaintiff’s discovery requests” and supplemented defendant Kuppinger’s responses “[u]pon  
4 receiving additional information, in good faith.” Goodwin Decl., ¶¶ 4-5. In addition, defense  
5 counsel states that he “will continue to supplement his responses if further discoverable and  
6 responsive information becomes available.” ECF No. 57 at 4.

7 Plaintiff did not file a reply to defendant’s response to this motion, which the court  
8 construes as plaintiff’s concession that that defendant Kuppinger’s supplemental responses are  
9 adequate. Therefore, the court denies plaintiff’s initial discovery motion, ECF No. 54, as moot.

---

10 <sup>2</sup> Defense counsel provided the following supplemental responses from defendant Kuppinger:

11 Supplemental Response to Interrogatory No. 4: Without waiving  
12 objection, Defendant has not been criminally “charged” or  
13 “disciplined” for excessive force toward an inmate. Defendant is  
14 informed an inmate asserted excessive force in a staff complaint  
15 after the incidents alleged in this lawsuit. The investigation into  
that grievance concluded Defendant did not employ excessive force  
in violation of CDCR policy.

16 Supplemental Response to Production Request No. 4: Without  
17 waiving objection, Defendant produces a redacted copy of the staff  
18 complaint brought by another inmate, asserting Defendant used  
19 excessive [force] during an incident on July 23, 2011, and the  
appeal first level response finding there was no violation of CDCR  
policy. (Bates 1-6.)<sup>2</sup> Defendant also produces a redacted copy of  
the Rules Violation Report referenced in the first level response.  
(Bates 7-27.)

20 Supplemental Response to Interrogatory No. 5: Without waiving  
21 objection, Defendant has not been “criminally” charged,  
22 “disciplined,” or investigated for ignoring or disregarding an  
inmate’s medical needs. Defendant is also unaware of accusations  
regarding such conduct.

23 Supplemental Response to Interrogatory No. 6: Without waiving  
24 objection, Defendant is informed and believes he was named in  
25 three other lawsuits brought by prisoners. However, Defendant was  
dismissed from each of those lawsuits and was never served with  
process.

26 Supplemental Response to Production Request No. 6: Without  
27 waiving objection, Defendant produces a printout from the Court’s  
28 Electronic Case Filing system, showing he was named in three  
other inmate civil-rights lawsuits. (Bates 38-40.) The documents  
filed in those cases are public and equally available to Plaintiff.

1 Plaintiff's second discovery motion seeks responses to his Interrogatories, Set Two,  
2 served, respectively, on defendants Kuppinger and Moore. ECF No. 58. Defendants refused to  
3 provide responses to these interrogatories on the ground that they were untimely served. See ECF  
4 No. 58 at 4 (June 25, 2015 letter to plaintiff from defense counsel); and ECF No. 59 (defendants'  
5 opposition to motion). As defense counsel asserts, pursuant to the court's existing scheduling  
6 order, "[a]ll requests for discovery . . . shall be served not later than sixty [60] days prior to [July  
7 17, 2015, the discovery deadline]." ECF No. 49 at 5, ¶ 6. Although the parties dispute the  
8 calculation of the date on which plaintiff served these discovery requests, the court finds that the  
9 appropriate date is May 28, 2015, by application of the prison mailbox rule.<sup>3</sup> Therefore,  
10 plaintiff's second sets of interrogatories were served 48 days prior to the discovery deadline and  
11 were therefore untimely. As a result, defendants were not obligated to respond to the  
12 interrogatories.

13 Notwithstanding the untimeliness of plaintiff's requests, it appears that plaintiff made a  
14 good faith effort to comply with the court's scheduling order. In addition, this court is required to  
15 accord appropriate deference to pro se litigants and to strive to resolve cases on their merits.  
16 Therefore, the court broadly construes plaintiff's motion as a request to extend the discovery  
17 deadline for the limited purpose of obtaining responses to plaintiff's Interrogatories, Set Two,  
18 served on defendants Kuppinger and Moore.

19 For good cause shown, the court grants plaintiff's motion; extends the discovery deadline  
20 to November 20, 2015, for the limited purpose of allowing defendants to serve their responses to  
21 this discovery; and extends the dispositive motion deadline to March 20, 2016.

22 Also in his second discovery motion, plaintiff seeks sanctions against defendants on the  
23 ground that they untimely noticed plaintiff's deposition, which took place on July 15, 2015, two

---

24  
25 <sup>3</sup> Pursuant to the prison mailbox rule, a document is deemed served or filed on the date a prisoner  
26 signs the document and gives it to prison officials for mailing. See Houston v. Lack, 487 U.S.  
27 266 (1988) (establishing prison mailbox rule); Campbell v. Henry, 614 F.3d 1056, 1059 (9th Cir.  
28 2010) (applying the mailbox rule to both state and federal filings by incarcerated inmates). See  
also Ford v. Soto, 2013 WL 4039803 at \*1 n.2, 2013 U.S. Dist. LEXIS 111471 at \*5 n.2 (C.D.  
Cal. 2013) ("the date written and initialed by a prison official on the back of the envelope  
containing the [p]etition" as the constructive filing date for purposes of the mailbox rule).

1 days before expiration of the discovery deadline. See ECF No. 58 at 1. However, as defendants  
2 assert, noticing a deposition is not governed by the court's deadline for propounding written  
3 discovery requests. As the instant scheduling order provides, "defendants may depose, either in  
4 person or by videoconference, plaintiff and any other witness confined in a prison upon condition  
5 that, *at least fourteen days before such a deposition*, defendants serve all parties with the notice  
6 required by Fed. R. Civ. P. 30(b)(1)." See ECF No. 49 at 5, ¶ 4.

7 Defendants have submitted a copy of their Notice of Plaintiff's Deposition, timely served  
8 on plaintiff on June 15, 2015, one month before. See ECF No. 60 at 3-7, Ex. A. Although  
9 defendants later served, on July 13, 2015, an Amended Notice of Plaintiff's Deposition, the  
10 changes noted therein were di minimis, specifically, that the deposition would commence at 10:30  
11 a.m., rather than 11:00 a.m., and that it would be conducted by videoconference. See id. at 8-13.

12 Therefore, plaintiff's motion for sanctions premised on defendants' alleged failure to  
13 comply with the court's scheduling order is without merit and denied on that basis.

14 III. Plaintiff's Request for the Court's Assistance to Obtain his Legal Materials

15 Plaintiff seeks the court's assistance in locating and retrieving (or providing duplicate  
16 copies of) his legal materials in this case. ECF No. 56. (Plaintiff makes this request in tandem  
17 with his request for appointment of counsel, addressed below.) Plaintiff states that he has had the  
18 assistance of other inmates in pursuing this action, who lost the materials.<sup>4</sup> However, because  
19 plaintiff made this request more than two months ago, it is not clear if he continues to be without  
20

---

21 <sup>4</sup> Plaintiff states that his legal materials were lost due to the following circumstances, ECF No. 56  
22 at 1-2 (sic):

23 [Plaintiff] had an inmate name Williams litigating this civil  
24 complaint, who filed all discovery. Who cut his risk on or about  
25 6/12/2015 and was placed on suicide precaution and do not know  
26 when hil return. This inmate left with most of Jones records. [¶]  
27 On 6/19/2015 Mr. Jones gave an inmate by the name Springfield []  
28 the rest of his records to salvidge the rest of this case. The sams  
day Mr. Springfield got attack by other inmate. C/o Galapan look  
thru all of Springfield legal documents and was only to retrieve Mr.  
Jones legal books and not any case files. Mr. Jones request that the  
court take Judicial Notice by contacting C/O Galapan, and contact  
C/O Roles to indintify that Mr. Williams was working on Mr. Jones  
case. I Henry A Jones has NO records of this case. . . .

1 his legal materials. If so, plaintiff will be required to file a new request for assistance.

2 Therefore, the instant request is denied without prejudice.

3 IV. Plaintiff's Request for Appointment of Counsel

4 Plaintiff has filed a second request for appointment of counsel. See ECF Nos. 55, 56; see  
5 also ECF Nos. 41-2 (denying plaintiff's prior request). Plaintiff states that he is "a serious health  
6 care inmate with locognitive (sic) fun[c]tioning." ECF No. 55 at 1. He states that he has limited  
7 education, is a mental health patient and is disabled under the ADA, and has relied on the help of  
8 other inmates in pursuing this action. Id. at 2; see also ECF No. 56 at 1-2.

9 Plaintiff is again informed that district courts do not have authority to require attorneys to  
10 represent indigent prisoners in Section 1983 cases. Mallard v. United States Dist. Court, 490 U.S.  
11 296, 298 (1989). In certain "exceptional circumstances," the district court may request the  
12 voluntary assistance of counsel pursuant to 28 U.S.C. § 1915(e)(1). Terrell v. Brewer, 935 F.2d  
13 1015, 1017 (9th Cir. 1991); Wood v. Housewright, 900 F.2d 1332, 1335-36 (9th Cir. 1990).  
14 When determining whether "exceptional circumstances" exist, the court must consider plaintiff's  
15 likelihood of success on the merits as well as his ability to articulate his claims pro se in light of  
16 the complexity of the legal issues involved. Palmer v. Valdez, 560 F.3d 965, 970 (9th Cir. 2009).  
17 The burden of demonstrating exceptional circumstances is on the plaintiff. Id.

18 In the present case, the court again finds that plaintiff has not met his burden of  
19 demonstrating the requisite exceptional circumstances. Circumstances common to most  
20 prisoners, such as a deficient general education, lack of knowledge of the law, mental illness and  
21 disability, do not in themselves establish exceptional circumstances warranting appointment of  
22 voluntary civil counsel. Moreover, the legal issues in this case are well established, and clearly  
23 set forth by the court's order filed February 5, 2015. See ECF No. 46. Also, plaintiff's current  
24 motions demonstrate that plaintiff (and/or his current inmate assistant) understands the discovery  
25 process and the principal legal issues to be resolved by this litigation. Significantly, plaintiff's  
26 initial discovery motion triggered the service of supplemental responses by defendant. For these  
27 several reasons, the court finds that plaintiff has not demonstrated exceptional circumstances  
28 warranting the appointment of counsel at this time.

1 Accordingly, plaintiff's request for appointment of counsel is denied without prejudice.

2 V. Request to Set Settlement Conference

3 Finally, plaintiff requests, for the second time, that a settlement conference be scheduled  
4 in this action. ECF No. 61; see also ECF No. 58 at 2. In response to plaintiff's first request, ECF  
5 No. 45, defendants responded as follows, ECF No. 47 at 2:

6 Defense counsel has begun investigating settlement possibilities by  
7 speaking with Defendants, analyzing documents related to this case,  
8 and inquiring into restitution owed by Plaintiff, but needs additional  
9 time to conduct the investigation. Because the investigation is not  
10 yet complete, Defendants do not believe a settlement conference  
would be helpful in resolving the pending litigation at this time.  
Defendants invite Plaintiff to send defense counsel a written  
settlement proposal for consideration.

11 In his present motion, plaintiff proposes a settlement that includes a monetary award of  
12 \$15,000.00, removal of a related disciplinary finding from his central file and restoration of  
13 associated points. ECF No. 61.

14 Defendants will again be directed to file and serve a statement indicating whether they  
15 believe a settlement conference would be helpful at this time.

16 CONCLUSION

17 1. Plaintiff's initial motion to compel discovery, ECF No. 54 (seeking further responses  
18 from defendant Kuppinger to plaintiff's Interrogatories, Set One, Numbers Four through Six, and  
19 plaintiff's corresponding Requests for Production, Set One, Numbers Four through Six), is denied  
20 as moot.

21 2. Plaintiff's further motion to compel discovery, ECF No. 58, is granted in part and  
22 denied in part, as follows:

23 a. Defendants Kuppinger and Moore shall serve their responses to plaintiff's  
24 Interrogatories, Set Two, within 45 days after the filing date of this order.

25 b. Plaintiff's motion for sanctions, premised on defendants' alleged failure to comply  
26 with the court's scheduling order in noticing plaintiff's deposition, is denied.

27 3. Plaintiff's request for the court's assistance to obtain his legal materials in this case,  
28 ECF No. 56, is denied without prejudice. If plaintiff is still without his legal materials, he may

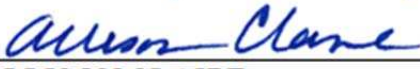
1 file a new request.

2 4. Plaintiff's second request for appointment of counsel, ECF No. 55 (see also ECF No.  
3 56), is denied without prejudice.

4 5. Within thirty days after the filing date of this order, defendants shall file and serve a  
5 statement indicating whether they believe a settlement conference in this action would be helpful  
6 at this time. If so, defendants shall indicate whether they consent to the undersigned Magistrate  
7 Judge presiding at the conference, or request the random assignment of another Magistrate Judge.

8 6. The discovery deadline is extended to November 20, 2015, for the limited purpose of  
9 allowing defendants to serve the responses required by this order; the dispositive motion deadline  
10 is extended to March 20, 2016.

11 DATED: September 16, 2015

12   
13 ALLISON CLAIRE  
14 UNITED STATES MAGISTRATE JUDGE  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28