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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

ROBERT BENYAMINI,  
Plaintiff,  
v.  
M. SWETT, et al.,  
Defendants.

No. 2:13-cv-0735-KJM-EFB P

ORDER

Plaintiff is a former state prisoner proceeding without counsel in an action brought under 42 U.S.C. § 1983. The matter was referred to a United States Magistrate Judge as provided by 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

On January 17, 2017, the magistrate judge filed findings and recommendations, which were served on all parties and which contained notice to all parties that any objections to the findings and recommendations were to be filed within fourteen days. Plaintiff has filed objections to the findings and recommendations and defendants have filed a response thereto.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 304, this court has conducted a *de novo* review of this case. Having reviewed the file, the court adopts the magistrate judge's findings but declines to adopt at this time the recommendation that the action be dismissed.

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1 This action is proceeding on Eighth Amendment claims raised in plaintiff's original  
2 complaint, filed April 15, 2013. ECF No. 1. The allegations supporting the claims have been  
3 described by the magistrate judge as follows:

4 [Plaintiff] alleges that, on May 6, 2009, defendant correctional  
5 officers subjected him to excessive force in violation of the  
6 Constitution when they forcefully removed him from his cell,  
7 restrained his hands and feet, and injected him with a psychiatric  
8 medication that had been ordered but to which plaintiff was  
9 allergic. [ECF No. 1] at 11-12. Plaintiff alleges that defendant  
10 Roth orchestrated the cell extraction. *Id.* at 12. Some of the  
11 defendants slammed plaintiff down and banged his cranium against  
12 the concrete floor. *Id.* Defendant Swett stomped hard on plaintiff's  
13 bare feet with his boot. *Id.* Defendant Miranda stepped on  
14 plaintiff's neck. *Id.* Defendant Carpenter banged plaintiff's head.  
15 *Id.* Defendant Perry observed, but did nothing. *Id.*

16 ECF No. 28 at 1-2.

17 On October 30, 2015, defendants filed a motion to compel responses to discovery and to  
18 modify the scheduling order. ECF No. 69. By order filed May 18, 2016, the magistrate judge  
19 granted the motion and ordered plaintiff to serve responses to several discovery requests. ECF  
20 No. 80 at 5.<sup>1</sup> On June 30, 2016, defendants filed the motion to compel and request for  
21 terminating sanctions, ECF No. 82, that resulted in the findings and recommendations now before  
22 the court. Relying on seven categories of information they seek, defendants contend plaintiff has  
23 failed to respond adequately, sometimes at all, as required by the May 18, 2016 order. *See* ECF  
24 No. 82-1 at 3-9. The information includes: (1) statements from plaintiff's witnesses; (2)  
25 plaintiff's personal diary entries about the May 6, 2009 incident; (3) petitions for writ of habeas

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26 <sup>1</sup> The magistrate judge deemed the motion unopposed. ECF No. 80 at 1. The record shows that  
27 on December 4, 2015, the magistrate judge ordered plaintiff to file, within twenty-one days, either  
28 an opposition to defendants' motion to compel or a statement of non-opposition. ECF No. 70.  
Plaintiff filed a document styled as objections to that order, ECF No. 71, and a document styled  
as a motion to amend the latter document. ECF No. 73. The magistrate judge considered these  
two documents, characterizing them as objections to, and a request for reconsideration of, the  
December 4, 2015 order. The substance of the documents suggests to this court that plaintiff was  
attempting to oppose at least some of the arguments raised in the motion to compel; his  
contentions concerning unsuccessful efforts to obtain his medical records from California State  
Prison-Sacramento were raised in those documents and are raised again in plaintiff's objections to  
the findings and recommendations currently before the court. *See* ECF No. 80 at 2; ECF No. 89  
at 10.

1 corpus regarding the cell extraction or a clear statement that he did not seek habeas corpus relief;  
2 (4) plaintiff's failure to make a reasonable inquiry to determine if there are documents other than  
3 the video of the incident which would show racial motivation; (5) documents regarding past and  
4 future pain and suffering; (6) documents concerning future and present expenses; and (7)  
5 documents related to injuries sustained as a result of each defendant's action and documents that  
6 support plaintiff's claim that each individual defendant's conduct was racially motivated. *Id.*

7 The magistrate judge recommends defendants' motion be granted and recommends that  
8 this action be dismissed as a sanction for plaintiff's failure to comply with May 18, 2016 order or  
9 to "meaningfully fulfill his discovery obligations." ECF No. 88 at 4. The magistrate judge  
10 addresses plaintiff's failure to respond to the request for (1) statements from plaintiff's witnesses;  
11 (2) plaintiff's personal diary entries about the May 6, 2009 incident; (3) documents regarding past  
12 and future pain and suffering; and (4) documents related to injuries sustained as a result of each  
13 defendant's action. *Id.* at 3-4. The findings and recommendations do not address the remaining  
14 three categories described above. In recommending dismissal as a sanction, the magistrate judge  
15 finds unavailable less drastic sanctions and, in particular, that "evidentiary sanctions against  
16 plaintiff in this instance is tantamount to dismissal." *Id.* at 5.

17 Plaintiff interposes several specific objections to the findings and recommendations.  
18 After review of the record, the court agrees with the magistrate judge's findings concerning the  
19 inadequacy of plaintiff's discovery responses. The court concludes, however, that evidentiary  
20 sanctions with respect to the four categories discussed by the magistrate judge are an appropriate  
21 and available alternative sanction that must be imposed instead of dismissal at this time.

22 The record shows that defendants have plaintiff's prison medical records, *see* ECF No. 82-  
23 1 at 6, and therefore have information about the nature of any alleged injuries identified by prison  
24 medical staff at the time of the alleged incident and any sequelae to those injuries of which  
25 plaintiff complained, or for which he was treated, while he was incarcerated. Plaintiff can, and  
26 will, be subject to an order precluding him from offering any evidence of post-incarceration  
27 medical treatment for his alleged injuries. Similarly, plaintiff can, and will, be subject to an order  
28 precluding him from offering evidence of "past or future expenses" resulting from the incident, if

1 any. Additionally, sanctions will be imposed for plaintiff's failure to make a reasonable inquiry  
2 to determine whether there is other evidence that would support his claim of racial motivation in  
3 the form of an order precluding plaintiff from offering any evidence that the acts or omissions of  
4 any defendant was racially motivated, other than the video already provided. Finally, plaintiff  
5 can, and will, be precluded from offering witness statements, other than his own, or calling  
6 witnesses at trial, and from offering any diary entries made concerning the May 6, 2009 incident.  
7 This preclusion order does not require dismissal of plaintiff's claims, because plaintiff's own  
8 testimony would still be available for his case in chief if the case proceeds further.

9 Finally, the court also concludes that plaintiff's response to defendants' request for  
10 production of any petitions for writ of habeas corpus plaintiff may have filed concerning the May  
11 6, 2009 incident is sufficient. Plaintiff objected to the request as irrelevant, but also responded  
12 that he "could not file any Habeas Corpus is [sic] as he was denied his constitutional right and  
13 wishes to access the library and the courts." ECF No. 82-2 at 7. Although the rest of plaintiff's  
14 response to this request is less focused, the court finds plaintiff has adequately responded that he  
15 did not file any petition for writ of habeas corpus concerning this incident.

16 This court ""abuses its discretion if it imposes a sanction of dismissal without first  
17 considering the impact of the sanction and the adequacy of less drastic sanction."" *In re*  
18 *Phenylpropanolamine (PPA) Products Liability Litigation*, 460 F.3d 1217, 1228 (9th Cir. 2006)  
19 (quoting *Malone v. U.S. Postal Service*, 833 F.3d 128, 132-33 (9th Cir. 1987) (internal citation  
20 omitted)). The court agrees with the magistrate judge's finding that plaintiff failed to comply in  
21 large part with the May 18, 2016 order, and that failure to comply with court orders can warrant  
22 the sanction of dismissal. Given that evidence preclusion is an available sanction that would not  
23 equate with dismissal of the action, the court will not dismiss this action at this time.

24 In their motion, defendants request additional time to depose plaintiff before filing a  
25 dispositive motion. Good cause appearing, that request will be granted and defendants will be  
26 granted thirty days from the date of this order in which to notice plaintiff's deposition. Plaintiff  
27 shall appear at, and cooperate fully in, a deposition noticed as authorized by this order. Plaintiff  
28 is further informed that his failure to appear at, or to cooperate fully in, his deposition will result

1 in the dismissal of this action. Because this court is issuing this order, any motion based on  
2 plaintiff's alleged failure to cooperate in his deposition should be made to this court, which will  
3 retain jurisdiction over this matter until after plaintiff's deposition is completed or any motion  
4 based on plaintiff's alleged failure to cooperate in his deposition is resolved.

5 Accordingly, IT IS HEREBY ORDERED that:

6 1. The findings filed January 17, 2017, are adopted to the extent consistent with this  
7 order;

8 2. Defendants' motion to compel and request for terminating sanctions (ECF No. 82) is  
9 denied without prejudice;

10 3. Defendants are granted thirty days from the date of this order in which to notice  
11 plaintiff's deposition;

12 4. Plaintiff shall appear at, and cooperate fully in, a deposition noticed as authorized by  
13 this order;

14 5. Plaintiff is informed that his failure to appear at, or to cooperate fully in, his deposition  
15 will result in the dismissal of this action;

16 6. Plaintiff is precluded from offering the following in connection with any motion for  
17 summary judgment or opposition to a defense motion for summary judgment, or at any trial of  
18 this action:

19 a. Any evidence of post-incarceration medical treatment for his alleged injuries;

20 b. Any evidence of "past or future expenses" resulting from the incident, if any;

21 c. Any evidence that the acts or omissions of any defendant was racially  
22 motivated, other than the video already provided;

23 d. Any witness statements, other than plaintiff's own statement, or witnesses at  
24 trial, other than plaintiff; and

25 e. Any personal diary entries made concerning the May 6, 2009 incident; and

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7. This court retains jurisdiction over this matter until after plaintiff's deposition is completed or any motion based on plaintiff's alleged failure to cooperate in his deposition is resolved.

DATED: March 30, 2017.

  
UNITED STATES DISTRICT JUDGE