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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

MARVIN GLENN HOLLIS,

Plaintiff,

v.

J. BAL, *et al.*,

Defendants.

Case No. 2:13-cv-02145-MCE-JDP (PC)

ORDER THAT:

(1) PLAINTIFF’S MOTION TO WITHDRAW ADMISSIONS IS GRANTED;

(2) DEFENDANTS’ MOTION TO MODIFY THE SCHEDULING ORDER IS GRANTED;

(3) PLAINTIFF’S MOTIONS FOR COURT ORDER AND FOR RETURN OF LEGAL PROPERTY ARE DENIED;

(4) DEFENDANTS’ MOTION FOR TERMINATING SANCTIONS IS DENIED WITHOUT PREJUDICE; AND

(5) PLAINTIFF’S MOTION FOR APPOINTMENT OF COUNSEL IS DENIED WITHOUT PREJUDICE

ECF Nos. 102, 104, 108, 113, 118, & 123

Pending before the court are various motions related to discovery. On April 27, 2022, I denied plaintiff’s request for an extension of time and directed him to submit his written responses to defendants’ discovery requests by June 9, 2022. ECF No. 101 at 4. Since then, plaintiff has failed to serve his responses on defendants and, on September 7, 2022, defendants

1 moved for terminating sanctions. ECF No. 118. I will deny that motion without prejudice and  
2 direct plaintiff to file his responses within thirty days of the date of this order's entry. If he fails  
3 to do so, defendants may renew their motion, and I will then recommend that this action be  
4 dismissed.

5 Also pending are motions filed by plaintiff to withdraw his previously deemed  
6 admissions, for orders directing the return of his legal materials, and for appointment of counsel.  
7 ECF Nos. 102, 108, 113, & 123. I will grant his motion to withdraw deemed admissions and  
8 deny his other motions. Finally, I will grant defendants' motion to extend discovery and the  
9 deadline for dispositive motions. ECF No. 104.

### 10 **Motion for Terminating Sanctions**

11 Defendants argue that terminating sanctions against plaintiff are appropriate because he  
12 has repeatedly failed to serve written responses to their discovery requests. ECF No. 118-1. I  
13 agree that plaintiff has failed to fulfill his discovery obligations, but terminating sanctions are  
14 premature. In determining whether to impose terminating sanctions, I consider five factors:

- 15 (1) the public's interest in expeditious resolution of litigation;  
16 (2) the court's need to manage its dockets; (3) the risk of prejudice  
17 to the [party seeking sanctions]; (4) the public policy favoring  
disposition of cases on their merits; and (5) the availability of less  
drastic sanctions.

18 *Malone v. United States Postal Service*, 833 F.2d 128, 130 (9th Cir. 1987). In considering the  
19 fifth factor, the availability of less drastic sanctions, the Ninth Circuit, in evaluating the actions of  
20 a district court, considers three subparts: "whether the court explicitly discussed alternative  
21 sanctions, whether it tried them, and whether it warned the recalcitrant party about the possibility  
22 of dismissal." *Valley Eng'rs, Inc. v. Elec. Eng'g Co.*, 158 F.3d 1051, 1057 (9th Cir. 1998). Here,  
23 none of those subparts may be answered in the affirmative, and thus I find terminating sanctions  
24 against the *pro se* plaintiff inappropriate at this time. I consider the most crucial of these to be the  
25 warning about possible dismissal; this order shall constitute that warning. If plaintiff does not  
26 meet his discovery obligations within thirty days of this order, I shall find terminating sanctions  
27 appropriate and recommend dismissal.

28 Defendants' motion is denied without prejudice. If plaintiff fails to serve his written

1 responses within thirty days, they may renew their motion. In granting plaintiff a final thirty days  
2 to submit his responses, I find it appropriate to grant defendants' motion to modify the scheduling  
3 order, ECF No. 104. The dates provided by defendants in that motion no longer serve, however.  
4 Discovery, including the filing of any motions to compel, must be completed by January 6, 2023.  
5 All dispositive motions should be filed by April 7, 2023.

#### 6 **Motion to Withdraw Admissions**

7 Plaintiff has filed a motion seeking to withdraw any admissions that were deemed true by  
8 his failure to answer defendant's requests for admission. ECF No. 102. In light of my order that  
9 plaintiff shall submit all discovery responses within thirty days of this order, he should also  
10 include his answers to those requests for admission. He is warned that failure to submit his  
11 answers will result in any admissions being deemed true, if terminating sanctions are not  
12 imposed.

#### 13 **Motions for Return of Legal Property and Access to Medical Records**

14 Plaintiff has filed two motions seeking the return of legal property, access to the prison  
15 law library at Mule Creek State Prison ("MCSP"), and access to his medical records. ECF Nos.  
16 108 & 113. The custodians of those resources are not, as best I can tell, parties to this case.  
17 Thus, I will not grant plaintiff's motions. He may, however, show this order to the appropriate  
18 officials at his institution and remind them that he is engaged in active litigation. Additionally, I  
19 will direct that a copy of this order be sent to the litigation coordinator at MCSP.

#### 20 **Motion for Appointment of Counsel**

21 Plaintiff requests appointment of counsel based on his difficulties in discovery, health  
22 issues, and his limited ability to access the law library. ECF No. 123. Plaintiff does not have a  
23 constitutional right to appointed counsel in this action, *see Rand v. Rowland*, 113 F.3d 1520, 1525  
24 (9th Cir. 1997), and the court lacks the authority to require an attorney to represent him, *see*  
25 *Mallard v. U.S. District Court for the Southern District of Iowa*, 490 U.S. 296, 298 (1989). The  
26 court can request the voluntary assistance of counsel. *See* 28 U.S.C. § 1915(e)(1) ("The court  
27 may request an attorney to represent any person unable to afford counsel"); *Rand*, 113 F.3d at  
28 1525. However, without a means to compensate counsel, the court will seek volunteer counsel

1 only in exceptional circumstances. In determining whether such circumstances exist, “the district  
2 court must evaluate both the likelihood of success on the merits [and] the ability of the [plaintiff]  
3 to articulate his claims pro se in light of the complexity of the legal issues involved.” *Rand*, 113  
4 F.3d at 1525 (internal quotation marks and citations omitted). Plaintiff has not demonstrated that  
5 these factors weigh in favor of appointing him counsel, and his motion is therefore denied.

6 It is ORDERED that:

7 1. Plaintiff’s motion to withdraw admissions, ECF No. 102, is GRANTED. Plaintiff  
8 shall serve responses to defendants’ request for admissions, interrogatories, and requests for  
9 production within thirty days of the date of this order.

10 2. Defendants’ motion to modify the scheduling order, ECF No. 104, is GRANTED.  
11 Discovery, including the filing of any motions to compel, must be completed by January 6, 2023.  
12 All dispositive motions should be filed by April 7, 2023.

13 3. Defendants’ motion for terminating sanctions, ECF No. 118, is DENIED without  
14 prejudice.

15 4. Plaintiff’s motions for return of legal property, law library access, and medical  
16 records, ECF Nos. 108 & 113, are DENIED.

17 5. Plaintiff’s motion for appointment of counsel, ECF No. 123, is DENIED.

18 6. The Clerk of Court is directed to send a copy of this order to the litigation  
19 coordinator at Mule Creek State Prison.

20  
21 IT IS SO ORDERED.

22 Dated: November 29, 2022

23   
24 JEREMY D. PETERSON  
25 UNITED STATES MAGISTRATE JUDGE  
26  
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