



1 judge's adoption of this court's companion findings and recommendations. See ECF No. 36 at 9.  
2 Therefore, the court agrees with defendants Singh and Rodriquez, ECF No. 32, that plaintiff's  
3 motion to compel their discovery, ECF No. 30, was prematurely filed. There is no current  
4 discovery dispute among these parties.

## 5 II. Plaintiff's Discovery Requests Served on Defendant Rogero

6 Also on December 23, 2014, this court directed defendant Rogero to file, within twenty-  
7 one days, a response to plaintiff's motion to compel Rogero's answers to interrogatories, ECF No.  
8 30-1 at 1-7, and plaintiff's motion to compel Rogero's production of documents, ECF No. 34.  
9 See ECF No. 36 at 10.<sup>1</sup> Defendant Rogero timely filed an opposition to each motion.<sup>2</sup> ECF Nos.  
10 38, 39. Meanwhile, plaintiff filed a third motion to compel, which challenges the substance of  
11 Rogero's answers to fourteen of plaintiff's twenty-five interrogatories. ECF No. 37.

### 12 A. Plaintiff's Interrogatories Served on Defendant Rogero

13 The court's Discovery and Scheduling Order requires that a party's discovery responses  
14 are due within forty-five days after service of written discovery requests. ECF No. 28 at 4.  
15 Plaintiff's Interrogatories, Set One,<sup>3</sup> were served on defendant Rogero by mail on October 22,  
16 2014. Allowing three days for service of the interrogatories, see Fed. R. Civ. P. 6(d), Rogero's  
17 answers were due on or before December 9, 2014. Rogero timely served an initial response on  
18 November 24, 2014, comprised only of legal objections. See ECF No. 38 at 2; and Exh. B. On  
19 the same date (applying the mailbox rule),<sup>4</sup> and prior to receiving defendant's objections, plaintiff  
20 filed a motion to compel, asserting that he had not yet received defendant's answers. ECF No.

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22 <sup>1</sup> As discussed below, the court reinstates plaintiff's motion filed December 22, 2014, ECF No.  
23 35, which challenges the content of defendant Rogero's responses to plaintiff's Request for  
24 Production of Documents, Set Two.

25 <sup>2</sup> Despite his arguments to the contrary, defendant is informed that plaintiff, a state prisoner  
26 proceeding pro se, is under no obligation to meet and confer prior to filing a motion compelling  
27 discovery. See Local Rule 230(l).

28 <sup>3</sup> No party has indicated that plaintiff served a subsequent set of interrogatories.

<sup>4</sup> The filing dates referenced in this discussion apply the prison mailbox rule. See Houston v.  
Lack, 487 U.S. 266 (1988) (establishing prison mailbox rule); Campbell v. Henry, 614 F.3d 1056,  
1059 (9th Cir. 2010) (applying the mailbox rule to both state and federal filings by incarcerated  
inmates).

1 30-1. Because defendant's answers were not due until December 9, 2014, defendant is correct  
2 that the subject motion was prematurely filed, and will be denied on that basis.

3       Thereafter, on December 23, 2014, defendant served amended answers to plaintiff's  
4 Interrogatories, Set One, which included substantive statements notwithstanding defendant's  
5 objections. ECF No. 38, Exh. A; see also ECF No. 39, Exh. A. Plaintiff's subsequent challenge  
6 to the content of those responses remains outstanding pursuant to plaintiff's motion filed  
7 December 29, 2014. ECF No. 37. Defendant Rogero states that he will address the substance of  
8 this motion in a separate response, see ECF No. 38 at 1 n.1, and is so directed.

9       B. Plaintiff's Requests for Production Served on Defendant Rogero

10       Plaintiff's Requests for Production of Documents, Sets One and Two, were served by mail  
11 on defendant respectively, on October 23, 2014, and November 2, 2014. Allowing three days for  
12 service of the interrogatories, see Fed. R. Civ. P. 6(d), Rogero's responses and production were  
13 due on or before, respectively, December 10, 2014, and December 22, 2014.<sup>5</sup> On December 4,  
14 2014, defendant served legal objections and the statement he "has no responsive documents" in  
15 response to each of plaintiff's Set One and Set Two production requests. ECF No. 39, Exhs. B,  
16 C.

17       1. Request for Production, Set One

18       On December 10, 2014 (applying the mailbox rule), plaintiff filed a motion to compel  
19 defendant Rogero to further respond to plaintiff's Request for Production of Documents, Set One.  
20 ECF No. 34. Defendant's argument that plaintiff's motion was prematurely filed, because  
21 defendant served his responses within the forty-five day deadline, is inapposite to Set One.  
22 Although plaintiff's motion prematurely challenged defendant's asserted failure to respond to Set  
23 Two, the motion challenges the specific content of defendant's response to Set One, wherein

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27 <sup>5</sup> Because the 48-day period ended on Saturday, December 20, 2014, it was extended to Monday,  
28 December 22, 2014. See Fed. R. Civ. P. 6(a)(1)(C) (period runs until the end of the next day that  
is not a Saturday, Sunday or legal holiday).

1 plaintiff seeks production of photographs identified in Set One Request Nos. 1 through 8.<sup>6</sup> In his  
2 opposition to the motion, defendant, a contract radiologist, explains that he does not have  
3 possession, custody or control of any of the photographs requested by plaintiff, and implies that  
4 he has no means to obtain them. Moreover, the court’s review of plaintiff’s requests indicates  
5 that plaintiff may be asking for specific photographs to be taken and then provided, not that  
6 existing photographs be produced.<sup>7</sup>

7 “Property is deemed within a party’s ‘possession, custody, or control’ if the party has  
8 actual possession, custody, or control thereof or the legal right to obtain the property on demand.”  
9 Scott v. Palmer, 2014 WL 6685810, \*3 (E.D. Cal. 2014) (citations and internal quotation marks  
10 omitted). The court finds defendant Rogero’s responses and objections to plaintiff’s production  
11 requests, Set One, to be reasonable and legally sufficient. Therefore, plaintiff’s motion to compel  
12 defendant Rogero’s further responses and production to plaintiff’s Request for Production of  
13 Documents, Set One, is denied.

## 14 2. Request for Production, Set Two

15 In contrast, plaintiff’s requests to defendant Rogero pursuant to his Request for Production  
16 of Documents, Set Two, appear to seek the production of existing items.<sup>8</sup> See ECF No. 39-2.  
17 The court previously vacated plaintiff’s motion to compel further responses to Set Two, ECF No.  
18 35, because the motion appeared to be identical to plaintiff’s challenge to Set One, ECF No. 34.  
19 See ECF No. 36 at 10. However, further review of these matters demonstrates that defendant  
20 Rogero’s response to plaintiff’s motion to compel, ECF No. 35, is required. Defendant’s  
21 response shall be filed and served within fourteen days after the filing date of this order.

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23 <sup>6</sup> Plaintiff’s motion incorrectly recounts his Set One production requests. Although he correctly  
24 reproduces Requests Nos. 1 through 7, the first “No. 8” and No. 9 were not part of his original  
25 requests. The second “No. 8” is consistent with the eighth and final request in Set One. See ECF  
26 No. 34 at 6.

27 <sup>7</sup> For example, Request No. 1, Set One, seeks “One enlarged photo of holding cell door while  
28 door is fully closed with plastic door slot closed.” (Sic.) ECF No. 39-3; ECF No. 34 at 5. The  
remaining requests seek similar photographs.

<sup>8</sup> For example, Request No. 1, Set Two, seeks a “Complete copy of med log’s of medication  
given to Plaintiff while he was admitted at San Joaquin General Hospital.” (Sic.) ECF No. 39-2;  
ECF No. 35 at 2.

1 III. Plaintiff's Request for Appointment of Medical Expert

2 Pursuant to Rule 706, Federal Rules of Evidence, and Rule 35, Federal Rules of Civil  
3 Procedure, plaintiff requests appointment of an impartial medical expert for the purpose of  
4 examining plaintiff, reviewing his medical records, and assessing the allegations and claims in  
5 this case. ECF No. 40 (entitled a "motion to show cause"). Plaintiff seeks an expert "who  
6 specialize[s] in radiology, or reading cat-scan x-rays of the kidney and spleen, splenectomy,  
7 abdominal organs involved in maintaining the proper condition of blood. . . ." Id. at 2.

8 The appointment of an independent expert witness is within the court's sound discretion.  
9 See Fed. R. Evid. 706(a); Fed. R. Civ. P. 35(a); Walker v. American Home Shield Long Term  
10 Disability Plan, 180 F.3d 1065, 1071 (9th Cir. 1999). Appointment of a neutral expert witness  
11 may be appropriate when "scientific, technical, or other specialized knowledge will assist the  
12 trier-of-fact to understand the evidence or decide a fact in issue. . . ." Ledford v. Sullivan, 105  
13 F.3d 354, 358-59 (7th Cir. 1997) (citing Fed. R. Evid. 702).

14 Plaintiff's request is denied at the present time for the following reasons. First, discovery  
15 is still proceeding in this action, and the court has not yet had occasion to review the available  
16 evidence. After the court has assessed the quality of the available evidence in deciding a  
17 dispositive motion and/or setting this case for trial, the court will also assess whether an  
18 independent medical examination of plaintiff and related testimony is necessary to properly  
19 resolve this case. Second, although plaintiff frames his request as one for neutral evaluation, it is  
20 clear that plaintiff seeks the appointment of an expert to assist in the presentation of his case.  
21 This is not the role of a neutral expert. "Reasonably construed, [Rule 706] does not contemplate  
22 the appointment of, and compensation for, an expert to aid one of the parties." Trimble v. City of  
23 Phoenix Police Dept., 2006 WL 778697, \*6 (D. Ariz. 2006) (citation omitted). Moreover, "28  
24 U.S.C. § 1915, the in forma pauperis statute, does not waive payment of fees or expenses for  
25 witnesses." Dixon v. Ylst, 990 F.2d 478, 480 (citing Tedder v. Odel, 890 F.2d 210, 211-12 (9th  
26 Cir. 1989)).

27 For these reasons, plaintiff's request for appointment of an impartial medical expert is  
28 denied without prejudice.

1 IV. Conclusion

2 For the foregoing reasons, IT IS HEREBY ORDERED that:

3 1. Plaintiff's motion to compel defendant Rogero to answer plaintiff's Interrogatories, Set  
4 One, ECF No. 30-1, is denied as prematurely filed and now moot.

5 2. Plaintiff's motion to compel defendant Rogero to provide further answers to plaintiff's  
6 Interrogatories, Set One, ECF No. 37, remains outstanding (as acknowledged by defendant, see  
7 ECF No. 38 at 1 n.1); defendant shall, within fourteen days after the filing date of this order, file  
8 and serve a response to plaintiff's motion.

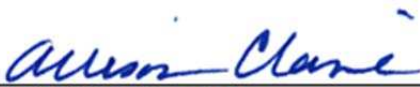
9 3. Plaintiff's motion to compel defendant Rogero's further responses to plaintiff's  
10 Request for Production of Documents, Set One, and for sanctions, ECF No. 34, is denied.

11 4. Plaintiff's motion to compel defendant Rogero's further responses to plaintiff's  
12 Request for Production of Documents, Set Two, ECF No. 35, is reinstated; defendant shall, within  
13 fourteen days after the filing date of this order, file and serve a response to plaintiff's motion.

14 5. Plaintiff's motion for appointment of a medical expert, ECF No. 40, is denied without  
15 prejudice.

16 6. The Clerk of Court shall redesignate defendant's oppositions filed January 13, 2015, as  
17 follows: ECF No. 38 is responsive to ECF Nos. 30 & 37 (ECF No. 37 remains outstanding); ECF  
18 No. 39 is responsive to ECF No. 34. In addition, the Clerk of Court shall indicate that plaintiff's  
19 motion at ECF No. 35 has not yet been resolved.

20 DATED: January 23, 2015

21   
22 ALLISON CLAIRE  
23 UNITED STATES MAGISTRATE JUDGE  
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