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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

MIGUEL ENRIQUE DIAZ,  
Plaintiff,  
v.  
R. FOX, et al.,  
Defendants.

No. 2:14-cv-2705 JAM CKD P

ORDER

Plaintiff is a state prisoner proceeding pro se with a civil rights action pursuant to 42 U.S.C. § 1983. Currently before the court are the parties’ motions to compel discovery (ECF Nos. 50, 54) and plaintiff’s motions for contempt of court and sanctions (ECF Nos. 66, 71), recusal (ECF No. 70), and extension of time (ECF No. 72).

I. Motion to Recuse

As an initial matter, plaintiff’s motion to recuse is properly before the undersigned. The Ninth Circuit has “held repeatedly that the challenged judge h[er]self should rule on the legal sufficiency of a recusal motion in the first instance.” United States v. Studley, 783 F.2d 934, 940 (9th Cir. 1986) (citing United States v. Azhocar, 581 F.2d 735, 738 (9th Cir. 1978)). If the affidavit is legally insufficient, then recusal can be denied. United States v. \$292,888.04 in U.S. Currency, 54 F.3d 564, 566 (9th Cir. 1995).

“Whenever a party to any proceeding in a district court makes and files a timely and

1 sufficient affidavit that the judge before whom the matter is pending has a personal bias or  
2 prejudice either against him or in favor of any adverse party, such judge shall proceed no further  
3 therein.” 28 U.S.C. § 144. “Any justice, judge, or magistrate judge of the United States shall  
4 disqualify himself in any proceeding in which his impartiality might reasonably be questioned.”  
5 28 U.S.C. § 455(a). Under both recusal statutes, the substantive standard is “whether a  
6 reasonable person with knowledge of all the facts would conclude that the judge’s impartiality  
7 might reasonably be questioned.” Studley, 783 F.2d at 939 (quoting Mayes v. Leipziger, 729  
8 F.2d 605, 607 (9th Cir. 1984) (internal quotations omitted)).

9 Plaintiff argues that the undersigned should recuse herself because she is a former  
10 prosecutor and has failed to rule on his pending motion for sanctions, which he asserts  
11 demonstrates her bias against him. (ECF No. 70 at 1.) The conclusory assertion that the  
12 undersigned must be biased against plaintiff because of her previous occupation is insufficient to  
13 show any actual bias or prejudice or to demonstrate that the undersigned’s impartiality might be  
14 reasonably questioned. With respect to the claims that the undersigned’s conduct in this case  
15 demonstrates bias, recusal “is required ‘only if the bias or prejudice stems from an extrajudicial  
16 source and not from conduct or rulings made during the course of the proceeding.’” Pau v.  
17 Yosemite Park & Curry Co., 928 F.2d 880, 885 (9th Cir. 1991) (quoting Toth v. TransWorld  
18 Airlines, 862 F.2d 1381, 1388 (9th Cir. 1988)). Plaintiff’s allegation that the undersigned has  
19 deliberately delayed the consideration of his motion is founded on nothing more than speculation  
20 and plaintiff’s frustration at the pace of litigation. “[A] judge, having been assigned to a case,  
21 should not recuse h[er]self on unsupported, irrational, or highly tenuous speculation.” United  
22 States v. Greenough, 782 F.2d 1556, 1558 (11th Cir. 1986). While the court understands  
23 plaintiff’s frustration at how long it can take to resolve matters, these delays are not attributable to  
24 any bias toward him, but rather to the fact that judges in the Eastern District of California  
25 maintain some of the heaviest caseloads in the nation, a significant portion of which are  
26 comprised of pro se inmate cases. This sometimes causes unavoidable delays in the resolution of  
27 individual matters.

28 Plaintiff’s conclusory allegations, based on nothing more than speculation, are legally

1 insufficient to establish a reasonable question as to the undersigned's impartiality or that a bias or  
2 prejudice exists. The request for recusal will therefore be denied.

3 II. Motion for Extension of Time

4 Plaintiff has also filed a motion for a thirty day extension of time "to comply with the  
5 Court's prior order." (ECF No. 72.) However, he does not identify which order he is referring to  
6 or what deadline he is seeking to extend. The motion is signed September 6, 2017 (id.), and the  
7 last order the court issued prior to the filing of the motion was filed May 31, 2017 (ECF No. 61).  
8 In that order, plaintiff was granted an additional fifteen days to oppose defendants' motion to  
9 compel and reply in support of his own motion to compel. (Id.) Plaintiff filed a response to  
10 defendants' motion to compel (ECF No. 62), but never filed a reply in support of his own motion.  
11 If the deadline he is seeking to extend is the deadline for replying in support of his motion to  
12 compel, then the motion for extension is untimely and fails to demonstrate excusable neglect,<sup>1</sup>  
13 particularly in light of the numerous other motions and requests plaintiff filed in between the  
14 filing of the order granting his previous request for extension and the filing of his current motion  
15 for extension. See Fed. R. Civ. P. 6(b)(1)(B) (untimely motion must demonstrate excusable  
16 neglect); ECF Nos. 62, 63, 65-37, 69-72.

17 It is unclear what deadline plaintiff seeks to extend and a request to extend his time to file  
18 a reply is untimely. Accordingly, the motion for extension of time will be denied.

19 III. Motions for Contempt of Court and Sanctions

20 Plaintiff has filed two motions for "contempt of court and monetary sanctions." (ECF  
21 Nos. 66, 71.) Both motions concern plaintiff's placement into administrative segregation which  
22 he alleges has deprived him of access to the law library and his legal property. (Id.) He also  
23 claims that he is being denied medication for pain and acid reflux, that his typewriter was stolen,  
24 and that he was placed in administrative segregation in retaliation for initiating a lawsuit and to

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25 <sup>1</sup> Although a number of plaintiff's filings after he filed the opposition to defendants' motion to  
26 compel allege that he was without any of his documents because he was placed in administrative  
27 segregation and transferred to other prisons, the alleged deprivation did not begin until July 6,  
28 2017, three weeks after his extended deadline to file a reply expired. (See ECF Nos. 65-67, 69-  
71.)

1 impede his ability to pursue his claims. (Id.) In the first motion, he requests that defendants'  
2 counsel and various non-defendants be ordered to show cause why they should not be held in  
3 contempt of court and issued monetary sanctions. (ECF No. 66 at 1, 3.) He further requests that  
4 the court require counsel and non-defendants to produce their e-mails for in camera review, that  
5 he be immediately released from administrative segregation and reinstated to his job assignment,  
6 and that a rules violation be expunged from his record. (Id. at 4.) The second motion requests  
7 that defendants and Warden Fox<sup>2</sup> be ordered to replace his typewriter and either immediately  
8 provide plaintiff with all of his property or be fined \$500.00 per day until they provide his  
9 property. (ECF No. 71 at 2.) It also requests that any court order issued between July 6 and  
10 August 18, 2017, be vacated and that a rules violation be expunged from his record. (Id. at 2-3.)  
11 Both motions will be denied.

12           Plaintiff fails to identify any court order or rule that defendants or their counsel have  
13 violated and the non-defendants are not currently before the court. Accordingly, holding these  
14 individuals in contempt of court and assessing monetary sanctions would be inappropriate.  
15 Furthermore, defendants appear to be wholly uninvolved in the incidents that serve as the basis  
16 for the motions and the incidents are entirely unrelated to the matters before the court in the  
17 instant case. The lawsuit plaintiff claims prompted the retaliation deals with allegations that he  
18 was subject to racial discrimination by individuals from the Father's House church.<sup>3</sup> (ECF No. 66  
19 at 1, 4, 10.) If plaintiff wants to pursue his claims for discrimination and retaliation, he will need  
20 to do so in a separate action. To the extent plaintiff claims defendants' counsel is somehow  
21 involved in his inability to access the library or his legal property, his allegations are entirely  
22 speculative. (See ECF No. 65 (letter to court summarily concluding counsel is involved in the  
23 alleged deprivation).) Finally, plaintiff has not demonstrated that his alleged inability to access

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25 <sup>2</sup> Warden Fox was originally named as a defendant (ECF No. 20), but the claims against him  
26 were screened out (ECF No. 21).

27 <sup>3</sup> It is not clear that plaintiff has actually initiated a lawsuit, as the documentation indicates that  
28 he instead sent a letter to the Father's House church seeking information on their liability  
insurance policy and "demanding 45k compensatory and 135k in punitive damages." (ECF No.  
66 at 10.)

1 his legal property between July 6 and September 2, 2017,<sup>4</sup> inhibited his ability to proceed in this  
2 case and such a showing would likely be difficult as there were no deadlines pending during at  
3 that time.

#### 4 IV. Motions to Compel

5 The scope of discovery under Federal Rule of Civil Procedure 26(b)(1) is broad.  
6 Discovery may be obtained as to “any nonprivileged matter that is relevant to any party’s claim or  
7 defense and proportional to the needs of the case.” Fed. R. Civ. P. 26(b)(1). “Information within  
8 this scope of discovery need not be admissible in evidence to be discoverable.” Id. The purpose  
9 of discovery is to make “trial less a game of blind man’s bluff and more a fair contest with the  
10 basic issues and facts disclosed to the fullest practicable extent,” United States v. Procter &  
11 Gamble Co., 356 U.S. 677, 682 (1958) (citing Hickman v. Taylor, 329 U.S. 495, 501 (1947)), and  
12 “to narrow and clarify” the issues in dispute, Hickman, 329 U.S. at 501.

13 Where a party fails to answer an interrogatory submitted under Fed. R. Civ. P. 33, or fails  
14 to produce documents requested under Fed. R. Civ. P. 34, the party seeking discovery may move  
15 for compelled disclosure. Fed. R. Civ. P. 37. “The party seeking to compel discovery has the  
16 burden of establishing that its request satisfies the relevancy requirements of Rule 26(b)(1).  
17 Thereafter, the party opposing discovery has the burden of showing that the discovery should be  
18 prohibited, and the burden of clarifying, explaining or supporting its objections.” Bryant v.  
19 Ochoa, No. 07cv200 JM (PCL), 2009 WL 1390794, at \* 1, 2009 U.S. Dist. LEXIS 42339, at \*3  
20 (S.D. Cal. May 14, 2009) (citations omitted). The opposing party is “required to carry a heavy  
21 burden of showing why discovery [should be] denied.” Blankenship v. Hearst Corp., 519 F.2d  
22 418, 429 (9th Cir. 1975).

#### 23 A. Plaintiff’s Motion

24 Plaintiff has filed a motion to compel responses to his requests for interrogatories and  
25 production of documents on the grounds that defendants have waived all their objections because  
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27 <sup>4</sup> Plaintiff’s motion for extension of time, which was filed after both motions for contempt of  
28 court, states that he received some of his legal property on September 2, 2017. (ECF No. 72.)

1 the responses were untimely, the objections lacked specificity, and they failed to provide a  
2 privilege log.<sup>5</sup> (ECF No. 50.) Defendants oppose the motion on the grounds that plaintiff failed  
3 to meet and confer with counsel prior to filing his motion, their responses were timely and  
4 sufficient, and the motion does not identify the specific discovery requests or responses at issue.

5 i. Failure to Meet and Confer

6 Defendants argue that plaintiff's motion to compel should be denied because he failed to  
7 comply with the meet and confer requirements of Local Rule 251. (ECF No. 51 at 2.) However,  
8 as is this court's standard practice in pro se prisoner cases such as this, the requirements of Local  
9 Rule 251 were explicitly ordered inapplicable (ECF No. 46 at 5) and this is not a valid ground for  
10 denying plaintiff's motion. Moreover, the court notes that were it to hold plaintiff to the  
11 requirements of Local Rule 251, defendants' motion to compel responses to their interrogatories  
12 and requests for production would also be denied for lack of compliance because a "meet and  
13 confer letter" does not satisfy the requirement that the parties confer in good faith. See Compass  
14 Bank v. Shamgochian, 287 F.R.D. 397, 399-400 (S.D. Tex. 2012) (collecting cases) ("Based on  
15 the foregoing case law, Plaintiff's single letter unilaterally identifying flaws in Defendant's  
16 discovery responses and setting an arbitrary response deadline for Defendant would seem to be  
17 inadequate, as it does not equate to a good faith conferral or attempt to confer"); see also Informal  
18 Telephonic Conferences re Discovery Disputes for Magistrate Judge Delaney<sup>6</sup> ("**The parties**  
19 **must meet and confer in person or via telephone or video conferencing (i.e. in voice to voice**  
20 **dialogue; other forms of communication are not sufficient).**" (emphasis in original)).

21 Though not raised by defendants, Federal Rule of Civil Procedure 37(a) also contains a  
22 requirement that the movant attempt to resolve any disputes prior to seeking court intervention.  
23 However, while compliance with that rule has not been explicitly excused and the court

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24 <sup>5</sup> Plaintiff also makes arguments related to the taking of his deposition and the events that  
25 transpired on the day his deposition was scheduled to take place. However, these arguments are  
26 immaterial to the resolution of his motion to compel and, where appropriate, will instead be  
27 considered as part of his opposition to defendants' motion to compel and for sanctions.

28 <sup>6</sup> Available under Case Management Procedures at  
<http://www.caed.uscourts.gov/caednew/index.cfm/judges/all-judges/5055/>.

1 encourages parties to attempt to resolve disputes prior to seeking court intervention, because  
2 plaintiff is incarcerated and proceeding pro se, it will not be enforced here and will not provide  
3 grounds for denying the motion.

4 ii. Timeliness of Defendants' Responses

5 Plaintiff argues that defendants' did not timely object to his discovery requests and they  
6 therefore waived all objections. (ECF No. 50 at 1.) His arguments indicate that he believes that  
7 defendants' responses were untimely because they were served more than thirty days after he  
8 served the requests. However, as defendants correctly point out, discovery in this matter was  
9 stayed, which consequently altered the date their responses were due.

10 Plaintiff's requests for production were received by the docketing unit of the Attorney  
11 General's Office on February 5, 2016, and received by defendants' previous counsel on February  
12 8, 2016.<sup>7</sup> (ECF No. 29-1 at 1, ¶ 2.) A certificate of service was not included with the requests,  
13 but they were dated January 29, 2016 (*id.*), making the responses due on March 2, 2016, under  
14 the default deadlines set by the Federal Rules of Civil Procedure, Fed. R. Civ. P. 33(b)(2); Fed.  
15 R. Civ. P. 34(b)(2)(A).

16 Defendants filed a motion to dismiss on February 9, 2016 (ECF No. 28), and then filed a  
17 motion for a protective order to stay discovery pending resolution of the motion to dismiss and to  
18 extend their deadline for responding to plaintiff's January 29, 2016 requests until forty-five days  
19 after the motion to dismiss was resolved (ECF No. 29). The motion for protective order was filed  
20 prior to defendants' deadline to respond to plaintiff's requests. On February 24, 2016, the  
21 undersigned granted the motion to stay discovery.<sup>8</sup> (ECF No. 30.) It was further ordered that any  
22 discovery requests served by plaintiff would be considered "served as of the date any Discovery  
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24 <sup>7</sup> The declaration submitted by defendants' current counsel states that she received the requests  
25 on February 5, 2016. (ECF No. 51-1 at 1, ¶ 2.) However, this seems unlikely in light of previous  
26 counsel's declaration (ECF No. 29-1) and the fact that current counsel did not become attorney of  
27 record until September 20, 2016 (ECF No. 44). The court assumes this apparent discrepancy is  
28 due to a typographical error or omitted explanation rather than any deliberate misrepresentation.

<sup>8</sup> Defendants incorrectly state that discovery was stayed at the time plaintiff's discovery requests  
were received. (ECF No. 51 at 1.)

1 and Scheduling Order issues.” (Id.) This means that the defendants’ deadline for responding to  
2 plaintiff’s January 29, 2016 requests was to be calculated based on the date the scheduling order  
3 was issued, not the date plaintiff originally served them.

4 The discovery and scheduling order was issued on November 2, 2016. (ECF No. 46.)  
5 The order altered the default thirty-day timeframe for responding to discovery requests and  
6 ordered that responses to discovery requests were “due forty-five days after the request is served.”  
7 (Id. at 4.) Defendants’ responses to plaintiff’s requests for production were served thirty days  
8 later on December 2, 2016 (ECF No. 51-1 at 5-6), and were therefore timely.

9 iii. Sufficiency of the Motion

10 Plaintiff moves to compel responses to his interrogatories and requests for production of  
11 documents. (ECF No. 50.) In their opposition, defendants refer only to requests for production  
12 (ECF No. 51) and plaintiff has not specifically identified the discovery requests at issue, so it is  
13 unclear whether he submitted both interrogatories and requests for production or just requests for  
14 production.<sup>9</sup> Regardless, because the motion does not identify the specific requests or responses  
15 at issue and only generally identifies the objections he argues are deficient, it will be denied with  
16 one exception.

17 As addressed above, defendants’ responses to plaintiff’s requests were not untimely.  
18 Accordingly, their objections have not been waived due to untimeliness as plaintiff argues.  
19 Although plaintiff also argues that the objections are waived because they are overly vague and  
20 non-specific, he has not identified the specific requests or objections so that the court may  
21 evaluate these claims.

22 The Court does not hold prisoners proceeding pro se to the same  
23 standards that it holds attorneys. However, at a minimum, as the  
24 moving party plaintiff bears the burden of informing the court of  
25 which discovery requests are the subject of his motion to compel  
and, for each disputed response, why defendant’s objection is not  
justified.

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26 <sup>9</sup> The copy of plaintiff’s requests for production that was provided when defendants moved to  
27 stay discovery shows that plaintiff identified them as requests brought pursuant to Federal Rules  
28 of Civil Procedure 26, 33, and 34 (ECF No. 29-1 at 5-6), so it appears that the interrogatories he  
seeks to compel responses to may actually be his requests for production.

1 Waterbury v. Scribner, No. 1:05-cv-0764 OWW DLB PC, 2008 WL 2018432, at \*1, 2008 U.S.  
2 Dist. LEXIS 53142, at \*3 (E.D. Cal. May 8, 2008). Plaintiff's motion failed to provide this  
3 necessary information, leaving the court unable to assess his claims, and though defendants  
4 identified this deficiency in their opposition to the motion, plaintiff failed to file a reply  
5 addressing the issue.

6 Plaintiff's final claim is that defendants' objections on the grounds of privilege are waived  
7 because they did not provide a privilege log. (ECF No. 50 at 1-3.) Defendants respond that they  
8 did provide a privilege log and submit the proof of service, though they do not provide a copy of  
9 the log. (ECF No. 51-1 at 6.) It is unclear whether plaintiff did not receive the log or whether he  
10 did not recognize the log for what it was. In either case, the court will order defendants to re-  
11 serve plaintiff with a copy of their privilege log.

12 For the foregoing reasons, plaintiff's motion to compel will be granted in so far as  
13 defendants will be required to re-serve their privilege log. The motion will otherwise be denied.

#### 14 B. Defendants' Motion

15 Defendants assert that their requests for admissions are deemed admitted because plaintiff  
16 failed to timely respond and move to compel substantive responses to their interrogatories and  
17 requests for production. (ECF No. 54-1.) They also seek to compel plaintiff to submit to a  
18 deposition and request that they be awarded their costs and fees for the failed attempt to take  
19 plaintiff's deposition and for having to bring the instant motion. (Id.) Plaintiff opposes the  
20 motion, but focuses almost entirely on his deposition. (ECF No. 62 at 1-3.) He argues that he was  
21 not required to participate in the deposition until the court ruled on his pending motion for  
22 protective order and that he did not deliberately evade counsel on the date the deposition was  
23 scheduled to take place. (Id.) He also argues that monetary sanctions are not appropriate because  
24 he was not in violation of an order compelling discovery. (Id.)

##### 25 i. Requests for Admissions

26 Defendants served plaintiff with a request for admissions on December 22, 2016. (ECF  
27 No. 54-2 at 9.) His responses were due by February 8, 2017 (ECF No. 46 at 4 (extending time for  
28 responses to forty-five days from service)), and were received by defendants on February 28,

1 2017 (ECF No. 54-2 at 3, ¶ 12). It is not clear when plaintiff submitted the responses, since they  
2 are not dated and it does not appear that they were accompanied by a certificate of service. (Id. at  
3 28-30.) However, plaintiff has provided a copy of a letter to defendants' counsel that indicates he  
4 submitted the responses on February 23, 2017. (ECF No. 50 at 8.)

5 Plaintiff's opposition to the motion to compel does not make any reference to the request  
6 for admissions. To the extent it appears that he is arguing that he was not required to respond to  
7 discovery in general prior to a ruling on his motion for protective order, this claim is without  
8 merit. Even if a pending motion for protective order was sufficient to stay plaintiff's obligation to  
9 respond to discovery, his motion for protective order made no mention of a request for  
10 admissions and focused solely on requests for production and the attempt to take his deposition.  
11 (ECF No. 47.) Accordingly, that motion fails to provide any basis for failing to timely respond to  
12 the request for admissions.

13 Assuming that plaintiff did in fact serve his responses on February 23, 2017, they were  
14 untimely and he has presented no justification that would excuse the untimeliness and each matter  
15 is therefore deemed admitted. Fed. R. Civ. P. 36(a)(3) (when a party fails to timely respond to a  
16 request for admission, the matter is automatically deemed admitted). "A matter admitted under  
17 [Rule 36] is conclusively established unless the court, on motion, permits the admission to be  
18 withdrawn or amended." Fed. R. Civ. P. 36(b). "[T]he court may permit withdrawal or  
19 amendment if it would promote the presentation of the merits of the action and if the court is not  
20 persuaded that it would prejudice the requesting party in maintaining or defending the action on  
21 the merits." Id.

22 The party who obtained the admission has the burden of proving  
23 that allowing withdrawal of the admission would prejudice its case.  
24 Hadley v. United States, 45 F.3d 1345, 1348 (9th Cir.1995). The  
25 prejudice contemplated by 36(b) is not simply that the party who  
26 obtained the admission will now have to convince the factfinder of  
27 the truth; rather, it relates to the difficulty a party may face in  
28 proving its case, for example by the unavailability of key witnesses  
in light of the delay. Id. at 1349 (finding only inconvenience but  
not prejudice despite the moving party's contention that if the  
admission had been timely it would have been able to engage in  
more extensive trial preparation); see also 999 [v. C.I.T. Corp.], 776  
F.2d 866, 869 (9th Cir. 1985)] (finding prejudice when the motion  
was not made until the middle of trial when 999 had nearly rested

1 its case and the record revealed that 999 had relied heavily on the  
2 admission and had even shown the admission to the jury).

3 Sonoda v. Cabrera, 255 F.3d 1035, 1039 (9th Cir. 2001).

4 Though plaintiff has not explicitly moved to withdraw or amend his admissions, the court  
5 will construe his February 23, 2017 letter to counsel, which is attached to his motion to compel,  
6 as a motion to withdraw and amend. (ECF No. 50 at 8 (stating that plaintiff “will NEVER agree”  
7 that the requests for admission are deemed admitted)). Review of the admissions and plaintiff’s  
8 untimely responses show that allowing amendment or withdrawal would “promote the  
9 presentation of the merits of the action.” (ECF No. 54-2 at 28-30.) However, prior to ruling on  
10 the motion, defendants will be given an opportunity to show that they would be prejudiced if  
11 plaintiff were permitted to withdraw his admissions and replace them with his untimely  
12 responses.

13 ii. Interrogatories and Requests for Production

14 Defendants also seek to compel further responses to interrogatories and requests for  
15 production. (ECF No. 54-2 at 7-8.) They argue that the untimely responses are deficient and that  
16 sanctions are warranted since plaintiff did not submit his responses until after they filed their  
17 original motion to compel. (ECF No. 54-1 at 7-10.) They further assert that plaintiff’s  
18 supplemental responses should be made without objection because he failed to timely respond  
19 and thereby waived any objections. (Id. at 9.) Plaintiff’s opposition to the motion does not  
20 specifically mention the interrogatories or requests for production, but instead addresses the  
21 attempt to take his deposition. (ECF No. 62 at 1-3.) He does appear to make a general assertion  
22 that he was justified in withholding discovery because he had a pending motion for protective  
23 order. (Id. at 2.)

24 As with the request for admissions, the interrogatories and requests for production were  
25 served on December 22, 2016 (ECF No. 54-2 at 7-8), and responses were due by February 8,  
26 2017 (ECF No. 46 at 4 (extending time for responses to forty-five days from service)). Plaintiff’s  
27 responses were received by defendants on February 28, 2017. (ECF No. 54-2 at 3, ¶ 12.) It is  
28 similarly not clear when plaintiff submitted the responses, since they are not dated and it does not

1 appear that they were accompanied by a certificate of service. (Id. at 20-27.) However,  
2 plaintiff's letter to defendants' counsel indicates he submitted the responses on February 23,  
3 2017. (ECF No. 50 at 8.)

4 Any claim that the motion for protective order stayed plaintiff's obligation to provide  
5 responses fails, particularly because the motion made no reference to the December 22, 2016  
6 interrogatories and production requests. (ECF No. 47.) Although the motion for protective order  
7 did reference a request for production, based on plaintiff's statement that it would take him more  
8 than fourteen days to obtain the requested documents (id. at 1), it appears that the request at issue  
9 was not the one served on December 22, 2016, but was instead a request that accompanied the  
10 deposition notice.<sup>10</sup> However, since neither party has provided a copy of the deposition notice  
11 and accompanying requests for production, it is impossible to tell whether those requests  
12 overlapped with the requests served on December 22, 2016. Regardless, even if the requests for  
13 production were the same and a pending motion for protective order justified plaintiff not  
14 bringing the requested documents to his deposition, the motion would not justify failing to  
15 respond to the December 22, 2016 requests within the forty-five days provided. Accordingly,  
16 plaintiff's responses, if they were served on February 23, 2017, as his letter indicates, were late  
17 and as a general matter plaintiff has waived any objections. Richmark Corp. v. Timber Falling  
18 Consultants, 959 F.2d 1468, 1473 (9th Cir. 1992) ("It is well established that a failure to object to  
19 discovery requests within the time required constitutes a waiver of any objection." (citing Davis  
20 v. Fendler, 650 F.2d 1154, 1160 (9th Cir. 1981))). However, privilege is not necessarily waived  
21 simply because it was untimely asserted. See Burlington N. & Santa Fe Ry. Co. v. United States  
22 Dist. Court, 408 F.3d 1142, 1149 (9th Cir. 2005) ("We hold that boilerplate objections or blanket  
23 refusals inserted into a response to a Rule 34 request for production of documents are insufficient  
24 to assert a privilege. However, we also reject a per se waiver rule that deems a privilege waived  
25 if a privilege log is not produced within Rule 34's 30-day time limit.").

26  
27 <sup>10</sup> Defendants' certificate of service indicates that a request for production accompanied the  
28 deposition notice. (ECF No. 54-2 at 14.)

1 In response to all seven requests for production, plaintiff objected as follows: “work  
2 product and attorney/client privilege’, herein but not limited thereto” (ECF No. 54-2 at 21-23)  
3 and provided no documents (id. at 3, ¶ 12). He made similar objections to the interrogatories and  
4 in some instances also provided responses. (Id. at 25-27.)

5 “The attorney-client privilege protects confidential communications between attorneys  
6 and clients, which are made for the purpose of giving legal advice.” United States v. Richey, 632  
7 F.3d 559, 566 (9th Cir. 2011) (citing Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)).

8 “The fact that a person is a lawyer does not make all communications with that person  
9 privileged.” United States v. Ruehle, 583 F.3d 600, 607 (9th Cir. 2009) (quoting United States  
10 v. Martin, 278 F.3d 988, 999 (9th Cir. 2002)). Attorney-client privilege exists when the following  
11 elements are found:

12 (1) Where legal advice of any kind is sought (2) from a professional  
13 legal adviser in his capacity as such, (3) the communications  
14 relating to that purpose, (4) made in confidence (5) by the client, (6)  
are at his instance permanently protected (7) from disclosure by  
himself or by the legal adviser, (8) unless the protection be waived.

15 In re Grand Jury Investigation, 974 F.2d 1068, 1071 n.2 (9th Cir. 1992); Ruehle, 583 F.3d at 607.

16 “The party asserting the privilege bears the burden of proving each essential element.” Ruehle,  
17 583 F.3d at 608 (citing United States v. Munoz, 233 F.3d 1117, 1128 (9th Cir. 2000)). “To  
18 qualify for work-product protection, documents must: (1) be ‘prepared in anticipation of litigation  
19 or for trial’ and (2) be prepared ‘by or for another party or by or for that other party’s  
20 representative.’” Richey, 632 F.3d at 567 (quoting In re Grand Jury Subpoena (Mark Torf/Torf  
21 Envtl. Mgmt.), 357 F.3d 900, 907 (2004)). When asserting privilege or protection of trial-  
22 preparation materials, the asserting party must “(i) expressly make the claim; and (ii) describe the  
23 nature of the documents, communications, or tangible things not produced or disclosed—and do  
24 so in a manner that, without revealing information itself privileged or protected, will enable other  
25 parties to assess the claim.” Fed. R. Civ. P. 26(b)(5)(A).

26 Neither the responses to the discovery requests nor the opposition to the motion to compel  
27 offers further explanation as to the nature of the documents or information withheld, and plaintiff  
28 did not provide defendants or the court with a privilege log (ECF No. 54-2 at 3, ¶ 12).

1 Accordingly, even if plaintiff's untimeliness is not a bar to his assertion of privilege and work-  
2 product, his blanket objections and failure to provide a privilege log are insufficient to properly  
3 raise the objections and support his failure to produce documents or respond to interrogatories.

4 The court notes that it is questionable whether attorney-client privilege applies to any of  
5 the requested information, since plaintiff is proceeding pro se. This is particularly true for the  
6 interrogatories, which seek factual information. The court notes that plaintiff's previous motion  
7 for protective order stated that he sent documents to several attorneys when seeking  
8 representation and "to the class action attorneys of the Prison Law Office and Rosen, Bien,  
9 Galvan" and that those documents are therefore privileged. (ECF No. 47 at 1.) He further stated  
10 that he received advice from the class action attorneys. (Id.) Advice plaintiff received from the  
11 attorneys he contacted is likely privileged. Moreover, privilege would also likely extend to  
12 identification of the specific documents he sent to the attorneys. In other words, he would not  
13 have to tell defendants which documents he sent to attorneys. However, the documents  
14 themselves are not privileged or work-product just because plaintiff sent them to an attorney. Nor  
15 are facts supporting plaintiff's claims entitled to privileged just because plaintiff relayed them to  
16 an attorney. See Hurst v. City of Rehoboth Beach, No. CIV A 03-362 KAJ, 2006 WL 3366389,  
17 at \*3, 2006 U.S. Dist. LEXIS 84901 at \*10 (D. Del. Nov. 21, 2006) ("work product doctrine and  
18 the attorney-client privilege do not permit someone to shield factual information"); Vinton v.  
19 Adam Aircraft Indus., Inc., 232 F.R.D. 650, 663 (D. Colo. 2005) (documents were not covered by  
20 the work product doctrine simply because they were "based on [plaintiff's] investigations of the  
21 facts of the case before bringing it *pro se*").

22 As an example, defendants' third request for production seeks the production of 602  
23 appeals that plaintiff submitted related to the claims in this case. (ECF No. 54-2 at 21.) These  
24 documents are not attorney-client privileged or entitled to work product protections, even if  
25 plaintiff sent copies of the appeals to attorneys or submitted the appeals to exhaust administrative  
26 remedies in preparation for litigation. One reason for this is because they have been voluntarily  
27 submitted to third-parties who are not bound by the privilege and there is a reasonable probability  
28 that the opposing party may see them. Bittaker v. Woodford, 331 F.3d 715, 719 (9th Cir. 2003)

1 (“An express waiver [of attorney-client privilege] occurs when a party discloses privileged  
2 information to a third party who is not bound by the privilege, or otherwise shows disregard for  
3 the privilege by making the information public.”); Cal. Sportfishing Prot. Alliance v. Chico Scrap  
4 Metal, Inc., 299 F.R.D. 638, 645 (E.D. Cal. 2014) (disclosure to a third-party ““does not waive  
5 the work product immunity unless it has substantially increased the opportunities for potential  
6 adversaries to obtain the information.”” (quoting Charles Alan Wright & Arthur R. Miller, 8  
7 Federal Practice and Procedure § 2024 (3d ed.))).

8           Because his assertions of privilege and work-product are insufficient and he has waived  
9 any other objections, plaintiff will be required to respond to all seven of defendants’ requests for  
10 production and to produce all responsive documents without objection. If no responsive  
11 documents exist, plaintiff must specifically state that no such documents exist. The only  
12 exception that will be permitted is that if plaintiff wants to assert that a document is protected  
13 from disclosure because it is privileged or work-product, he must provide a privilege log that  
14 identifies each document individually and “describes the nature of the documents,  
15 communications, or tangible things not produced or disclosed—and do so in a manner that,  
16 without revealing information itself privileged or protected, will enable other parties to assess the  
17 claim.” Fed. R. Civ. P. 26(b)(5)(A). Continued blanket assertions of privilege and work product,  
18 or failure to provide an adequate privilege log, will likely result in an order requiring plaintiff to  
19 produce the documents or face exclusionary or terminating sanctions.

20           Defendants also seek to compel plaintiff to provide responses, or clarification to existing  
21 responses, to Interrogatories 1, 2, 4, and 6 through 9. (ECF No. 54-1 at 9-10.) The  
22 interrogatories and responses in dispute are as follows:

23           **Interrogatory No. 1:** Please state all facts that support your  
24 contention you had the right to be provided with diabetic snacks in  
25 July of 2014.

26           **Response to Interrogatory No. 1:** I tried to procure my doctor  
27 prescribed medical txmnt w/aa valid chrono and was denied on  
28 different days by both of these defendants. I do not waive “work  
product or attorney-client privilege or any other privilege. This is  
my good faith effort at discovery compliance. Herein but not  
limited thereto.

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**Interrogatory No. 2:** Please state all facts that support your contention that Defendants Stankewitz and Ferreira wrongfully deprived you of diabetic snacks in July of 2014.

**Response to Interrogatory No. 2:** Same as above, w/o waiving any privilege(s) asserted above herein but not limited thereto.

**Interrogatory No. 4:** Please identify all facts supporting your contention that your medical condition required that you be provided with diabetic snacks in July of 2014.

**Response to Interrogatory No. 4:** Valid medical chrono, w/o waiving any asserted privileges in Response #1, herein but not limited thereto.

**Interrogatory No. 6:** Please identify the date that the chrono, allegedly authorizing that you be provided with diabetic snacks, expired in 2014.

**Response to Interrogatory No. 6:** Work product and attorney/client privilege, herein but not limited thereto.

**Interrogatory No. 7:** Please describe your understanding of the policy that was in effect in July of 2014 regarding which inmates would receive diabetic snacks.

**Response to Interrogatory No. 7:** I never received any policy statement in writing. "Work product and attorney/client privilege" herein but not limited thereto.

**Interrogatory No. 8:** Please identify any physical, mental, and emotional injuries or harm you sustained as a result of not receiving diabetic snacks in July of 2014.

**Response to Interrogatory No. 8:** "Work product and attorney/client privilege", herein but not limited thereto.

**Interrogatory No. 9:** Please identify all individuals with knowledge of facts that support your contention that you suffered physical, mental, and emotional injuries or harm as a result of not receiving diabetic snacks in July of 2014.

**Response to Interrogatory No. 9:** "Work product and attorney/client privilege", herein but not limited thereto.

(ECF No. 54-2 at 25-27.)

These requests seek information relating to the factual basis for plaintiff's claims and alleged injuries as well as the identification of witnesses. As explained above, this is not the kind of information that would be protected by either attorney-client privilege or the work-product doctrine and plaintiff will be required to provide a response to each disputed interrogatory

1 without objection. Accordingly, plaintiff must provide complete responses to Interrogatories 6, 8,  
2 and 9 without any objections. For Interrogatories 1 and 2, plaintiff must clarify whether the facts  
3 he has provided are all the facts that support his contentions. If there are no additional facts, he  
4 must state that there are no additional facts. If he withheld facts on the basis of his objections, he  
5 must provide those facts. Plaintiff must answer Interrogatory 4 without objection and using  
6 complete sentences. He must clarify whether a valid medical chrono is his only supporting fact  
7 and if there are other facts he must provide them. Finally, with respect to Interrogatory 7,  
8 whether or not he received a copy of a written policy is not responsive to the question and  
9 plaintiff must answer the question asked and explain what he believed the policy was.

10 iii. Deposition

11 Defendants also move to compel plaintiff to submit to a deposition because he refused to  
12 participate in his originally scheduled deposition. (ECF No. 54-1 at 10-12.) Plaintiff argues that  
13 he was substantially justified in refusing to be deposed because he had a pending motion for  
14 protective order. (ECF No. 62 at 1-2.)

15 Although the parties disagree as to the specifics of what occurred on February 7, 2017,  
16 when plaintiff was scheduled to be deposed, they agree that plaintiff ultimately refused to be  
17 deposed until there was a ruling on his motion for protective order. (ECF No. 54-2 at 2, ¶ 7; ECF  
18 No. 62 at 1.) The motion for a protective order was denied (ECF No. 49) and plaintiff's  
19 opposition to the motion to compel does not offer any reason why he should not be required to  
20 submit to a deposition. Accordingly, defendants' motion to compel will be granted. Defendants  
21 will be given another opportunity to depose plaintiff and plaintiff must participate fully in the  
22 deposition. Plaintiff is warned that if he fails to participate in the deposition, it will result in  
23 sanctions that may range from exclusion of evidence all the way up to dismissal of the case,  
24 depending upon the degree of non-compliance. He is further advised that a pending motion for  
25 protective order will not be grounds for refusing to participate in the deposition.

26 iv. Sanctions

27 Defendants' request that plaintiff be sanctioned in the form of their expenses in bringing  
28 the instant motion and for the costs and fees associated with the failed attempt to take plaintiff's

1 deposition. (ECF No. 54-1 at 7-8, 10-12.) Plaintiff argues that he cannot be sanctioned for  
2 failing to respond to discovery requests because he was not in violation of a discovery order and  
3 that his failure to participate in his deposition was substantially justified. (ECF No. 62 at 1-2.)

4 Plaintiff is incorrect that defendants cannot be awarded their costs because there was not  
5 an order requiring him to respond to their discovery requests. Federal Rule of Civil Procedure  
6 37(a)(5)(A) provides that when the court grants a motion to compel, or responses to discovery  
7 requests are submitted after a motion to compel is filed,

8 the court must, after giving an opportunity to be heard, require the  
9 party or deponent whose conduct necessitated the motion . . . to pay  
10 the movant's reasonable expenses incurred in making the motion,  
including attorney's fees. But the court must not order this  
payment if:

11 (i) the movant filed the motion before attempting in good faith to  
12 obtain the disclosure or discovery without court action;

13 (ii) the opposing party's nondisclosure, response, or objection was  
substantially justified; or

14 (iii) other circumstances make an award of expenses unjust.

15 The rule does not require a party to be in violation of a court order, only that the party's conduct  
16 necessitated a meritorious motion to compel.

17 Although the court finds that plaintiff's failure to respond to discovery requests in a timely  
18 manner was not substantially justified, in light of his status as an incarcerated plaintiff proceeding  
19 pro se and in forma pauperis, the court declines to award sanctions at this time. Moreover,  
20 defendants have failed to identify their expenses related to bringing the motion to compel  
21 plaintiff's responses to their discovery requests and the court is therefore unable to grant the  
22 motion even if it were so inclined.

23 The court also declines to assess costs and fees for plaintiff's refusal to participate in his  
24 deposition. Plaintiff, presumably relying upon Federal Rule of Civil Procedure 37(d)(2), argues  
25 that his failure to participate in his deposition is excused because he had a pending motion for  
26 protective order. (ECF No. 62 at 1.) Rule 37(d)(2) provides that a party's failure to appear at his  
27 properly noticed deposition "is not excused on the ground that the discovery sought was  
28 objectionable, unless the party failing to act has a pending motion for protective order under Rule

1 26(c).” However, “[t]he court may punish a party for failing to appear for deposition even if the  
2 party has a motion for a protective order pending at the appointed time,” though it is not required  
3 to do so. Hiramanek v. Clark, No. 13-cv-00228-RMW, 2016 WL 217255, at \*4 n. 34, 2016 U.S.  
4 Dist. LEXIS 6176, at \*12 (N.D. Cal. Jan. 19, 2016) (citing Pioche Mines Consol., Inc. v. Dolman,  
5 333 F.2d 257, 269 (9th Cir. 1964); Fed. R. Civ. P. 37(d)(2)-(3)). The court finds that plaintiff’s  
6 interpretation of the rule, though incorrect, is not unreasonable given his pro se status and will  
7 therefore not sanction him for his refusal to participate in his deposition.

8 Defendants argue that plaintiff’s then pending motion should not bar sanctions because he  
9 failed to attempt to confer in good faith prior to filing his motion and waited until the last minute  
10 to file his motion. (ECF No. 54-1 at 10-12.) The court finds this argument to be unpersuasive.  
11 Plaintiff declared under penalty of perjury that he did not receive the notice until January 24,  
12 2017. (ECF No. 47 at 1-2.) Assuming he then mailed his motion for protective order on January  
13 30, 2017,<sup>11</sup> he acted within six days of receiving the notice of deposition. The motion was  
14 received by the Clerk’s Office on February 2, 2017, and entered onto the docket on February 3,  
15 2017. (See Docket Entry for ECF No. 47.) The deposition was scheduled for February 7, 2017.  
16 (ECF No. 54-2 at 2, ¶ 4; ECF No. 62 at 1.) Given his incarcerated status and its inherent  
17 limitations, it is unclear how much more quickly plaintiff could have acted or how he was to be  
18 expected to confer with defendants’ counsel prior to bringing the motion. The court is  
19 particularly skeptical of defendants’ argument that plaintiff should have been able to accomplish  
20 these things in the time he had in light of previous counsel’s representation that obtaining a  
21 stipulation for an extension of time was not reasonably possible given plaintiff’s incarcerated  
22 status. (ECF No. 42 at 2, ¶ 5.) In the court’s experience, this is a common reason given by  
23 attorneys in the Attorney General’s Office for not discussing matters with a prisoner-plaintiff that  
24 must be completed within a limited timeframe. If counsel, who is undoubtedly more able to  
25 contact plaintiff on short notice, is unable to even attempt to secure a stipulation on what is

26 \_\_\_\_\_  
27 <sup>11</sup> Plaintiff’s motion for protective order was not accompanied by a certificate of service, but  
28 since the motion was received by the Clerk’s Office on February 2, 2017, it is reasonable to  
assume that the date signed the motion was the same date it was mailed.

1 generally a routine matter, then plaintiff cannot reasonably be expected to contact counsel prior to  
2 bringing a motion on a more complex matter in such a short period of time. Counsel cannot cite  
3 plaintiff's incarceration as an excuse for not conferring with plaintiff on matters that would  
4 normally require communication between the parties and then conveniently ignore his  
5 incarcerated status when plaintiff, who is generally limited to initiating and carrying out  
6 communication by mail, does the same.

7 Although the court declines to grant defendants their costs and fees associated with  
8 bringing the instant motion to compel and plaintiff's failure to participate in his deposition,  
9 plaintiff is cautioned that if he continues to refuse to participate in discovery, future requests for  
10 fees and costs may be granted regardless of plaintiff's status as an incarcerated plaintiff  
11 proceeding pro se and in forma pauperis.

12 V. Plain Language Summary of this Order for a Pro Se Litigant

13 Your motion for recusal is denied because the facts you have alleged do not show that the  
14 undersigned is biased against you. Your motion for an extension of time is denied because the  
15 court cannot tell what deadline you are trying to extend. If you are trying to extend your time to  
16 reply in support of your motion to compel, the motion for extension is late and does not explain  
17 why it is late. Your motions for contempt of court and monetary sanctions are denied because the  
18 individuals you identify are not in violation of a court order, most of them are not defendants, and  
19 the issues you raise are unrelated to this case. Your motion to compel is denied because  
20 defendants' responses were submitted on time and you did not give the court enough information  
21 about the requests and responses. However, defendants will be required to send you another copy  
22 of their privilege log.

23 Defendants' requests for admissions are deemed admitted because your response was late.  
24 However, the court is considering allowing you to withdraw the admissions and substitute the  
25 untimely responses. Defendants are being given an opportunity to show the court that allowing  
26 you to substitute your late responses would prejudice them. If they file a response, you will have  
27 fourteen days to reply.

28 Defendants' motion to compel further discovery responses is granted. Your responses to

1 the interrogatories and requests for production were late and you have waived your objections.  
2 You must fully respond to all seven requests for production. Because privilege and work-product  
3 protections are not automatically waived when late, if you believe that a document is protected as  
4 either privileged or work-product, you must provide a privilege log that (1) describes what kind  
5 of document it is (i.e. appeal, letter, etc.); (2) generally identifies the contents and/or purpose of  
6 the document (i.e. legal advice, facts related to case, etc.); (3) identifies the individuals who sent,  
7 received, and created the document; and (4) states whether you are claiming the document is  
8 attorney-client privileged, work-product, or both. If you do not provide the information necessary  
9 to support your claim of privilege or work-product, the protection will be waived and you will be  
10 required to produce the documents. Factual information about your claims is not attorney-client  
11 privileged or work-product.

12 You must provide complete responses to Interrogatories 6, 8, and 9 without objections.  
13 For Interrogatories 1, 2, and 4 you must provide supplemental responses that clarify whether there  
14 are other facts that support your claims and provide any additional facts that may exist. For  
15 Interrogatory 7, you must answer the question asked and explain your understanding of the policy  
16 at issue.

17 Defendants will be given another opportunity to depose you. You must participate fully in  
18 the deposition or you will be subject to sanctions. Filing a motion for protective order will not  
19 excuse you from participating in your deposition.

20 If you do not provide responses to defendants' discovery requests or participate in your  
21 deposition, you will be subject to sanctions. Defendants' request that you be required to  
22 reimburse them for some of their expenses for the current motion to compel and failing to  
23 participate in your original deposition will be denied.

24 Accordingly, IT IS HEREBY ORDERED that:

- 25 1. Plaintiff's motion for recusal (ECF No. 70) is denied.
- 26 2. Plaintiff's motion for an extension of time (ECF No. 72) is denied.
- 27 3. Plaintiff's motions for contempt of court and monetary sanctions (ECF Nos. 66, 71)
- 28 are denied.

1           4. Plaintiff's motion to compel (ECF No. 50) is granted in part and denied in part. The  
2 motion is granted to the extent that defendants shall re-serve plaintiff with their privilege log  
3 within seven days of the filing of this order. The motion is otherwise denied.

4           5. Defendants shall have fourteen days from the filing of this order to file a response  
5 showing that they would be prejudiced by permitting plaintiff to withdraw his admissions and  
6 amend them with his untimely responses. Plaintiff may file a reply within fourteen days of  
7 service of the response.

8           6. Defendants' motion to compel further discovery responses (ECF No. 54-1) is granted.  
9 Within twenty-one days of service of this order, plaintiff must provide further responses to  
10 defendants' requests for production and interrogatories, as set forth in this order. Defendants  
11 shall have forty-five days from service of this order to bring any motion for sanctions based upon  
12 plaintiff's failure to comply with this order.

13           7. Defendants' motion to compel plaintiff to submit to a deposition (ECF No. 54-1) is  
14 granted and they shall have sixty days from the filing of this order to take plaintiff's deposition.  
15 If plaintiff refuses to participate in his deposition, defendants may bring a motion for sanctions  
16 within fourteen days of being advised of plaintiff's refusal.

17           8. Defendants' request for their costs and fees associated with bringing this motion and  
18 plaintiff's failed deposition is denied.

19           9. Plaintiff's failure to comply with this order and provide complete responses to  
20 defendants' discovery requests and participate in his deposition will result in sanctions that may  
21 range from exclusion of evidence all the way up to dismissal of the case, depending upon the  
22 degree of non-compliance. Failure to comply may also result in monetary sanctions.

23 Dated: November 9, 2017

24   
25 \_\_\_\_\_  
26 CAROLYN K. DELANEY  
27 UNITED STATES MAGISTRATE JUDGE

28 13:diaz2705.mtc.recuse