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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

DANIEL LEE THORNBERRY, Plaintiff, v. J. BAL, et al., Defendants.	No. 2:17-CV-0953-TLN-DMC-P  <u>ORDER</u>
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Plaintiff, a prisoner proceeding pro se, brings this civil rights action pursuant to 42 U.S.C. § 1983. Pending before the court are two motions to compel, both initiated by plaintiff. See ECF Nos. 78 and 84. Defendants have filed responses to both motions. See ECF Nos. 85 and 90.

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**I. SUMMARY OF DISCOVERY IN DISPUTE**

In his motions, plaintiff challenges defendants’ responses to certain requests for production, sets one and two. Plaintiff also references defendants’ failure to respond to interrogatories and requests for admissions.

**A. Requests for Production of Documents**

Plaintiff states that he served his “first request for production of documents to counsel for the defendants” on July 19, 2018. See ECF No. 78, pg. 2. Plaintiff states that he received defendants’ responses to his requests for production, set one, on September 5, 2018. See id. According to plaintiff, the “documents in dispute” concern his request for production, set one, request no. 3. See id. As to his second set of requests for production, plaintiff states that the dispute concerns request nos. 1 and 3. See id. at 3.

**B. Interrogatories and Requests for Admissions**

Regarding interrogatories, plaintiff states:

Returning again to this issue of the failure of defendant’s [sic] to provide responses or answers to plaintiff’s first set of interrogatories, on July 24, 2018, plaintiff submitted his first set of interrogatories to defendants James Chau and Christopher Smith. . . .

On October 1, 2018, plaintiff submitted his first set of Interrogatories to defendant Bal along with a request for admissions to defendant Chau. Both requests went and remain unanswered as well. . . .

Id. at 5.

It should be noted that the above statement is plaintiff’s first and only reference to unanswered requests for admissions.

As to interrogatories and requests for admissions referenced in plaintiff’s motions, defendants acknowledge those outstanding discovery requests, admit that they failed to respond, and seek leave to serve late responses due to excusable neglect and lack of prejudice to plaintiff.

See ECF No. 85, pgs.6-7.

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1 **II. DISCUSSION**

2 The Court here separately addresses (1) plaintiff’s motions to compel concern  
3 disputes regarding defendants’ responses to requests for production, set one, request no. 3, and  
4 requests for production, set two, request nos. 1 and 3 and (2) defendants’ failure to respond to  
5 interrogatories and requests for admissions.

6 **A. Requests for Production of Documents**

7 The disputed requests for production and responses thereto are as follows:

8 Request for Production, Set One

9 REQUEST NO. 3: A statistical summary of all non-formulary  
10 medication request made by all primary care providers subordinate to  
11 Defendant Bobbala while the defendant acted in his capacity of Chief  
12 Medical Executive in any correctional facility subordinate to the secretary  
13 of the California Department of Corrections and Rehabilitation and/or the  
14 Director of the California Correctional Health Care Services for the five  
15 years preceding the filing of the instant complaint.

16 RESPONSE: Defendants object to this request on the grounds that  
17 it is overly broad as to time and specific medication, overly burdensome as  
18 Defendant Bobbala has worked at several institutions and with multiple  
19 physicians at each institution and the records for each would have to be  
20 searched for the time frame Dr. Bobbala was there, and the request seeks  
21 information that is not relevant to the claims or defenses of this matter.  
22 Without waiving said objections, there are no documents responsive to this  
23 request, and gathering the compiled raw data with the number of non-  
24 formulary prescriptions during the requested time period would be overly  
25 burdensome and contain privileged healthcare information concerning  
26 other inmates.

27 ECF No. 78, pgs. 12-13 (Exhibit A to plaintiff’s motion).

28 Request for Production, Set Two

REQUEST NO. 1: The names of all voting members of the  
systemwide pharmacy and therapeutics [sic] committee. These names go  
to discovery and proof if the existence of unwritten rules, mandates, and  
directives with respect for the medication formulary and the nonformulary  
approved process. This also stands to establish the relative culpability of  
each defendant and the degree of involvement in the actions giving rise to  
the complaint.

RESPONSE: Defendants object to this request on the ground that it  
does not seek an identifiable document, but rather, seeks the names of  
persons who serve on a committee, is vague as to time, and overly broad as  
the members of the committee can change. Without waiving said  
objections, there are no documents responsive to this request, and  
Defendants are not required to create a document for Plaintiff in response  
to this request. However, Defendants are providing the CCHCS

1 Systemwide Pharmacy and Therapeutics Committee Procedures as  
2 Attachment 1.

3 REQUEST NO. 3: A statistical summary of all nonformulary  
4 medication requests denied by defendant Bobbala for the 3 years previous  
5 to the filing of the complaint. [¶] This request is not overly broad in that it  
6 requests only denials of nonformulary requests and it concerns only actions  
7 taken by defendant Bobbala. This supplemental request is amended to  
8 shorten the time covered in the requested statistical summary for the  
9 convenience of counsel for Defendants.

10 RESPONSE: Defendants object to this request on the grounds that  
11 it is overly broad as to time and specific medication, overly burdensome as  
12 Defendant Bobbala has worked at several institutions and with multiple  
13 physicians at each institution and the records for each would have to be  
14 searched for the time frame Dr. Bobbala was there, and the request seeks  
15 information that is not relevant to the claims or defenses of this matter.  
16 Without waiving said objections, there are no documents responsive to this  
17 request, and gathering the compiled raw data with the number of non-  
18 formulary prescriptions during the requested time period would be overly  
19 burdensome and contain privileged healthcare information concerning  
20 other inmates.

21 ECF No. 78, pgs. 17-19 (Exhibit B to plaintiff's motion).

22 As to each of the disputed requests for production, the court finds defendants'  
23 objections are well-taken. In particular, each asks defendants to create a document that does not  
24 exist in the normal course of record-keeping, specifically a "statistical summary" and a list of  
25 names. Defendants are not required to do so. See Ahad v. Bd. of Trs. of S. Ill. Univ., 2018 U.S.  
26 Dist. LEXIS 11248 (S.D. Ill., Jan. 24, 2018). Moreover, as defendants note, plaintiff's request for  
27 a list of names is more appropriately made in the context of interrogatories.

28 **B. Interrogatories and Requests for Admissions**

Defendants admit failing to respond to plaintiff's interrogatories and requests for  
admissions. Defendants cite excusable neglect and seek leave to file late responses. According to  
defendants:

Plaintiff alleges that he propounded Requests for Interrogatories for  
Defendants, and provides proofs of service. Plaintiff also alleges that he  
propounded Requests for Admissions to each of the Defendants, but he  
does not provide proofs of service. After receiving this motion, as well as  
Plaintiff's other motions to compel discovery responses, counsel for  
Defendants searched the file and could not find the requests. (Defendants'  
Exhibit A, declaration of K. Hammond.) Apparently, they were mixed in  
with other documents. A second search by counsel's supervisor was  
conducted, and the requests were found, including Plaintiff's requests for

1 admissions.

2 The failure to respond to Plaintiff's requests for interrogatories and  
3 admissions was due to inadvertent error. The documents were mixed in  
4 with documents that would not be responded to, such as five copies of a  
5 subpoena for Debbie McKinney, deposition questions for Debbie  
6 McKinney, a motion for the U.S. Marshall to serve Debbie McKinney, and  
7 a motion for deposition of Dr. Segal with attached medical records. In  
8 going back to review the documents, there is no proof of service for the  
9 Request for Admissions.

10 It also appears that Plaintiff's Requests for Interrogatories were  
11 served concurrently with his motions for the appointment of counsel and a  
12 psychiatric expert. Although those requests have a proof of service  
13 attached, they were also overlooked by counsel.

14 All of the discovery requests were served within days of each other;  
15 however, the Request for Production of Documents was served separately  
16 from other documents that is why counsel worked to prepare responses and  
17 to provide the requested documents, where available.

18 The great majority of practitioners seem able to maintain their  
19 litigation calendars without missing important dates, but on occasion—for  
20 whatever reason—even the most conscientious attorney will, at some point,  
21 miss a date set by the court or by opposing counsel. Failures of this nature  
22 are never to be excused by a mere shrug of the shoulders. *FDIC v. Jackson-*  
23 *Shaw Partners, Ltd.*, 850 F.Supp. 839, 842 (N.D. Cal. 1994). However, in  
24 cases where a deadline is missed by simple inadvertence, or by a good faith  
25 misunderstanding, courts appear to be willing to grant counsel leave to  
26 complete the required duty in a timely manner---especially where there  
27 can be no real prejudice to the opposing party. *Id.*, see also, *Greenberg v.*  
28 *U.S. Treasury*, 10 F.Supp. 2nd, 3, 10 (D.D.C. 1998).

This should be one of those cases. Counsel's failure to file  
responses to Plaintiff's Requests for Admissions and Interrogatories was  
not attributable in any sense to negligence, bad faith, or a lack of due  
diligence. It was due to a failure to find the discovery requests because they  
were mixed in with other documents. If the court overlooks this error and  
grants Defendants leave to file a late responses, Plaintiff will not suffer any  
real prejudice because he will still have an opportunity to move for  
summary judgment. Accordingly, Defendants request leave to serve late  
responses to Plaintiff's outstanding discovery requests.

ECF No. 85, pgs. 6-7.

Plaintiff has not filed a reply.

Defendants' position regarding interrogatories and requests for admissions is  
supported by the declaration of defendants' counsel, Kelli M. Hamond, Esq. See ECF No. 85,  
pgs. 10-11 (Exhibit A to defendants' response). Ms. Hammond declares that plaintiff's  
interrogatories and requests for admissions were served with a packet of other discovery materials  
and she "inadvertently failed to find these discovery requests, and they went unanswered." *Id.* at  
11. According to Ms. Hammond, "a subsequent search was conducted by my supervisor, who  
found the discovery requests." *Id.* As of the date of her declaration – November 5, 2019 – Ms.

1 Hammond states that responses to plaintiff's interrogatories and requests for admissions would be  
2 served within the next two weeks. See id.

3 The court is satisfied that defendants' failure to respond to plaintiff's  
4 interrogatories and requests for admissions was due to excusable neglect. The court will direct  
5 defendants to serve responses within seven days of the date of this order if they have not already  
6 done so, such responses to be deemed timely if provided by this deadline.

7 On June 5, 2019, the court ordered discovery re-opened and extended for an  
8 additional 120 days from the date of the order. See ECF No. 69. Pursuant to that order,  
9 discovery has now closed. Given defendants' inadvertent failure to initially respond to plaintiff's  
10 interrogatories and requests for admissions, the court will sua sponte re-open and further extend  
11 the deadline for completion of discovery in this action set in the court's June 5, 2019, order.

### 12 13 **III. CONCLUSION**

14 Accordingly, IT IS HEREBY ORDERED that:

- 15 1. Plaintiff's motions to compel (ECF Nos. 78 and 84) are denied in part and  
16 granted in part;
- 17 2. Plaintiff's motions are denied as to defendants' responses to plaintiff's  
18 requests for production, set one, request no. 3, and requests for production, set two, request nos. 1  
19 and 3 as the requests at issue seek creation of new documents defendants are not obligated to  
20 create;
- 21 3. Plaintiff's motions are granted as to defendants' failure to respond to  
22 plaintiff's interrogatories and requests for admissions; to the extent defendants have served  
23 responses to plaintiff's interrogatories and requests for admissions, such responses are deemed  
24 timely; to the extent defendants have not served responses to plaintiff's interrogatories and  
25 requests for admissions, they shall do so within seven days of the date of this order, such  
26 responses to be deemed timely if served by this deadline;

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4. Discovery is re-opened for a period of 60 days commencing the date of this order;
5. All requests for discovery shall be served by this new cut-off date, and any motions necessary to compel further discovery responses shall be filed within 60 days of this new cut-off date; and
6. Dispositive motions shall be filed by July 27, 2020.

Dated: February 13, 2020



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DENNIS M. COTA  
UNITED STATES MAGISTRATE JUDGE