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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

WILLIE D. RANDLE,

 Plaintiff,

 v.

K. PORTER, et al.,

 Defendants.

No. 2:17-cv-01583 AC

ORDER

Plaintiff is a state prisoner proceeding pro se and in forma pauperis with this civil rights action seeking relief pursuant to 42 U.S.C. § 1983.

On April 18, 2018, plaintiff filed the following: (1) a motion to extend discovery (ECF No. 22); (2) a motion to compel discovery (ECF No. 23), and (3) a motion for sanctions (ECF No. 24). On May 7, 2018, defendants filed oppositions to plaintiff’s motion for sanctions and motion for extension of time. ECF Nos. 25, 26. An opposition to plaintiff’s motion to compel was filed on May 9, 2018. ECF No. 27. For the reasons stated below, the court will deny all three motions. The court will also order plaintiff to return or destroy any and all privileged documents received from defense counsel and order the privileged document filed by plaintiff stricken from the record.

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1 I. MOTION TO EXTEND DISCOVERY

2 A. Plaintiff's Motion to Extend Discovery Deadlines

3 Plaintiff moves to extend the discovery deadline date from May 4, 2018, to May 27, 2018.
4 ECF No. 22. He asserts that good cause to do so exists because on March 1, 2018, he was
5 transferred to another facility, and as a result, he did not have access to his personal and legal
6 property until several weeks later. See ECF No. 22 at 1. Plaintiff also requests the additional
7 time so that he may propound his requests for admission ("RFAs"). See id.

8 B. Defendants' Opposition

9 Defendants argue that in light of the fact that discovery began in January 2018, plaintiff
10 has had ample time to comply with the discovery and scheduling order; he simply failed to timely
11 propound his RFAs. See ECF No. 26 at 1. Furthermore, defendants assert, plaintiff has not
12 explained why he failed to propound the admission requests in the months preceding his transfer.
13 See id. In addition, when defendants objected on untimeliness grounds to the RFAs that plaintiff
14 did attempt to serve, plaintiff did not challenge defendants' objections, nor did he move to compel
15 further responses prior to the discovery deadline of May 4, 2018.¹ See id. at 2-3. Finally,
16 defendants point out, a further extension would affect the dispositive motion deadline, which
17 would unnecessarily delay these proceedings. See id. at 3. For these reasons, they argue, the
18 court should deny plaintiff's extension request.

19 C. Discussion

20 A pretrial scheduling order "may be modified only for good cause and with the judge's
21 consent." Fed. R. Civ. P. 16(b)(4). "Rule 16(b)'s 'good cause' standard primarily considers the
22 diligence of the party seeking the amendment. The district court may modify the pretrial
23 schedule 'if it cannot reasonably be met despite the diligence of the party seeking the extension.'" Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 609 (9th Cir. 1992) (quoting Fed. R. Civ.
24 P. 16 Advisory Committee's Notes (1983 Amendment)).
25

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27 ¹ The motion to compel addressed here, timely filed on April 18, 2018, requests that defendants
28 be compelled to produce responses to two interrogatory requests. See generally ECF No. 23. It
does not request that defendants be compelled to produce responses to plaintiff's RFAs.

1 The discovery and scheduling order, issued January 16, 2018, clearly stated that the
2 parties were permitted to conduct discovery until May 4, 2018 and that the service of discovery
3 requests was to occur no later than sixty days prior to this date. See ECF No. 19 at 5. Thus, the
4 RFAs plaintiff currently wishes to propound should have been served by March 5, 2018.

5 The March 1, 2018 transfer and the resultant lack of access to legal materials may have
6 been factors beyond plaintiff's control. While the court understands that a prisoner's transfer to a
7 different facility may create considerable uncertainty, and it acknowledges the fact that such a
8 change often separates the transferee from his belongings for a notable length of time, plaintiff's
9 transfer occurred four days before all written discovery was to have been served.

10 Plaintiff was given the opportunity to serve discovery as early as January 2018 – well in
11 advance of his transfer – and it appears that he did serve some. See generally ECF No. 23
12 (plaintiff's motion to compel); see also ECF No. 20 (court granting defendants two-week
13 extension of time to file responses to discovery requests plaintiff served). Plaintiff does not assert
14 that he made timely efforts to serve the RFAs prior to the March 5, 2018 deadline but was unable
15 to do so despite his efforts. See Zivkovic v. Southern California Edison Co., 302 F.3d 1080, 1087
16 (9th Cir. 2002) (stating scheduling order may be modified if it cannot be met despite diligence of
17 party seeking extension) (citing Johnson, 975 F.2d at 609). In sum, plaintiff has not demonstrated
18 he exercised diligence when attempting to serve his RFAs. Therefore, the inquiry stops here, and
19 the court need not consider whether a denial of plaintiff's motion would result in injustice to him.
20 See Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, (9th Cir. 1992) (stating party's lack of
21 diligence ends inquiry as to whether motion to modify should be denied); see, e.g., Coleman v.
22 Quaker Oats Co., 232 F.3d 1271, 1295 (9th Cir. 2000) (finding movants' failed to demonstrate
23 diligence and stopping further inquiry). Accordingly, the court will deny plaintiff's motion to
24 extend the discovery deadline date (ECF No. 22) due to failure to show diligence.

25 II. MOTION TO COMPEL DISCOVERY

26 A. Plaintiff's Motion to Compel

27 Pursuant to Federal Rules of Civil Procedure 34(b) and 37(a), plaintiff moves for an order
28 to compel defendants to produce the documents plaintiff requested in his first requests for

1 production of documents (“RFPs”). See ECF No. 23 at 1. Specifically, he asks that the court
2 require defendants to produce items asked for in RFP Nos. 3 and 11. These requests read as
3 follows:

4 Request for Production No. 3:

5 Produce any and all documents, e-mail [sic] concerning any defendants [sic]
6 related proceeding whether administrative, civil or criminal, in which any
7 defendants was [sic] formally counseled, disciplined, punish [sic] or criminal [sic]
8 prosecuted or other wise [sic] made the subject of remedial action in connection
9 with having failed to make report [sic] or having made false statement [sic] of any
10 kind.

11 Request for Production No. 11:

12 Produce any and all documents, e-mail [sic] concerning any defendants relating to
13 proceeding [sic] whether administrative, civil or criminal, in which any
14 defendants was [sic] formally counseled, disciplined, punish [sic] or criminally
15 prosecuted or other wise [sic] made the subject of remedial action while at CSP-
16 Sac as a correctional officer or employee, whether present or prior [sic].

17 ECF No. 23 at 1-2 (brackets added).

18 Plaintiff states that he is seeking damages and a declaratory judgment against defendants
19 due to their retaliation, harassment and violation of his First Amendment right to communicate
20 through the mail. ECF No. 23 at 2. He argues that the documents he seeks are relevant, and that
21 Federal Rule of Civil Procedure 26(b)(1) permits the discovery of “any non-privileged matter that
22 is relevant to any party’s claim or defense.” Id. at 2-3. Plaintiff contests defendants’ assertion
23 that their personnel records are not relevant to this action. See id. at 3. He insists that they are
24 relevant because in his complaint, he states that other inmates have complained about defendants’
25 mishandling of mail to no avail, and personnel records would show this. This would, in turn,
26 support his claims against all the defendants because such evidence is admissible to show proof of
27 motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or
28 accident. See generally id. at 3-4. For these reasons, plaintiff asserts, the court should grant his
motion to compel.

29 B. Defendants’ Opposition

30 Defendants contend that their objections to plaintiff’s RFPs are valid and that as a result,
31 the court should deny plaintiff’s motion to compel. See ECF No. 27 at 1-2. They also suggest

1 that plaintiff's motion to compel is flawed because it did not reproduce defendants' responses, nor
2 does it explain why their objections are not meritorious. See id. at 2; see generally ECF No. 23.

3 Defendants' responses to plaintiff's RFP Nos. 3 and 11 are as follows:

4 Response to Request for Production No. 3:

5 Responding party objects on the ground that the request is overly broad and seeks
6 documents that are not relevant to acclaim or defense in this lawsuit or reasonably
7 calculated to lead to the discovery of admissible evidence. Responding party
8 further objects that the request seeks information that is confidential and protected
9 by the individual Defendants' right to privacy and the official information
privilege. Without waiving these objections, following a diligent search,
responding party has no responsive documents within [his/her] possession,
custody or control.

10 Response to Request for Production No. 11:

11 Responding party objects on the ground that the request is overly broad and seeks
12 documents that are not relevant to a claim or defense in this lawsuit or reasonably
13 calculated to lead to the discovery of admissible evidence. Responding party
14 further objects that the request seeks information that is confidential and protected
15 by the individual Defendants' right to privacy and the official information
privilege.

16 ECF No. 27 at 2-3.

17 With respect to defendants' response to RFP No. 11, defendants further assert that
18 plaintiff seeks "documents that are confidential and protected by the official information
19 privilege," and "documents from administrative, civil or criminal proceedings, from an open-
20 ended timeframe where the Defendants were subject to 'remedial action'," and that as result, the
21 documents plaintiff seeks to obtain from the request are unclear. Consequently, it is "difficult
22 [for them] to imagine the relevance of those documents to a claim or defense in this lawsuit." See
23 ECF No. 27 at 3 (brackets added). Defendants further assert that in their responses to plaintiff's
24 interrogatories, they told plaintiff that they had not been subject to disciplinary action stemming
25 from staff complaints filed against them that are related to this incident. See id.; see also ECF
26 No. 23 at 10 (defendants' response to Plaintiff's Interrogatory No. 11).

27 Defendants also argue that to the extent that plaintiff is requesting third-party inmate
28 grievances that show mistreatment of inmates' mail, those grievances – if they exist – would not
be relevant to this action and would constitute inadmissible character evidence. See ECF No. 27

1 at 3-4. Finally, defendants contend that the production of such a request would be unduly
2 burdensome and would infringe on third-party inmates' rights to privacy. See id. at 4. For these
3 reasons, defendants argue, the court should deny plaintiff's motion to compel.

4 C. Discussion

5 Plaintiff's RFP No. 3 seeks any and all documents related to proceedings in which
6 defendants were counseled, disciplined, punished and the like in connection with having failed to
7 make a report of having made a false statement. See ECF No. 23 at 1. No other limiting
8 parameters are provided. See generally id. Given that defendants have stated that they do not
9 have such responsive documents (see ECF No. 27 at 2-3), the court need not address their
10 substantive arguments opposing the motion to compel. The motion to compel production of RFP
11 No. 3 documents can only be denied outright.

12 As for RFP No. 11, although the request as written is ambiguous, plaintiff clarifies in his
13 motion that he seeks only documents related to defendants' mishandling of inmates' mail and his
14 argument that these documents are relevant to his supervisory liability and other claims (see ECF
15 No. 23 at 3-4). Such documents, however, are not discoverable. Whether other inmates have
16 filed staff complaints against defendants alleging that they wrongfully mishandled their mail is
17 not relevant to plaintiff's mishandling and retaliatory claims against defendants. This is because
18 whether similar complaints have been lodged by third parties against defendants is a fact of no
19 consequence in the outcome of this action. See Federal Rule of Evidence 401 (defining relevant
20 evidence as that which has tendency to make fact more or less probable than without it and said
21 fact is consequence in determining action). In addition, the request is overly burdensome as it
22 would require defendants to search potentially hundreds of inmate files to determine if each of
23 them was named in a complaint. In light of these findings, the motion to compel production of
24 RFP No. 11 is also denied.

25 III. MOTION FOR SANCTIONS

26 A. Plaintiff's Motion for Sanctions

27 Plaintiff contends that defendants produced perjured interrogatory responses. The
28 accusation of perjury is based on an e-mail indicating that defense counsel made small edits to

1 defendants' interrogatory responses after they had been signature-verified. Plaintiff contends that
2 because defendants never examined the edits, they constitute perjury. See ECF No. 24 at 2. He
3 further contends that because the deadline for defense counsel to submit the unedited, original
4 interrogatories has passed, sanctions are appropriate.

5 B. Defendants' Opposition

6 Via sworn declaration, defense counsel contends that "any formatting or typographical
7 errors that were corrected prior to mailing did not alter the verification of those responses." ECF
8 No. 25-1 at 2. Defense counsel conveyed this fact to plaintiff via a meet and confer letter on
9 April 2, 2018. See id.

10 Defense counsel further asserts that the e-mail in question, along with other protected
11 attorney work-product, was inadvertently sent to plaintiff. See id. As a result, pursuant to
12 Federal Rule of Civil Procedure 26(b)(5)(B), plaintiff was obligated either to return it or destroy
13 all originals and copies. See id. Defense counsel states that plaintiff returned the e-mail and
14 other documents and that she received them on April 17, 2018. See id. However, prior to
15 returning the e-mail at issue, plaintiff made a copy of it and has filed it in open court to support
16 this motion for sanctions. See id.; see also ECF No. 24 at 4.

17 C. Discussion

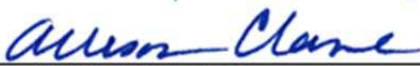
18 Plaintiff's motion for sanctions is denied. Although defense counsel's decision to correct
19 formatting or typographical errors of defendants' verified responses without subsequent
20 verification prior to mailing them to plaintiff (see generally ECF No. 25-1 at 2) is of concern,
21 defense counsel has stated under penalty of perjury that the corrections made "did not alter the
22 verification of those responses." See id. In light of this statement, it does not appear that plaintiff
23 has not been harmed by defense counsel's indiscretion. There is no reason to doubt the
24 substantive accuracy of the responses as defendants' answers. Moreover, the privileged
25 document in question was produced to plaintiff in error. See id. Given these facts, defense
26 counsel should not be sanctioned for the error, nor should plaintiff benefit from it when absent it,
27 he would not have had access to the privileged content the error produced. For these reasons, the
28 sanction of defense counsel is not appropriate.

1 Finally, plaintiff is reminded that despite his pro se status, he is obligated to follow the
2 rules and applicable law in this action like any other litigant. See E.D. Cal., L.R. 183(a) (2009).
3 By retaining the privileged e-mail in question and copying it, plaintiff violated federal rules. See
4 Federal Rule of Civil Procedure 26(b)(5)(B) (requiring recipient of privileged information to
5 promptly return, sequester or destroy privileged information and copies and forbidding its
6 disclosure prior to resolution of claim). Therefore, plaintiff will be ordered to either promptly
7 return or to promptly destroy any and all original e-mail and/or other privileged and/or protected
8 documents and any copies in his possession that he has received in this action. In addition, the
9 court will order the privileged materials filed by plaintiff (see ECF No. 24 at 4) to be stricken
10 from the record.

11 Accordingly, IT IS HEREBY ORDERED that:

- 12 1. Plaintiff's motion to extend discovery deadlines (ECF No. 22) is DENIED;
- 13 2. Plaintiff's motion to compel discovery (ECF No. 23) is DENIED;
- 14 3. Plaintiff's motion for sanctions (ECF No. 24) is DENIED;
- 15 4. Plaintiff is to either promptly return to defense counsel or to promptly destroy any and
16 all original e-mail and/or other privileged and/or protected documents and any copies
17 in his possession that he has received in this action. See Fed. R. Civ. Proc.
18 26(b)(5)(B), and
- 19 5. The privileged material filed by plaintiff on April 18, 2018 (ECF No. 24 at 4) is to be
20 STRICKEN from the record by the Clerk of Court.

21 DATED: May 21, 2018

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23 ALLISON CLAIRE
24 UNITED STATES MAGISTRATE JUDGE
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