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5 UNITED STATES DISTRICT COURT
6 NORTHERN DISTRICT OF CALIFORNIA
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8 MICHAEL J. HICKS,

No. C 12-2207 SI (pr)

9 Plaintiff,

**ORDER DENYING MOTIONS TO
QUASH SUBPOENAS, PERMITTING
AMENDED COMPLAINT, AND
SETTING SCHEDULE**

10 v.

11 LINDA NEAL; et al.,

12 Defendants.
13 _____/

14 This matter is now before the court for consideration of plaintiff's motions to quash or
15 modify subpoenas issued by defendants for plaintiff's prison medical records and his motion to
16 amend his complaint.
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18 A. The Subpoenas For Plaintiff's Medical Records.

19 A party may serve a subpoena commanding a nonparty "to produce documents,
20 electronically stored information, or tangible things...." Fed. R. Civ. P. 45(a)(1)(C). The
21 subpoena is subject to the relevance requirements set forth in Rule 26(b), i.e., the subpoena may
22 command the production of documents which are "nonprivileged" and are "relevant to any
23 party's claim or defense" or "reasonably calculated to lead to the discovery of admissible
24 evidence." Fed. R. Civ. P. 26(b)(1). The information sought need not be admissible at trial as
25 long as it appears reasonably calculated to lead to the discovery of admissible evidence. *Id.* A
26 "relevant matter" under Rule 26(b)(1) is any matter that "bears on, or that reasonably could lead
27 to other matter that could bear on, any issue that is or may be in the case." *Oppenheimer Fund,*
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1 *Inc. v. Sanders*, 437 U.S. 340, 351 (1978). Upon a timely motion, the court will quash a
2 subpoena that "requires disclosure of privileged or other protected matter, if no exception or
3 waiver applies." Fed. R. Civ. P. 45(c)(3)(A)(iii).

4 Plaintiff objects to the production of his medical records for several reasons. The only
5 portion of his motions that merits any discussion is his argument that the subpoenas should be
6 limited to the record defendants had when they admitted him into the mental health program in
7 2011.¹ Although he initially claimed the materials were privileged, he later dropped that
8 argument and now argues that allowing defendants to retrieve his allegedly voluminous medical
9 records from his 20 years of incarceration is improper. *See* Docket # 26, p. 2 ("Plaintiff has no
10 objection to the privileged information sought by the defendants. To subpoena plaintiff's DMH
11 medical records from admission to discharge is unnecessary"); Docket # 33, p. 3 ("plaintiff's
12 current state of mental health is not relevant"). He apparently wants the court to limit the
13 subpoena's reach to exclude records (1) generated after his discharge from the mental health
14 program in 2011, and (2) generated before his entry into the mental health program that
15 defendants did not consider. *See id.*; Docket # 33, p. 2; Docket # 34, p. 3.

16 Plaintiff has sued mental health practitioners for allegedly failing and refusing to
17 adequately treat his mental illness, and thus has put his mental health at issue in this action. In
18 so doing, he has waived any privilege and privacy rights for his medical records that contain
19 information about his mental health. *See Jaffee v. Redmond*, 518 U.S. 1, 15 (1996)
20 ("confidential communications between a licensed psychotherapist and her patients in the course
21 of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal
22 Rules of Evidence"); *id.* at 15 n.14 (privilege may be waived); *Sanchez v. U.S. Airways, Inc.*, 202

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24 ¹Some of plaintiff's arguments against the subpoenas are meritless. Plaintiff contends that
25 Salinas Valley is not a party and does not possess any of the records sought. Neither of those
26 objections is grounds for quashing a subpoena: a subpoena may be issued against a non-party
27 who will produce the records or state that it does not have them. Plaintiff also argues that the
28 records are voluminous, but that too is not a grounds for quashing a subpoena against a non-
party. Plaintiff also asks several questions about why defendants want the records. A party's
desire to learn more about the litigation process and his opponent's strategy are not grounds for
quashing a subpoena. Plaintiff's contention that the subpoenas violate federal regulations is
unpersuasive because 45 C.F.R. § 164.512(e) permits disclosure of medical records in response
to subpoena as long as (as here) the individual received notice of the disclosure.

1 F.R.D. 131, 134 (E. D. Penn. 2001) (like other testimonial privileges, the psychotherapist
2 privilege may be waived; privilege waived by bringing a claim that puts plaintiffs' emotional
3 state at issue); *Doe v. City of Chula Vista*, 196 F.R.D. 562, 568 (S. D. Cal. 1999); *cf. Seaton v.*
4 *Mayberg*, 610 F.3d 530, 534 (9th Cir. 2010) (prisoner has a diminished expectation of privacy
5 in his medical records). This case does not involve a routine claim of emotional distress where
6 there may be a question as to whether the privilege has been waived: defendants' response to
7 plaintiff's mental health needs is at the very core of this case.

8 From the limited record before the court, it appears that issues in this case include the
9 nature of plaintiff's mental illness(es), the appropriate treatment(s) for the mental illness(es), and
10 the connection between his suicidal thoughts and particular mental illness(es).² He appears to
11 disagree with defendants' diagnoses and course of treatment. Plaintiff's prison medical records
12 would include his mental health records, information about his suicidal activities, his requests
13 for care, and the treatment program he entered. These are documents that are relevant to the
14 claims and defenses in this action, and therefore are discoverable. *See* Fed. R. Civ. P. 26(b). In
15 light of the absence of a firm starting date for the mental illness that is critical to plaintiff's claim
16 and his claimed ongoing problems and need for treatment, defendants may have discovery of
17 plaintiff's medical records for his entire stay in the prison system.

18 Plaintiff's motions to quash or modify the subpoenas are DENIED. (Docket # 23, # 26,
19 # 27.)

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24 ²Plaintiff's own filings suggest he has a complicated mental health picture. In an
25 attachment to the complaint, Hicks wrote that he has "a mood disorder and [is] schizoaffective-
26 bipolar" as well as has a "sever[e] sexual sadism disorder. The combination of these factors
27 cause [him] to want to harm [him]self and others." Docket #1-2, p. 3. However, in his motion
28 for a preliminary injunction, he asked to be diagnosed with the disorder he alleged in his
complaint that he has, and asked for a professional to deem him in need of the particular kind
of treatment he alleged in his complaint that he needs. *See* Docket # 2, p. 7. His claimed sexual
sadism disorder may have existed throughout his imprisonment, as he is in prison serving a 35-
year sentence on his conviction of rape, oral copulation, kidnapping and false imprisonment in
1993. *See Hicks v. Palmer*, C 98-4574 CAL (Order Denying Habeas Petition).

1 B. Motion To Amend Complaint

2 Plaintiff filed a motion to file an amended complaint and submitted a proposed amended
3 complaint with the motion. (Docket # 12, # 13.) Federal Rule of Civil Procedure 15(a) provides
4 that leave to amend should be freely given when justice so requires. Plaintiff's amended
5 complaint adds a new defendant, M. Knapp, a social worker at the Salinas Valley psychiatric
6 program, who (with Dr. Kulka) failed to provide targeted sexual disorder treatment and caused
7 him to be discharged from the psychiatric program. *See* Amended Complaint, ¶¶ 9-10, 21-22.
8 Liberally construed, the amended complaint states a cognizable § 1983 claim against defendant
9 Knapp for deliberate indifference to plaintiff's serious mental illness. Plaintiff's motion to file
10 an amended complaint is GRANTED. (Docket # 12.) The amended complaint is now the
11 operative pleading.

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13 C. Scheduling

14 1. The clerk shall issue a summons and the United States Marshal shall serve, without
15 prepayment of fees, the summons, a copy of the complaint and a copy of all the documents in
16 the case file upon social worker M. Knapp, who apparently works in the Salinas Valley
17 Psychiatric Program at Salinas Valley State Prison.

18 2. The court earlier vacated the briefing schedule for dispositive motions so that it
19 could address plaintiff's motion to quash the subpoenas and motion to amend the complaint.
20 Now that those motions have been addressed and in order to expedite the resolution of this case,
21 the following new briefing schedule for dispositive motions is set:

22 a. No later than **May 24, 2013**, defendants must file and serve a motion for
23 summary judgment or other dispositive motion. If defendants are of the opinions that this case
24 cannot be resolved by summary judgment, defendants must so inform the court prior to the date
25 the motion is due. If defendants file a motion for summary judgment, defendants must provide
26 to plaintiff a new *Rand* notice regarding summary judgment procedures at the time they file such
27 a motion. *See Woods v. Carey*, 684 F.3d 934, 939 (9th Cir. 2012). If defendants file a motion to
28 dismiss for non-exhaustion of administrative remedies, defendants must provide to plaintiff a

1 notice regarding motions to dismiss for non-exhaustion procedures at the time he files such a
2 motion. *See Stratton v. Buck*, 697 F.3d 1004, 1008 (9th Cir. 2012).

3 b. Plaintiff's opposition to the summary judgment or other dispositive motion
4 must be filed with the court and served upon defendants no later than **June 21, 2013**. Plaintiff
5 must bear in mind the notice and warning regarding summary judgment provided later in this
6 order as he prepares his opposition to any motion for summary judgment. Plaintiff also must
7 bear in mind the notice and warning regarding motions to dismiss for non-exhaustion provided
8 later in this order as he prepares his opposition to any motion to dismiss.

9 c. If defendants wish to file a reply brief, the reply brief must be filed and
10 served no later than **July 12, 2013**.

11 3. Plaintiff is provided the following notices and warnings about the procedures for
12 motions for summary judgment and motions to dismiss for non-exhaustion of administrative
13 remedies:

14 The defendants may make a motion for summary judgment by which they seek to have
15 your case dismissed. A motion for summary judgment under Rule 56 of the Federal
16 Rules of Civil Procedure will, if granted, end your case. . . . Rule 56 tells you what you
17 must do in order to oppose a motion for summary judgment. Generally, summary
18 judgment must be granted when there is no genuine issue of material fact -- that is, if
19 there is no real dispute about any fact that would affect the result of your case, the party
20 who asked for summary judgment is entitled to judgment as a matter of law, which will
21 end your case. When a party you are suing makes a motion for summary judgment that
22 is properly supported by declarations (or other sworn testimony), you cannot simply rely
23 on what your complaint says. Instead, you must set out specific facts in declarations,
24 depositions, answers to interrogatories, or authenticated documents, as provided in Rule
25 56(e), that contradict the facts shown in the defendants' declarations and documents and
26 show that there is a genuine issue of material fact for trial. If you do not submit your own
27 evidence in opposition, summary judgment, if appropriate, may be entered against you.
28 If summary judgment is granted, your case will be dismissed and there will be no trial.
Rand v. Rowland, 154 F.3d 952, 962-63 (9th Cir. 1998).

 The defendants may file a motion to dismiss for failure to exhaust administrative
remedies instead of, or in addition to, a motion for summary judgment. A motion to
dismiss for failure to exhaust administrative remedies is similar to a motion for summary
judgment in that the court will consider materials beyond the pleadings. You have the
right to present any evidence you may have which tends to show that you did exhaust
your administrative remedies or were excused from doing so. The evidence may be in
the form of declarations (that is, statements of fact signed under penalty of perjury) or
authenticated documents (that is, documents accompanied by a declaration showing
where they came from and why they are authentic), or discovery documents such as
answers to interrogatories or depositions. In considering a motion to dismiss for failure
to exhaust, the court can decide disputed issues of fact with regard to this portion of the
case. If defendants file a motion to dismiss and it is granted, your case will be dismissed


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and there will be no trial. *See generally Stratton v. Buck*, 697 F.3d at 1008-09.

4. Defendants are represented by different attorneys in this action. Plaintiff is cautioned that he must send a copy of every document he files to each of those attorneys. Even if the document plaintiff files pertains to only one defendant, he must send a copy of it to each of the attorneys representing defendants in this action.

IT IS SO ORDERED.

Dated: February 20, 2013



SUSAN ILLSTON
United States District Judge