

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ANDY LI,

Plaintiff,

v.

CONTRA COSTA COUNTY, et al.,

Defendants.

Case No. [16-cv-02861-EMC](#)

**ORDER RE UNSERVED
DEFENDANTS, DISCOVERY, AND
SCHEDULING**

Docket No. 15

United States District Court
For the Northern District of California

Andy Li filed this *pro se* civil rights action under 42 U.S.C. § 1983, alleging claims about his medical care at the Martinez Detention Facility in Contra Costa County. This order addresses a service of process problem for three Defendants and Mr. Li’s motion to compel discovery responses.

A. The Claims In This Action

In his complaint, Mr. Li alleges the following about his eye care while he was incarcerated at the Martinez Detention Center (“MDF”) in Contra Costa County: In November 2015, Mr. Li requested an optometry examination and complained of pains to nurses Herjinder Dhanoa and Joy Kick. Docket No. 1 at 3. Mr. Dhanoa and Ms. Kick said they would consult Dr. Dennis McBride, but no pain medications were provided. On April 27, 2016, Mr. Li filed a grievance, and nurse Felisa told him to use “‘phone’ triage sick call,” which he did and asked for pain medications while he waited for his optometry appointment. *Id.* “No actions were taken by nurse Felisa.” *Id.* At the highest level of the grievance system, MDF medical health administrator Sam Rosales on May 3, 2016 informed Mr. Li that MDF medical staff would not give him any pain medications. “Contra Costa County condones an unofficial practice and policy of not providing pain medications when requested by [its] inmates.” *Id.* (Mr. Li had an optometry appointment on

1 February 17, 2017, several months after he filed this action. *See* Docket No. 20 at 5.)

2 The Court screened the complaint and found that, liberally construed, the complaint stated
3 cognizable Eighth Amendment claims for deliberate indifference to Mr. Li’s serious medical
4 needs. Docket No. 5 at 2. A claim was stated against “the three nurses, a doctor and a health
5 administrator” based on the allegations that they “have refused to provide medications to relieve
6 the eye pain of which Mr. Li has complained and have failed to schedule an eye exam to deal with
7 the alleged eye pain.” *Id.* A *Monell* claim was stated against Contra Costa County based on the
8 allegations that the County “has a practice and policy of allowing jail medical providers not to
9 provide pain medications for inmates, and that allegedly has led to Mr. Li’s suffering.” Docket
10 No. 5 at 2-3 (citing *Monell v. Dep’t of Social Servs.*, 436 U.S. 658 (1978)). The Court noted that
11 Mr. Li’s claims would arise under the Fourteenth Amendment’s Due Process Clause rather than
12 the Eighth Amendment’s Cruel and Unusual Punishment Clause if he was a pretrial detainee
13 rather than a convict at the relevant time. *Id.* at 2 n.1. The Court ordered service of process on six
14 defendants. *Id.* at 3.

15 B. The Unserved-Defendants Problem

16 Three of the six Defendants have not been served with process or appeared in this action.
17 Defendants Contra Costa County, Mr. Dhanoa, and Mr. Rosales were served and have appeared in
18 this action. Defendants nurse Joy Kick, nurse Felisa, and Dr. Dennis McBride have not been
19 served with process or appeared in this action.

20 On October 17, 2016, the Marshal returned the “Process Receipt and Return” forms for
21 nurse Kick, nurse Felisa, and Dr. McBride, informing the Court that the Marshal had been unable
22 to locate those defendants, as to whom he had attempted service at the Martinez Detention
23 Facility. Docket No. 9. The Marshal made a notation that nurse Kick was “no longer employed at
24 the facility,” but provided no details as to why nurse Felisa and Dr. McBride were not served.
25 Docket No. 9 at 1.

26 The Court sought clarification about the unserved Defendants in a December 6, 2016 order
27 extending deadlines: “Service of process was ordered on six Defendants, but only three of those
28 Defendants have moved for an extension of the deadlines. In order to avoid the potentially

1 unnecessary effort to make further efforts to serve process on the other Defendants, no later than
2 December 16, 2016, defense counsel must file a notice indicating whether he will be representing
3 the three Defendants who have not yet appeared in this action.” Docket No. 13 (emphasis
4 deleted).

5 Counsel representing the three Defendants who *had* been served filed a response, stating
6 that he did not yet represent any of the unserved Defendants. Defense counsel explained that the
7 unserved Defendants were no longer employed by Contra Costa County, they “must request
8 representation and Contra Costa County Risk Management has to accept the request” before
9 defense counsel could represent those Defendants. Docket No. 14 at 1. Defense counsel was
10 unaware of a request for representation by the unserved Defendants, or that Contra Costa County
11 Risk Management had agreed to accept their defense. *Id.* at 1-2. Additionally, defense counsel
12 represented that he had not been authorized to accept service on behalf of the unserved
13 Defendants. *Id.* at 2.

14 “If a defendant is not served within 90 days after the complaint is filed, the court--on
15 motion or on its own after notice to the plaintiff--must dismiss the action without prejudice against
16 that defendant or order that service be made within a specified time. But if the plaintiff shows
17 good cause for the failure, the court must extend the time for service for an appropriate period.”
18 Fed. R. Civ. P. 4(m). Where a prisoner is proceeding *in forma pauperis* and must rely on the
19 Marshal for service of process, “[s]o long as the prisoner has furnished the information necessary
20 to identify the defendant, the marshal's failure to effect service ‘is automatically good cause’ for
21 not effectuating timely service.” *Walker v. Sumner*, 14 F.3d 1415, 1422 (9th Cir. 1994),
22 *overruled on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995); *see e.g., id.* (district court
23 did not err in dismissing defendant where plaintiff “did not prove that he provided the marshal
24 with sufficient information to serve” this particular defendant or that he requested service).

25 Service of process has not occurred within ninety days of the date the court ordered service
26 of process on the three unserved Defendants. Although it is the Marshal’s duty to serve process
27 when a prisoner-plaintiff is proceeding as a pauper, the Marshal’s ability to do so depends on a
28 plaintiff providing sufficient information about a defendant for the Marshal to find the defendant

1 to serve him or her. It appears that Mr. Li has not done so here, because the Marshal has been
2 unable to serve process at the only address mentioned in Mr. Li's complaint and using the names
3 he provided in his complaint.

4 Accordingly, no later than **July 21, 2017**, Mr. Li must provide information (a) further
5 identifying nurse Felisa, whose last name he did not provide, and (b) providing an address at
6 which each of the three unserved Defendants may be served with process. There are many ways
7 Mr. Li might attempt to learn this information. For example, he could do an internet search
8 (which should be easy, as he is no longer in custody), submit a discovery request to the
9 Defendants who already have been served in this action, subpoena personnel records from the jail,
10 contact the Contra Costa County personnel department, or contact the licensing agencies for
11 doctors and nurses. It is Mr. Li's obligation, not the Court's, to gather this information. In the
12 alternative to providing the information, Mr. Li must show cause by that same deadline why he
13 has not provided the information needed to locate the unserved Defendants and serve process on
14 them. If Mr. Li fails to provide sufficient information to enable service of process to be
15 accomplished on the unserved Defendants, the unserved Defendants will be dismissed without
16 prejudice unless Mr. Li shows cause for his failure to provide the information.

17 C. Plaintiff's Motion To Compel Discovery Responses

18 1. The Dispute

19 Mr. Li sent a request for production of documents and things to defense counsel on or
20 about December 26, 2016. Docket No. 17-1 at 2. Mr. Li requested three items, only the last two
21 of which are in dispute:

22 # 1. My medical records and history at MDF and medical
23 grievances.

24 # 2. MDF to compile a complete list of inmates who requested,
25 optometry service in the form of Inmate name, date requested
optometry and date received optometry service for a period of five
years, from January 1, 2012 to January 1, 2017.

26 # 3. CCRMC to compile a complete list of all inmates who,
27 requested optometry service, in the form of Inmate name, date
requested optometry and date received optometry service. For a
28 period of five years, from January 1, 2012 to January 1, 2017.

1 Docket No. 17-1 at 2 (errors in source). (MDF referred to Martinez Detention Facility, and
2 CCRMC referred to Contra Costa Regional Medical Center.) Mr. Li's request instructed
3 Defendants to produce the documents by February 6, 2017, and to notify him within five business
4 days of any "objections to their production." *Id.* He warned that, "[i]n the event defendants do
5 objects, I will seek judicial intervention." *Id.*

6 On January 12, 2017, defense counsel sent a letter to Mr. Li, agreeing to produce records
7 responsive to Request # 1, but objecting to Requests # 2 and # 3. According to defense counsel
8 explained that Requests # 2 and # 3 sought "sensitive medical information relating to other
9 inmates" and that "production of the information in the manner requested would violate the
10 physician/patient privilege, HIPPA medical information privacy rules, and the inmates' right to
11 privacy under the U.S. and California Constitutions." Docket No. 17-1 at 4. Defense counsel also
12 objected that the requests were overly broad in that they sought information predating Mr. Li's
13 October 2, 2015 arrival at the jail. *Id.* at 4-5. Defense counsel offered to produce some of the
14 information, consistent with the discovery order in another case -- i.e., the *Wong v. Kick* case
15 discussed later in this order --for similar optometry-related records. Defense counsel proposed to
16 produce the information sought in Requests # 2 and # 3, provided that (1) the inmate/patient's
17 name is replaced with a unique identifying label; (2) the "County only has to produce information
18 related to the date that the inmate/patient first requested an optometry appointment and the date
19 that the inmate/patient was seen by the optometrist; and (3) the time period of this request is
20 limited to October 2, 2015, to January 1, 2017." *Id.* at 5. Defense counsel did not object to
21 providing "lists," which might involve some computations or organization of information.
22 Defense counsel asked Mr. Li to sign and agree to the Northern District's Model Protective Order
23 before the information was produced. *Id.*

24 Without making any effort to respond to defense counsel's proposal, Mr. Li immediately
25 filed a motion to compel. Docket No. 15. Mr. Li wrote that the five-year period of information
26 was necessary so that he could "establish a fact of existing pattern of practices of inadequate
27 optometry to inmates." *Id.* at 3.

28 Defendants opposed the motion to compel, arguing that it was premature because Mr. Li

1 filed his motion to compel before he made a good-faith effort to meet and confer to try to resolve
2 the discovery dispute, and before Defendants’ date to produce the requested documents had
3 arrived. Defendants also objected that the motion was procedurally defective in that it did not
4 comply with the Court’s Civil Standing order On Discovery, No. 4, which required a joint letter
5 brief to be filed with the Court.

6 2. Analysis

7 A party may obtain discovery “regarding any nonprivileged matter that is relevant to any
8 party’s claim or defense and proportional to the needs of the case, considering the importance of
9 the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant
10 information, the parties’ resources, the importance of the discovery in resolving the issues, and
11 whether the burden or expense of the proposed discovery outweighs its likely benefit.” Fed. R.
12 Civ. P. 26(b)(1). Such information need not be admissible in evidence to be discoverable. *Id.*

13 The Court does not have enough time or resources to oversee all discovery, and therefore
14 requires that the parties present to it only their very specific disagreements. And to promote the
15 goal of addressing only very specific disagreements (rather than becoming an overseer of all
16 discovery), the Court requires that the parties meet and confer to try to resolve their disagreements
17 before seeking Court intervention. *See* Fed. R. Civ. P. 37(a)(1); N. D. Cal. Local Rule 37-1(a).

18 Mr. Li failed to make a good faith effort to meet and confer. He made no effort to respond
19 to Defense counsel’s letter proposing a compromise on the medical information about other
20 inmates. In support of his motion to compel, he offers various theories as to why the motion was
21 not premature, e.g., he “was not letting discovery time waste;” his discovery request itself satisfied
22 the meet-and-confer requirement; and Defendants’ January 12, 2017 letter (which Mr. Li did not
23 respond to) satisfied the requirement. *Id.* at 3-4. But none of his theories are convincing, and all
24 reflect a desire to avoid any effort to narrow the scope of the discovery dispute, and thrust that
25 responsibility onto the Court. Mr. Li simply chose not to make a good faith effort to meet and
26 confer. For that reason, his motion to compel could be denied. Nonetheless, in the interests of
27
28

1 judicial economy, the Court will resolve the dispute.¹ However, in the future, any failure to meet
2 and confer in good faith will result denial of the motion.

3 The Court’s resolution of the discovery dispute is largely guided by the resolution of a very
4 similar dispute in another case in this district, *Kam Wong v. Joy Kick*, N.D. Cal. Case No. 14-cv-
5 4760 JST (“*Wong v. Kick*”). There, the plaintiff complained that officials at the Martinez
6 Detention Facility had made him wait approximately seventeen months (from his April 5, 2013
7 request, until his appointment on August 23, 2014) for an optometry appointment, and had failed
8 to prescribe pain medication. *See* Docket No. 89 at 1-2 in *Wong v. Kick*. The plaintiff made a
9 discovery request for (among other things) MDF and CCRMC to compile lists of inmates who
10 requested optometry examinations in the period from March 2012 to March 2016, with the list
11 including each inmate’s first initial and last name, file number, date of referral, and date of
12 completion of the optometry examination. *See id.* at 2-6 and 7.

13 In *Wong v. Kick*, Judge Tigar determined that the requested information was relevant as to
14 insofar as it pertained to the time period leading up to the date of the plaintiff’s optometry
15 examination; waiting periods after that plaintiff received his optometry appointment were not
16 relevant to that plaintiff’s Eighth Amendment claim or whether there was a policy in place that
17 caused the deliberate indifference to that plaintiff’s specific medical need. *Id.* at 3-4. Judge Tigar
18 then analyzed several privilege and privacy objections, and determined that the defendants’
19 assertion of privacy concerns weighed in favor of a limited disclosure of the information, with a
20 protective order:

21 Defendants may not rely on the physician-patient privilege to
22 withhold records. Assertions of privileges in federal question cases
23 are governed by federal common law. Fed. R. Evid. 501. The
24 physician-patient privilege is not recognized by federal common
law, federal statute, or the U.S. Constitution. *Soto [v. City of
Concord]*, 162 F.R.D. 603, 618 (N.D. Cal. 1995).]

25 Nor may Defendants rely on HIPAA [i.e., the Health Insurance
Portability and Accountability Act, Pub.L. No. 104–191, 110

26
27 ¹ Defendants also argue that Mr. Li failed to comply with paragraph 4 of the undersigned’s Civil
28 Standing Order On Discovery, which directs the parties to file a joint letter brief. Because Mr. Li
was incarcerated and proceeding *pro se* (and may not even have been aware of the Standing
Order), the Court will overlook that procedural deficiency.

1 Stat.1936 (1996) (codified at various sections of Titles 18, 29, and
2 42 of the United States Code)] to withhold records. HIPPA allows
3 Contra Costa County to disclose protected health information in the
4 course of a judicial proceeding in response to a discovery request if
5 reasonable efforts have been made to secure a qualified protective
6 order that prohibits the parties from using or disclosing the protected
7 health information for any purpose other than the litigation for
8 which such information was requested, and requires that the
9 protected health information be returned to the covered entity or
10 destroyed at the end of the litigation. 45 C.F.R. § 164.512(e).

11 While there is a right of privacy under both the federal constitution
12 and the California constitution, Cal. Const., Article I, § 1; *Griswold*
13 *v. Connecticut*, 381 U.S. 479, 484 (1965) (right to privacy is implied
14 in the 1st, 3rd, 4th, 5th, and 9th Amendments); *see also Heda v. Sup.*
15 *Ct.*, 275 Cal. Rptr. 136, 137 (Cal. Ct. App. 1990) (privacy right
16 created by California Constitution extends to patient’s medical
17 history), privacy interests may be invaded for litigation purposes,
18 *see generally Ragge v. MCA/Universal Studios*, 165 F.R.D. 601, 604
19 (C.D. Cal. 1995). “Resolution of a privacy objection . . . requires a
20 balancing of the need for the information sought against the privacy
21 right asserted. The privacy objection also must be evaluated against
22 the backdrop of the strong public interest in uncovering civil rights
23 violations . . .” *Keith H. v. Long Beach Unified School Dist.*, 228
24 F.R.D. 652, 657 (C.D. Cal. 2005) (internal citation and quotations
25 omitted). To the extent that Defendants’ assertion of a right of
26 privacy is subject to a balancing test, it weighs in favor of limited
27 disclosure and a protective order. *Id.*

28 Accordingly, the Court GRANTS in part Plaintiff’s motion to
compel further responses to RFP No. 1. Defendants shall draft a
protective order that addresses their concerns regarding patient
privacy rights and HIPPA. CCRMC shall compile a complete list of
inmates who sought optometry appointments between March 2012
and August 23, 2014. CCRMC need not provide the inmate’s
initials, names, or medical record number. Instead, CCRMC may
assign each inmate a unique identifying label of its choice. CCRMC
shall specify the date the inmate first requested an optometry
appointment, and the date the inmate was provided an optometry
appointment.

Docket No. 89 at 5-6 in *Wong v. Kick* (footnotes omitted). Judge Tigar also required MDF to
create the same list as required from CCRMC. *Id.* at 7. Judge Tigar later modified the starting
date, so that the records to be produced did not include records from March through June 2012,
because those records had not been kept electronically and assembling the information for that
time frame would be unduly burdensome. Docket No. 105 at 4-5 in *Wong v. Kick*.

The approach taken by Judge Tigar appears to be a sound one and will be adopted in this
case. Accordingly, the Court will GRANT in limited part Mr. Li’s motion to compel. (Docket
No. 15.) First, within **ten** days of the date of this order, defense counsel must send to Mr. Li a

1 proposed stipulated protective order, using the Northern District's Model Protective Order for
2 Standard Civil Litigation as a guide, to address their concerns regarding HIPAA and patient
3 privacy rights. Within **ten days** of his receipt of the proposed stipulated protective order, Mr. Li
4 must (a) review, sign and return that proposed stipulated protective order to defense counsel to
5 show his agreement to its terms or (b) contact defense counsel to meet and confer to resolve any
6 disagreement they have as to the stipulated protective order. Within **ten days** after it is executed,
7 defense counsel must file the stipulated protective order. Second, within **twenty days** after filing
8 the stipulated protective order, Defendants must provide the information requested by Mr. Li's
9 Requests # 2 and # 3 in the following manner: (1) the inmate/patient's name is replaced with a
10 unique identifying label (such as a number or other designation); (2) Defendants only have to
11 produce information related to the date that the inmate/patient first requested an optometry
12 appointment and the date that the inmate/patient was seen by the optometrist; and (3) the
13 information/documents must be produced for the time period from January 1, 2014 through
14 January 31, 2017.²

15 D. Scheduling on Dispositive Motion And Miscellaneous Matters

16 The discovery responses may cause the parties to want to provide further evidence and/or
17 argument regarding Defendants' pending motion for summary judgment. If Mr. Li wants to
18 present further argument and/or evidence in opposition to Defendants' motion for summary
19 judgment, he may file and serve a sur-reply no later than **August 18, 2017**. The sur-reply may
20 only present arguments (not to exceed ten pages) and evidence related to the discovery responses
21 to Requests # 2 and # 3. Any arguments unrelated to these discovery responses will not be

22 _____
23 ² In the January 12, 2017 letter to Mr. Li, defense counsel proposed to provide information limited
24 to the time period from and after October 2, 2015, when Mr. Li arrived at the jail. This order
25 requires Defendants' discovery response to include the time period starting about eighteen months
26 earlier (i.e., on January 1, 2014) through the end of the month in which Mr. Li received his
27 optometry appointment (i.e., January 2017). This longer time period is proportional to the needs
28 of the case, and is appropriate given Mr. Li's interest in attempting to show a pattern of delayed
optometry appointments. Due to the reportedly long waits for optometry appointments -- Mr. Li
indicates he waited fourteen months and another inmate waited eighteen months, Docket No. 15 at
4 -- a larger window of time is appropriate so that any pattern that may exist can be seen more
clearly. This is not to say that a pattern of long waits for optometry appointments would alone
necessarily establish a constitutional violation, but simply that a large window of time will enable
one to discern any pattern that does exist.

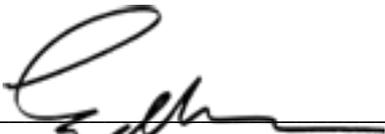
1 considered. If Mr. Li files a sur-reply, any rebuttal from Defendants to that sur-reply must be filed
2 and served no later than **August 28, 2017**.

3 Mr. Li is cautioned that, because he is no longer in custody, he must be sure that his sur-
4 reply is filed and served on or before the deadline, not simply mailed to the Court on or before the
5 deadline.

6 Finally, it is not entirely clear to the Court what Mr. Li's custodial status was at the
7 relevant time. In one filing, he wrote that he was "a federal inmate held in another county's
8 detention prior to being transferred to MDF on October 2, 2015." Docket No. 28 at 2. His
9 statement that he came from another county's detention suggests he might have been serving a
10 sentence at the same time he was a pretrial detainee. Therefore, no later than **August 18, 2017**,
11 Mr. Li must file a short document (which he might label as a "notice of custodial status") in which
12 he explains whether he was in custody as *only* a pretrial detainee at the relevant time, or was also
13 serving a sentence pursuant to a criminal conviction during part or all of that time. If he was
14 serving a sentence, he needs to provide the date of conviction and the terms of his sentence.

15
16 **IT IS SO ORDERED.**

17
18 Dated: June 12, 2017

19 
20 _____
21 EDWARD M. CHEN
22 United States District Judge
23
24
25
26
27
28