

1 IN THE UNITED STATES DISTRICT COURT  
 2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

3 JOHN M. SCHOPPE-RICO,

No. C 11-04283 YGR (PR)

4 Plaintiff,

**ORDER DENYING DEFENDANTS'  
 MOTION TO STAY DISCOVERY;  
 VACATING THE PORTION OF  
 COURT'S APRIL 27, 2012 ORDER  
 DISMISSING DEFENDANTS WILLIAMS  
 AND RAMIREZ; ADDRESSING  
 PLAINTIFF'S PENDING MOTIONS;  
 AND INSTRUCTIONS TO CLERK**

6 vs.

7 D. LEWIS, et al.,

8 Defendants.

(Docket Nos. 21, 22, 24, 25, 26, 34, 48, 50,  
 51, 58)

9 \_\_\_\_\_ /  
 10  
 11 Plaintiff filed this *pro se* civil rights action under 42 U.S.C. § 1983. In an Order dated  
 12 September 28, 2011, the Court found that, liberally construed, Plaintiff's complaint stated a  
 13 cognizable claim for violation of his First Amendment rights against the following Defendants at  
 14 Pelican Bay State Prison ("PBSP"): Procurement and Service Officer II J. L. Rupert; Correctional  
 15 Business Manager I J. Van Walkenburgh; Mailroom Supervisor C. Williams; Correctional Officer S.  
 16 Ramirez; Correctional Officer Ruthledge; Warden G. D. Lewis; Associate Warden P. T. Smith; and  
 17 Associate Warden Cook. (Docket No. 5.)

18 Defendants Williams and Ramirez have not been served in this action. In an Order dated  
 19 February 15, 2012, the Court directed Plaintiff to provide the required information necessary to  
 20 locate these Defendants within thirty days. Because Plaintiff failed to provide the Court with the  
 21 aforementioned information by the deadline, the Court dismissed Defendants Williams and Ramirez  
 22 pursuant to Federal Rule of Civil Procedure 4(m) in an Order dated April 27, 2012. (Apr. 27, 2012  
 23 Order at 2 (citing *Walker v. Sumner*, 14 F.3d 1415, 1421-22 (9th Cir. 1994) (prisoner failed to show  
 24 cause why prison official should not be dismissed under Rule 4(m) because prisoner did not prove  
 25 that he provided marshal with sufficient information to serve official)).)

26 On February 27, 2012, Defendants Rupert, Van Valkenburgh, Ruthledge, Lewis, Smith, and  
 27 Cook filed a motion to dismiss Plaintiff's complaint on the basis that it fails to state a claim on which  
 28 relief may be granted and on the basis that these Defendants are entitled to qualified immunity.

1 Before the Court are Defendants' motion to stay discovery as well as Plaintiff's various  
2 pending motions, which will all be elaborated upon below. (Docket Nos. 21, 22, 24, 25, 26, 34, 48,  
3 50, 51, 58.) Also before the Court is Plaintiff's filing entitled, "In re W. Barnts, CCII Lit. Co. PBSP  
4 Accepts Service of Summons for Defendants C/O C. Williams and C/O S. Ramirez." (Docket No.  
5 61.)

6 **I. Defendants' Motion to Stay Discovery**

7 On March 2, 2012, Defendants filed a motion to stay discovery pending resolution of their  
8 motion to dismiss. (Docket No. 34.)

9 A district court has broad discretion to stay discovery proceedings pending the disposition of  
10 a potentially dispositive motion. *See Panola Land Buyers Ass'n v. Shuman*, 762 F.2d 1550, 1560  
11 (11th Cir. 1985); *Scroggins v. Air Cargo, Inc.*, 534 F.2d 1124, 1133 (5th Cir. 1976); *Hovermale v.*  
12 *School Bd. of Hillsborough County*, 128 F.R.D. 287, 289 (M.D. Fla. 1989). The pending discovery  
13 requests in the instant case, however, are not especially burdensome. In addition, staying discovery  
14 would only further delay resolution of the case if the motion to dismiss is denied. Accordingly,  
15 Defendants' motion to stay discovery is DENIED.

16 **II. Plaintiff's Request for Extension of Time to File Opposition to Defendants' Motion to**  
17 **Stay Discovery**

18 On April 30, 2012, Plaintiff filed a request for an extension of time in which to file an  
19 opposition to Defendants' motion to stay discovery. (Docket No. 50.) In light of the Court's denial  
20 of Defendants' motion to stay discovery, Plaintiff's request for an extension of time to file an  
21 opposition to this motion is DENIED as moot.

22 **III. Plaintiff's Request for Extension of Time to File Opposition to Defendants' Motion to**  
23 **Dismiss**

24 On April 25, 2012, Plaintiff filed a request for an extension of time to file an opposition to  
25 Defendants' pending motion to dismiss. (Docket No. 48.) On April 30, 2012, however, Plaintiff  
26 filed a document entitled, "Motion to Strike Defendants' Motion to Dismiss," which was docketed as  
27 such by the Clerk of the Court. (Docket No. 51.) Defendants have construed Plaintiff's motion to  
28 strike Defendants' motion to dismiss as an opposition thereto. (Reply at 1.) The Court agrees with  
this construction and will construe Plaintiff's motion to strike accordingly. The Clerk shall docket

1 Plaintiff's motion to strike as his "Opposition to Motion to Dismiss," and shall terminate this motion  
2 as unnecessary. Because Plaintiff has already filed an opposition to Defendants' motion to dismiss,  
3 his request for an extension of time to file such an opposition is hereby DENIED as moot.

4 **IV. Defendants Williams and Ramirez**

5 In his July 9, 2012 filing, Plaintiff now claims that "Litigation Services Lit. Co. PBSP Barnts  
6 CCII just notified Plaintiff [that] they'll accept substitute service or summons." (July 9, 2012 Filing  
7 at 1.) Indeed, attached to Plaintiff's filing is a note from the litigation coordinator at PBSP, W.  
8 Barnts, which states: "Shoppe-Rico, PBSP Litigation will accept substitute service for C. Williams  
9 and C/O. S. Ramirez both current employees at PBSP." (Attach. to July 9, 2012 Filing at 4.) Albeit  
10 delayed, Plaintiff has provided the Court with the information needed to serve these Defendants.  
11 Therefore, the Court will allow service to be attempted on these Defendants one final time.  
12 Accordingly, the Court VACATES the portion of its April 27, 2012 Order dismissing Defendants  
13 Williams and Ramirez pursuant to Rule 4(m). The Court directs the Clerk to serve Defendants  
14 Williams and Ramirez using the information provided in Plaintiff's July 9, 2012 filing. As the  
15 Court's February 15, 2012 Order stated, however, if service fails a second time, the Court will  
16 dismiss these Defendants pursuant to Rule 4(m).

17 **V. Plaintiff's Discovery Requests**

18 In January and early February 2012, prior to Defendants filing their dispositive motion,  
19 Plaintiff filed several discovery motions, including: his "Request for Discovery, Protective Order  
20 and Hearing" (Docket No. 22); his "Application for Order Extending Time to Complete  
21 Discovery/Declarations" (Docket No. 24); and his "Motion Requesting U.S. Marshall [sic] Service  
22 of Process Subpoenas" (Docket No. 25). He has also filed document entitled, "Order to Show Cause  
23 for Preliminary Injunction" (Docket no. 20), in which Plaintiff is requesting the Court to direct  
24 prison officials at Kern Valley State Prison ("KVSP") to "give [him] reasonable access to  
25 discovery." Discovery may be taken in accordance with the Federal Rules of Civil Procedure. No  
26 further court order under Federal Rule of Civil Procedure 30(a)(2) or Local Rule 16-1 is required  
27 before the parties may conduct discovery. For Plaintiff's information, the proper manner of  
28 promulgating discovery is to send demands for documents or interrogatories (questions asking for

1 specific, factual responses) directly to Defendants' counsel. *See* Fed. R. Civ. P. 33-34. The scope of  
2 discovery is limited to matters "relevant to the claim or defense of any party . . . . Relevant  
3 information need not be admissible at trial if the discovery appears reasonably calculated to lead to  
4 the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). Discovery may be further limited  
5 by court order if "(i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable  
6 from some other source that is more convenient, less burdensome, or less expensive; (ii) the party  
7 seeking discovery has had ample opportunity by discovery in the action to obtain the information  
8 sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit." Fed.  
9 R. Civ. P. 26(b)(2).

10       If Plaintiff intends to file a motion to compel, the Court further explains the procedure that  
11 must be followed before such a motion is filed. It is not an effective or appropriate use of the  
12 Court's limited resources for it to oversee all aspects of discovery. Thus, before filing a motion to  
13 compel, the moving party must first attempt to resolve the dispute informally with the opposing  
14 party. It is only when the parties are unable to resolve the dispute after making a good faith effort to  
15 do so should they seek the Court's intervention. *See* Fed. R. Civ. P. 37(a)(2)(B); N.D. Cal. Local  
16 Rule 37-1. Because Plaintiff is incarcerated, he is not required to meet and confer with Defendants  
17 *in person*. Rather, if Plaintiff's discovery requests are denied and he intends to pursue a motion to  
18 compel, he need only send a letter to Defendants to that effect, offering them one last opportunity to  
19 provide him the sought-after information. The letter should state the specific discovery he seeks,  
20 and state the reasons that Plaintiff believes he is entitled to such discovery.

21       Again, the Court notes that the aforementioned discovery motions were all filed before  
22 Defendants filed their dispositive motion on February 27, 2012. In addition, the Court has denied  
23 Defendants' motion to stay discovery pending the Court's ruling on their motion to dismiss. Thus, it  
24 is evident that the aforementioned discovery motions filed by Plaintiff were all filed prematurely.  
25 Therefore, Plaintiff's "Request for Discovery, Protective Order and Hearing" is DENIED as  
26 premature.

27       The Court also DENIES Plaintiff's request for the Court to issue his proposed "Order to  
28 Show Cause for Preliminary Injunction" (Docket no. 20) in which Plaintiff is requesting the Court to

1 direct prison officials at KVSP to "give [him] reasonable access to discovery." If Plaintiff is  
2 alleging that prison officials at KVSP are violating his constitutional rights stemming from his claim  
3 that he is being denied access to discovery, then he must bring such a claim before the United States  
4 District Court for the Eastern District of California. The events giving rise to any alleged claim of a  
5 constitutional violation occurred at KVSP located in Delano, California, which lies within the venue  
6 of the Eastern District of California. See 28 U.S.C. § 84(b). Therefore, venue is not proper in this  
7 district. See 28 U.S.C. § 1391(b). Accordingly, if Plaintiff wishes to pursue any constitutional  
8 claims, he must file a complaint in the Eastern District of California.

9 In addition, Plaintiff's "Application for Order Extending Time to Complete  
10 Discovery/Declarations" (Docket No. 24) is DENIED as unnecessary because, as mentioned above,  
11 discovery has not been stayed, and Plaintiff may continue to pursue discovery.

12 Finally, the Court notes that in Plaintiff's "Motion Requesting U.S. Marshall [sic] Service of  
13 Process Subpoenas," he has attached multiple forms entitled, "Subpoena In a Civil Case." In all  
14 these forms, Plaintiff makes discovery request upon non-parties, and thus these requests all  
15 constitute a demand made upon a non-party. Therefore, the Court shall construe his motion as a  
16 motion for leave to conduct non-party discovery. The Court cannot compel non-parties to provide  
17 Plaintiff with information unless he follows the correct procedure according to the Federal Rules of  
18 Civil Procedure. Plaintiff may compel a person who is not a party to this action to produce  
19 documents for inspection and copying pursuant to a subpoena duces tecum. See Fed. R. Civ. P.  
20 34(c), 45(a). In order to do so, Plaintiff must fill out subpoena forms and must ensure that each  
21 person is served with the subpoena by a non-party. Plaintiff must tender to each person "the fees for  
22 one day's attendance and the mileage allowed by law." Fed R. Civ. P. 45(b)(1). The current  
23 requisite fee for each person is forty dollars per day, see 28 U.S.C. § 1821(b), and cannot be waived  
24 for a plaintiff proceeding *in forma pauperis*. See *Dixon v. Ylst*, 990 F.2d 478, 480 (9th Cir. 1993).  
25 Therefore, Plaintiff's motion for leave to conduct non-party discovery is DENIED at this time.

26 **VI. Plaintiff's Remaining Pending Motions**

27 Plaintiff has filed three other motions, which the Court will rule on below.

28 Plaintiff's "Motion for Sanctions and Issuence [sic] of Default for Disobedience to Prior

1 Court Order" was filed on January 17, 2012. (Docket no. 21.) Plaintiff claims prematurely that  
2 Defendants are in default because they did not respond to the Court's September 28, 2011 Order of  
3 Service. The Court finds that no sanctions are warranted in this action. In its September 28, 2011  
4 Order, the Court did not direct Defendants to file an answer to the complaint. Instead, it directed  
5 them to file a motion for summary judgment or other dispositive motion within ninety days.  
6 Thereafter, Defendants filed a motion for extension of time to file their dispositive motion up to and  
7 including February 27, 2012, which the Court granted in an Order dated January 9, 2012. The Court  
8 notes that Defendants also filed their "Waiver of Reply and Demand for Jury Trial" in January 2012.  
9 Finally, the Court finds that Defendants' pending motion to dismiss was timely filed on February 27,  
10 2012. Accordingly, Plaintiff's "Motion for Sanctions and Issuence [sic] of Default for Disobedience  
11 to Prior Court Order" is DENIED.

12 Plaintiff's previously-filed "Motion for Extension of Time" (Docket No. 26), which was filed  
13 on February 9, 2012, requests an extension of time "to file a response to Defendants' dispositive  
14 motion." (Feb. 9, 2012 EOT Mot. at 1.) Plaintiff also states that he requests extension of time  
15 pursuant to Rule 56(f) of the Federal Rules of Civil Procedure, which will be construed as a Rule  
16 56(d) motion.<sup>1</sup> However, Defendants had not yet filed their dispositive motion at the time Plaintiff's  
17 February 9, 2012 motion was filed, therefore his motion for an extension of time is DENIED as  
18 premature. Similarly, his Rule 56(d) is also DENIED as premature.

19 Plaintiff's "Motion to Disqualify Magistrate Judge" (Docket No. 58) is DENIED as  
20 unnecessary because there is no magistrate judge assigned to this case. The undersigned judge is an  
21 Article III judge and not a magistrate judge.

22 **CONCLUSION**

23 For the reasons outlined above, the Court orders as follows:

24 \_\_\_\_\_  
25 <sup>1</sup> Plaintiff's motion refers to Rule 56(f); however, effective December 1, 2010, Rule 56 was  
26 amended and the provisions of subdivision (f) were moved to subdivision (d), without substantial  
27 change. *See* Fed. R. Civ. P. 56, advisory committee's notes (2010 amends.) ("Subdivision (d) carries  
28 forward without substantial change the provisions of former subdivision (f)."). The Ninth Circuit  
has held that when a party moves for summary judgment before the opposing party has had a  
"realistic opportunity to pursue discovery relating to its theory of the case, district courts should  
grant any Rule 56(f) motion fairly freely." *Burlington Northern Santa Fe R. Co. v. Assiniboine*, 323  
F.3d 767, 774 (9th Cir. 2003).

