

1 UNITED STATES DISTRICT COURT  
2 NORTHERN DISTRICT OF CALIFORNIA

3 EARL WARNER,  
4 Plaintiff,

5 v.

6 C. TILESTON, et al.,  
7 Defendants.  
8

Case No. [16-cv-04100-YGR](#) (PR)

**ORDER DENYING PLAINTIFF'S MOTION TO COMPEL; GRANTING PLAINTIFF LEAVE TO FILE SUPPLEMENTAL OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT; SETTING NEW BRIEFING SCHEDULE; AND ORDER REGARDING THIRD NOTICE TO PLAINTIFF REGARDING INABILITY TO SERVE DEFENDANT A. WILLIAMS**

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10 **I. PLAINTIFF'S MOTION TO COMPEL DISCOVERY**

11 Before the Court is Plaintiff's motion to compel discovery. Dkt. 38. Defendants have  
12 opposed Plaintiff's motion to compel, claiming that Plaintiff failed to "meet and confer" with them  
13 about certain discovery requests. *See* Dkt. 40. Since filing their opposition, Defendants have filed  
14 a motion for summary judgment, which includes various declarations and exhibits. Dkt. 49.

15 In an Order dated January 23, 2018, the Court directed Defendants to explain whether they  
16 have already produced some of the discovery Plaintiff is seeking, or are in the process of obtaining  
17 records in response to some of Plaintiff's requests. *See* Dkt. 67. Defendants have since filed a  
18 response to the Court's January 23, 2018 Order. Dkt. 69.

19 Discovery may be taken in accordance with the Federal Rules of Civil Procedure. No  
20 further court order under Federal Rule of Civil Procedure 30(a)(2) or Local Rule 16-1 is required  
21 before the parties may conduct discovery. For Plaintiff's information, the proper manner of  
22 promulgating discovery is to send demands for documents or interrogatories (questions asking for  
23 specific, factual responses) directly to Defendants' counsel. *See* Fed. R. Civ. P. 33-34. The scope  
24 of discovery is limited to matters "relevant to the claim or defense of any party . . . . Relevant  
25 information need not be admissible at trial if the discovery appears reasonably calculated to lead to  
26 the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). Discovery may be further limited  
27 by court order if "(i) the discovery sought is unreasonably cumulative or duplicative, or is  
28 obtainable from some other source that is more convenient, less burdensome, or less expensive;

1 (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the  
2 information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely  
3 benefit.” Fed. R. Civ. P. 26(b)(2).

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

14 Here, Plaintiff did not meet and confer with Defendants as to most of his discovery  
15 requests, which would have afforded them with a final opportunity to address each request upon  
16 which he now asks the Court to rule. Plaintiff only sought to meet and confer about the last-  
17 known contact information for unserved Defendant A. Williams. As Defendants have since  
18 provided the Court with Defendant Williams’s last-known address (*in camera*) such a request is  
19 now moot. *See* Dkt. 40 at 4, Dkt. 46. Furthermore, the Court notes that the present motion to  
20 compel was filed before Defendants pending motion for summary judgment was filed. It may be  
21 that Plaintiff obtained some sought-after discovery after Defendants filed their motion for  
22 summary judgment and accompanying exhibits. In addition, the record shows that Plaintiff has  
23 since filed an opposition to Defendants’ motion, his declaration, a request for judicial notice, and  
24 multiple exhibits in support of his opposition. Dkts. 62, 63, 64. Plaintiff has also filed a document  
25 entitled, “Plaintiff’s Declaration Re: Discovery In Support of Opposition to Motion for Summary  
26 Judgment.” Dkt. 70. In this filing, Plaintiff claims that he “had requested additional discovery  
27 from the Defendant[s] need to support his argument(s) in opposition to the Motion for Summary  
28 Judg[ment].” *Id.* at 1. Plaintiff indicates that on January 28, 2018, he had sent a letter to  
Defendants “informing [them] that the [discovery] respon[s]es were incomplete, and requesting

1 that they be supplemented.” *Id.* Plaintiff claims that on February 13, 2018, he received a response  
2 from Defendants “indicating that [their] counsel is ‘. . . [i]n the process of evaluating’ the  
3 Plaintiff’s letter.” *Id.* at 1-2. Therefore, it is evident that at this time, the parties are in need of  
4 more time to conduct further discovery, and they are somehow able to meet and confer. Thus, any  
5 remaining discovery issues may soon be moot. For these reasons, Plaintiff’s motion to compel is  
6 DENIED as premature. Dkt. 38. The Court will also set a discovery cut-off date. Because certain  
7 discovery requests may still be pending, the Court GRANTS Plaintiff leave to file a supplemental  
8 opposition after discovery is complete. The parties are directed to abide by the briefing schedule  
9 outlined below.

10 **II. INEFFECTIVE SERVICE ON DEFENDANT WILLIAMS**

11 In an Order dated March 28, 2017, the Court issued a “Notice Regarding Inability to Serve  
12 Defendant A. Williams.” Dkt. 30. The Court stated that it had been informed that Defendant  
13 Williams “does not work for CDCR/SVSP and [has] no forwarding address.” *Id.* (citing Dkt. 27 at  
14 1). Thereafter, as mentioned above, Defendants provided the Court with Defendant Williams’s  
15 last-known address, and the Clerk re-served this Defendant. *See* Dkt. 46. However, the prison  
16 litigation coordinator indicated that Defendant Williams may have moved out of state, and the last  
17 known address may be outdated. On September 14, 2017, the summons mailed to Defendant  
18 Williams’s last known address was returned as undeliverable because he was “not at [that]  
19 address.” Dkt. 47.

20 On November 17, 2017, the Court issued its “Second Notice Regarding Inability To Serve  
21 Defendant A. Williams.” Dkt. 58. The Court directed Plaintiff to provide it with a current address  
22 for Defendant Williams. *Id.* at 1. To date, Plaintiff has not provided the Court with a current  
23 address for Defendant Williams.

24 While Plaintiff may rely on service by the United States Marshal, “a plaintiff may not  
25 remain silent and do nothing to effectuate such service. At a minimum, a plaintiff should request  
26 service upon the appropriate defendant and attempt to remedy any apparent service defects of  
27 which [he] has knowledge.” *Rochon v. Dawson*, 828 F.2d 1107, 1110 (5th Cir. 1987). If the  
28 marshal is unable to effectuate service and the plaintiff is so informed, the plaintiff must seek to  
remedy the situation or face dismissal of the claims regarding that defendant under Federal Rule of

1 Civil Procedure 4(m). *See* Fed. R. Civ. P. 4(m) (If service of the summons and complaint is not  
2 made upon a defendant in 90 days after the filing of the complaint, the action must be dismissed  
3 without prejudice as to that defendant absent a showing of “good cause.”). No later than **twenty-**  
4 **eight (28) days** from the date of this Order, Plaintiff must provide the Court with a current address  
5 for Defendant Williams, as directed below.

6 **III. CONCLUSION**

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

8 1. Plaintiff’s motion to compel discovery is DENIED as premature. Dkt. 38. As  
9 mentioned above, the parties are still engaged in discovery. In the interests of justice, the Court  
10 sets a discovery cut-off date of **twenty-eight (28) days** from the date of this Order. The Court  
11 also GRANTS Plaintiff leave to file a supplemental opposition after discovery is complete.  
12 (Again, the parties are to abide by the new briefing schedule below.) If Plaintiff attempts to meet  
13 and confer with Defendants regarding requests for the production of documents and is not satisfied  
14 with the result he may file a renewed discovery motion. But in no event shall Plaintiff file such a  
15 motion until after he has reviewed Defendants’ response to his January 28, 2018 letter, which  
16 should be forthcoming. *See* Dkt. 70 at 1-2.

17 2. No later than **twenty-eight (28) days** from the date of this Order, Plaintiff must  
18 provide the Court with a current address for Defendant Williams. Plaintiff should review the  
19 federal discovery rules, Rules 26-37 of the Federal Rules of Civil Procedure, for guidance about  
20 how to determine the current address of Defendant Williams. **If Plaintiff fails to provide the**  
21 **Court with the current address of Defendant Williams within the twenty-eight-day deadline,**  
22 **all claims against Defendant Williams will be dismissed without prejudice under Rule 4(m).**

23 3. The parties shall abide by the following briefing schedule:

24 a. The discovery cut-off date is **twenty-eight (28) days** from the date of this  
25 Order;

26 b. Plaintiff’s supplemental opposition to Defendants’ motion for summary  
27 judgment shall be filed with the Court and served on Defendants no later than **sixty (60) days** after  
28 the date of this Order;

c. Defendants shall file a supplemental reply brief no later than **fourteen (14)**

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**days** after the date Plaintiff's opposition is filed.

d. **No further extensions of time will be granted absent extraordinary circumstances.**

4. This Order terminates Docket No. 38.

IT IS SO ORDERED.

Dated: March 6, 2018



YVONNE GONZALEZ ROGERS  
United States District Judge