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United States District Court
Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ROBERT HUGH COLE,
Plaintiff,

v.

NANCY ADAM, et al.,
Defendants.

Case No. 17-05691 BLF (PR)

**ORDER DENYING PLAINTIFF’S
MOTION TO COMPEL; DENYING
MOTION TO STRIKE
DEFENDANTS’ REPLY
DECLARATION**

(Docket No. 39)

Plaintiff, a California inmate, filed the instant *pro se* civil rights action pursuant to 42 U.S.C. § 1983 against medical officials at Pelican Bay State Prison (“PBSP”). The Court found cognizable Plaintiff’s Eighth Amendment claims based on his allegations of inadequate medical care. (Docket No. 9.) Defendants filed a motion for summary judgment, (Docket No. 19), which has been fully briefed and submitted for decision. The Court will rule on the motion for summary judgment in a separate order. In this order, the Court addresses two pending motions that require advance disposition.

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1 **DISCUSSION**

2 **A. Motion to Compel**

3 Along with his opposition to Defendants’ motion, Plaintiff filed a motion to compel,
4 (Docket No. 30 at 175-212, hereinafter “Mot.”), along with a declaration in support
5 thereof, (*id.* at 213-216.) Defendants filed opposition to the motion, (Docket No. 34,
6 hereinafter “Opp.”), and Plaintiff filed a reply, (Docket No. 42, hereinafter “Reply”).

7 Defendants first argue in opposition that Plaintiff’s motion is 38 pages long, in
8 blatant disregard of the Court’s order limiting the motion to ten pages.¹ (Opp. at 2-3.) In
9 reply, Plaintiff asserts that the length of his motion “was determined by Defendants[’]
10 failure to properly cooperate in discovery” such that it “require[d] more than ten (10) pages
11 to draft a meaningful compel motion.” (Reply at 2.) Because Defendants’ opposition goes
12 on to addresses the merits of the motion, the Court will review the motion on the merits.

13 Parties may obtain discovery regarding “any nonprivileged matter that is relevant to
14 any party’s claim or defense and proportional to the needs of the case, considering the
15 importance of the issues at stake in the action, the amount in controversy, the parties’
16 relative access to relevant information, the parties’ resources, the importance of the
17 discovery in resolving the issues, and whether the burden or expense of the proposed
18 discovery outweighs its likely benefit.” Fed. R. Civ. P. 26(b)(1). Discovery may be
19 limited by the court if “(i) the discovery sought is reasonably cumulative or duplicative, or
20 is obtainable from some other source that is convenient, less burdensome, or less
21 expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the
22 action to obtain the information sought; or (iii) the proposed discovery is outside the scope
23 permitted by Rule 26(b)(1).” Fed. R. Civ. P. 26(b)(2)(C).

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25 ¹ Before filing the motion to compel, Plaintiff filed a request “to file [an] extended motion
26 to compel” that would allow him to file a motion that exceeds 25 pages under the Local
27 Rules. (Docket No. 6.) The Court found no good cause for allowing an essentially
28 unlimited length for such a motion where normally such motions are limited to 3 pages.
(Docket No. 29 at 2.) Even so, the Court granted the request in part and allowed Plaintiff a
10-page limitation. (*Id.*)

1 The Court found that Plaintiff’s complaint, liberally construed, stated cognizable
2 claims against Defendant Adam and Waddell for deliberate indifference to serious medical
3 needs related to his severe long-term chronic pain and physical impairment. (Docket No. 9
4 at 2); *see Estelle v. Gamble*, 429 U.S. 97, 104 (1976). The Court also exercised
5 supplemental jurisdiction over his state tort claims of negligence, fraud, and intentional
6 infliction of emotional distress. (*Id.*) Accordingly, under Rule 26(b)(1), Plaintiff must
7 show that the requested discovery is relevant to his deliberate indifference claim against
8 Defendant Adam and Waddell or the related state tort claims.

9 **1. Official Information Privilege**

10 Plaintiff first attacks the sufficiency of a declaration by W. Reynolds, a PBSP
11 employee, asserting official information privilege in response to his request for discovery.
12 (Mot. at 8-12, Attach. 2, hereinafter “Reynolds Decl.”)

13 The official information privilege is one of federal common law. *Sanchez v. City of*
14 *Santa Ana*, 936 F.2d 1027, 1033 (9th Cir. 1990). “To determine whether the information
15 sought is privileged, courts must weigh the potential benefits of disclosure against the
16 potential disadvantages.” *Id.* at 1033-34. The balancing test “is moderately pre-weighted
17 in favor of disclosure.” *Kelly v. San Jose*, 114 F.R.D. 653, 661 (N.D. Cal. 1987). The
18 privilege “must be formally asserted and delineated in order to be raised properly,” and the
19 party opposing disclosure must “state with specificity the rationale of the claimed
20 privilege.” *Kerr v. United States Dist. Ct. for the Northern Dist. of Cal.*, 511 F.2d 192,
21 198 (9th Cir. 1975). *Kerr* requires that to allow the court to decide whether the official
22 information privilege applies, defendants must provide with their objection a declaration or
23 affidavit containing (1) an affirmation that the agency generated or collected the material
24 in issue and has in fact maintained its confidentiality, (2) a statement that the official has
25 personally reviewed the material in question, (3) a specific identification of the
26 governmental or privacy interests that would be threatened by disclosure of the material to
27 plaintiff and/or his lawyer, (4) a description of how disclosure subject to a carefully crafted

1 protective order would create a substantial risk of harm to significant governmental or
2 privacy interests, and (5) a projection of how much harm would be done to the threatened
3 interests if the disclosure were made. *Kelly*, 114 F.R.D. at 670.

4 Defendants argue that their assertion of the official information privilege through
5 the declaration of W. Reynolds is valid because it meets the *Kelly* standards. (Opp. at 6.)
6 Mr. Reynolds attests that he is familiar with the CDCR's policies and procedures for
7 classifying documents as confidential, as well as PBSP's policies governing classification
8 of certain documents as confidential. (Reynolds Decl. ¶ 2.) He attests that the CDCR
9 considers staff training records and disciplinary documents to be confidential and
10 maintains them as confidential, like other portions of personnel files. (*Id.* at ¶ 3.) These
11 statements satisfy the first *Kelly* standard. Mr. Reynolds also states that he has reviewed
12 the material in question, satisfying the second standard. (*Id.* at ¶ 7.) Mr. Reynolds
13 describes how disclosing these documents would be detrimental and dangerous as inmates
14 would obtain and use information to undermine prison staff's authority, to manipulate
15 them, or mark staff for retribution, and that disclosure of policies, procedures, and
16 practices specific to the institution and the training afforded to staff on a daily basis and
17 during emergency situations would expose staff to undue risk, particularly in the security
18 housing setting of this lawsuit. (*Id.* at ¶¶ 5, 6.) Disclosure could also be used to
19 embarrass, extort, undermine, or promote aggression against Defendants and their families,
20 or to identify and target confidential sources. (*Id.* at ¶ 7.) Furthermore, Mr. Reynolds
21 discusses the privacy interest of the inmates whose medical records Plaintiff requests, and
22 how redaction would not be sufficient to protect patient confidentiality. (*Id.* at ¶ 8.)
23 Lastly, Mr. Reynolds states that the disclosure of information concerning the provision of
24 methadone to treat chronic pain could be used to create strategies or tactics to obtain
25 opioids among inmates. (*Id.* at ¶ 9.) These assertions satisfy the third, fourth, and fifth
26 *Kelly* standards.

27 The burden then shifts to Plaintiff to prove the following in his motion to compel:
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1 (1) how the requested information is relevant to the litigation or is reasonably calculated to
2 lead to the discovery of admissible evidence; (2) identify his interest that would be harmed
3 if the material were not disclosed; and (3) how that harm would occur and how extensive it
4 would be. *Kelly*, 114 F.R.D. at 671. The Court will review each set of requests to
5 determine if Plaintiff has met these requirements.

6 **2. Documents Requested from Defendants' Personnel Files in "Set One"**

7 Plaintiff first argues that Defendants' responses to his "set one for production of
8 documents" is "evasive, non-responsive, frivolous, and contain improper privilege claims."
9 (Mot. at 7.) Plaintiff requests the following documents from the personnel files of
10 Defendants Adam and Waddell: (1) Defendants' post orders² for the period "June 2014 to
11 date," (*Id.* at 12-13); (2) documents related to Defendants' duties for the period January 1,
12 2014 to date, (*id.* at 14-15); and (3) Defendants' "training logs" for the period of "1-1-14 to
13 date," (*id.* at 15).

14 In opposition, Defendants argue that Plaintiff has failed to carry his burden of
15 showing that the additional documents he seeks are relevant under Rule 26(b)(1) of the
16 Federal Rules of Civil Procedure. (Opp. at 3, citing *Integrated Glob. Concepts, Inc. v. j2*
17 *Glob., Inc.*, No. 512CV03434RMWPSG, 2014 WL 232211, at *1 (N.D. Cal. Jan. 21,
18 2014).) Defendants point out that Plaintiff dedicates most of his motion attacking their
19 objections and the declaration of W. Reynolds while spending relatively little effort
20 justifying the discovery sought. (*Id.*)

21 First of all, all the requested documents from Defendants' personnel files are
22 protected by the official information privilege as asserted in Mr. Reynolds's declaration.
23 *See supra* at 4. In response, Plaintiff has failed to establish that the documents are either
24 relevant to the claims in this action or are reasonably calculated to lead to the discovery of
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26 ² According to the declaration by W. Reynolds, post orders, also known as post
27 assignments, are documents pertaining to a staff member's training and duties. (Reynolds
28 Decl. ¶ 3.)

1 admissible evidence. For example, Plaintiff has failed to establish the relevancy of the
2 requested personnel files to establishing his Eighth Amendment claim against Defendants.
3 To establish deliberate indifference to serious medical needs under the Eighth Amendment,
4 Plaintiff must show two elements: (1) that he had a “serious” medical need which, if left
5 untreated, could result in further significant injury or the “unnecessary and wanton
6 infliction of pain”; and (2) Defendants knew that Plaintiff faced a substantial risk of
7 serious harm and disregarded that risk by failing to take reasonable steps to abate it. *See*
8 *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). Defendants must both know of “facts from
9 which the inference could be drawn” that an excessive risk of harm exists, and they must
10 actually draw that inference. *Id.* Here, Plaintiff provides no explanation as to how these
11 personnel files would establish that he had a “serious” medical need or reveal that
12 Defendants knew that he faced a substantial risk of serious harm and disregarded that risk
13 by failing to take reasonable steps to abate it. *See Farmer*, 511 U.S. at 834. Plaintiff
14 merely makes conclusory assertions that Defendants’ post orders are “highly relevant”
15 because they “related to their duties and responsibilities.” (Mot. at 13.) There is no
16 explanation as to why a description of Defendants’ duties and responsibilities is relevant to
17 resolving the issue of whether their treatment of his medical needs violated the Eighth
18 Amendment, or any of his related state tort claims. In the same way, Plaintiff also fails to
19 explain the relevance of documents related to Defendants’ “duties” to his claims, and only
20 makes the conclusory assertion that this information is “clearly relevant.” (Mot. at 15.)
21 Lastly, Plaintiff asserts that the training logs would show “when they attended specific
22 types of training” and then speculates that “training is *sometimes* directed pursuant to
23 findings of filed complaints and, therefore, will *probably* lead to other relevant and
24 admissible evidence.” (*Id* at 16, *italics* added.) But Plaintiff fails to explain why this
25 information is relevant to his Eighth Amendment claim or any of the state tort claims.
26 Plaintiff has also failed to identify his interest that would be harmed if the privileged
27 material were not disclosed, and how that harm would occur and how extensive it would
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1 be. *Kelly*, 114 F.R.D. at 671. Accordingly, Plaintiff has failed to overcome Defendants’
2 assertion of the official information privilege. His motion to compel the production of
3 Defendants’ personnel files is DENIED.

4 **3. Additional Documents Requested in “Set One”**

5 In addition, Plaintiff requests the following documents: (1) “medical records of all
6 inmates, redacted form if necessary, who has had their prescribed pain meds discontinued
7 by Defendant Adam[] upon their arrival to the PBSP/RCGP within 6 months, for the
8 periods 6-1-13 to date and 2-1-16 to date, respectively,” (*id.* at 16-17); (2) “policies,
9 directives, and instructions to Adam Re: pain medication/treatment of pain at PBSP from
10 1-1-14 to date,” (*id.* at 18-19); (3) “policies, directives, or instructions mandated by
11 Healthcare Service Division/PBSP Re: sleep deprivation, from 1-1-14 to date,” (*id.* at 20-
12 21); (4) “PBSP pain committee policies, bulletins and e-mails from 1-1-14 to date,” (*id.* at
13 21-22); (5) “documents regarding Plaintiff at PBSP from 1-1-16 to date authored by or
14 acted upon by Defendant Adam,” (*id.* at 23); (6) “policies, directives or instructions
15 governing sick call procedures of general population inmates at PBSP,” (*id.* at 23-24); (7)
16 “policies, directives for instructions mandated by the Healthcare Service Divisions
17 (HCSD) for CDCR sick call from 1-1-14 to date,” (*id.* at 24-25); (8) “names and ages of
18 the two RNs or medical staff assigned on 2-24-16 to process new arrivals (inmates),” (*id.*
19 at 25-26); (9) “any logs, lists or other documentation reflecting grievances filed by PBSP
20 inmates directed to Defendant Adam for discontinuing inmate pain medications prescribed
21 by other doctors upon th[eir] arrival to PBSP (from 6-1-13 to date).” (*id.* at 27-28); (10)
22 “any and all documents directed to CDCR medical employees that address in any form or
23 fashion pain medications from 1-1-14 to date,” (*id.* at 28-29); and (11) “documents
24 regarding California’s Interactable Pain Treatment Act applied toward CDCR prisoners
25 (from 6-1-13 to date),” (*id.* at 29-30). Furthermore, Plaintiff objects to Defendants’
26 responses to his request for admissions as “non-responsive, evasive, and frivolous.” (*Id.* at
27 31-32.)

1 In opposition, Defendants assert that Plaintiff seeks these documents in order to
2 obtain evidence of a conspiracy to promote an “underground, non-medical policy and
3 practice” of banning all opioid medication at PBSP, and that the extensive record of
4 Defendants’ treatment of Plaintiff was fraudulently created to hide this underground
5 conspiracy. (Opp. at 4.) Defendants assert that this speculation by Plaintiff is not
6 sufficient to justify his efforts to intrude into Defendants’ personnel files and the medical
7 records of third-party inmates. (*Id.*) In reply, Plaintiff merely repeats his conclusory
8 assertions that the requested documents “for the most part are facially relevant.” (Reply at
9 3-4.)

10 The Court finds that Plaintiff’s motion to compel production of these documents is
11 without merit. First of all, the Court has determined that Defendants are entitled to the
12 official information privilege, and many of these requested documents are protected under
13 that privilege as involving third-party medical records, personnel files, and prison
14 “policies, directives, or instructions.” The burden having shifted to Plaintiff, he has failed
15 to prove that the requested information is relevant to his claims or is reasonably calculated
16 to lead to the discovery of admissible evidence in support of his claims. *Kelly*, 114 F.R.D.
17 at 671. Even if such documents could prove a conspiracy, the Court has never found that
18 Plaintiff’s complaint stated a cognizable conspiracy claim. Therefore, the Court finds that
19 Plaintiff has failed to establish the relevance of these documents to his Eighth Amendment
20 medical claims or his state tort claims, and that they are being requested to support an
21 unfounded conspiracy claim which is not a subject of this action. As such, these requested
22 documents are outside the scope permitted by Rule 26(b)(1), and therefore properly
23 limited. Fed. R. Civ. P. 26(b)(2)(C)(iii).

24 With regards to their admissions, Defendants assert that they have responded to
25 Plaintiff’s more than 150 requests for admissions. (Opp. at 3.) Defendants assert that
26 Plaintiff does not provide any substantive argument whatsoever that he is entitled to
27 further responses, having simply listing the responses which he asserts are deficient and
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1 now requesting the court to “determine the sufficiency of the responses, compel proper
2 responses, and have the matters admitted.” (Mot. at 31.)

3 Rule 36(a) of the Federal Rules of Civil Procedure, which governs requests for
4 admission, provides that if a matter is not admitted, “the answer must specifically deny it
5 or state in detail why the answering party cannot truthfully admit or deny it,” and that “a
6 denial must fairly respond to the substance of the matter, and when good faith requires that
7 a party qualify an answer or deny only a part of a matter, the answer must specify the part
8 admitted and qualify or deny the rest.” Fed. R. Civ. P. 36(a)(4). The Court has reviewed
9 the copies of Defendants’ admissions provided by Plaintiff with his motion to compel and
10 finds Defendants’ answers satisfy Rule 36(a)(4). Specifically, Defendant Adam’s response
11 is 27 pages long and provides specific and detailed responses to each of Plaintiff’s 86
12 requests for admissions, and Defendant Waddell’s 18-page response also includes specific
13 and detailed responses to each of Plaintiff’s 52 requests for admissions. (Mot., Attach. 3,
14 4.) Plaintiff only makes general objections to these responses and makes no substantive
15 arguments with respect to their insufficiency. (Mot. at 32.) Accordingly, the Court finds
16 no further answer is warranted.

17 Based on the foregoing, Plaintiff’s motion to compel the production of these
18 documents and for further admissions is DENIED.

19 **4. Documents Requested in “Set Two”**

20 Lastly, Plaintiff asserts that Defendants’ response to “Set Two” of his request for
21 production of documents is also non-responsive and evasive, and that their privilege
22 assertion (through another declaration by W. Reynolds) is “unsupported and unfounded,”
23 (*id.* at 33-36). Plaintiff also asserts that Defendants’ response to his second request for
24 admissions is also “evasive and non-responsive.” (*Id.* at 36-37.) Plaintiff requested: (1) his
25 medical file for the period January 1, 2014 to date; (2) a copy of a manual, booklet, or
26 pamphlet titled “‘Games Inmates Play’ the manipulation of staff by inmates”; and (3) a
27 copy of Defendant Adam’s “complete curriculum vitae.” (*Id.* at 35-36.)

1 Plaintiff objects to Defendants’ response to his first request for a copy of his
2 medical file because they allegedly omitted medical records of his pre-PBSP pain
3 committee determinations and Defendant Adam’s authorization for P.A. Thomas to
4 dispense medication. (Mot. at 35.) However, he fails to explain how these missing
5 documents are relevant to his claims.³ (*Id.*) Accordingly, he fails to satisfy the relevancy
6 requirement of Rule 26(b)(1). Furthermore, Plaintiff challenges Defendants’ objection to
7 the book “Games Inmates Play” as irrelevant, asserting that the book “displays the biased
8 mind set of Defendants and their co-workers” and that “state of mind is at issue.” (*Id.*)
9 However, there is no allegation that Defendants had any knowledge of the book and its
10 contents to support this argument, nor an explanation of how it is specifically relevant to
11 the Eighth Amendment claim or other state tort claims against them.

12 Plaintiff also objects to the Defendants’ assertion that the official information
13 privilege protects disclosure of Defendant Adam’s curriculum vitae. (Mot. at 36.)
14 Plaintiff asserts that the document is relevant and “may lead to additional relevant
15 information. (*Id.*) In response, Defendants objected to the request for their “complete
16 curriculum vitae” as vague and ambiguous, but nevertheless produced a copy of their most
17 recent resumes and/or curriculum vitae, “redacting privileged personal contact, first name,
18 and residence/contact information,” in exercise of the privileges. (*Id.*, Attach. 5 at 2.)
19 Plaintiff fails to explain why the production of the document in redacted form is
20 insufficient, or what other specific and relevant information is lacking in Defendants’
21 response. (Mot. at 36.)

22 Lastly, the Court finds no merit to Plaintiff’s objections to Defendants’ responses to
23 his request for admissions in “Set Two.” (Mot. at 37-38.) The Court has reviewed the
24 copies of Defendants’ admissions, (Mot., Attach. 7, 8), and finds their answers satisfy Rule

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26 ³ Furthermore, Plaintiff may also attempt to obtain these documents through the normal
27 prison procedures since prisoners have a right of access to their own medical files. *See*
28 Cal. Health & Safety Code §§ 123100-123149.5 (“Patient Access to Health Records Act”).

1 36(a)(4). Plaintiff's dissatisfaction with their answers does not render them insufficient.
2 Accordingly, the Court finds no further answer is warranted.

3 Based on the foregoing, Plaintiff's motion to compel the production of these
4 documents and for further admissions for is DENIED.

5 **B. Motion to Strike Declarations**

6 Plaintiff filed a motion to strike the declaration of Defendant Nancy Adam, (Docket
7 No. 33-1), filed in support of Defendants' reply to their motion for summary judgment.
8 (Docket No. 39.) Plaintiff asserts that the declaration "introduces new evidence outside
9 their moving papers, denying Plaintiff the opportunity to respond." (*Id.* at 1.) In
10 opposition, Defendants argue that the declaration was properly submitted in direct
11 response to arguments raised in Plaintiff's opposition, and therefore should not be struck.
12 (Docket No. 44.) In reply, Plaintiff asserts that Defendants already had an opportunity to
13 respond to the complaint and in their previous moving papers. (Docket No. 46 at 2.)

14 The Court finds that Defendant Adam's second declaration was submitted in direct
15 response to Plaintiff's opposition, wherein he argues that Physician's Assistant ("P.A.") L.
16 Thomas allegedly overwrote his then-existing methadone prescription upon arrival at
17 PBSP with identical dosage but for a shorter period, and that Defendant Adam is liable for
18 P.A. Thomas's actions. (Docket No. 30 at 27-28.) In her reply declaration, Defendant
19 Adam states that she would not have been aware of or involved in events occurring
20 immediately upon Plaintiff's arrival and that regardless, P.A. Thomas committed no
21 wrongdoing. (Docket No. 33-1.) Defendant Adam is merely responding to Plaintiff's
22 opposition argument, which is permitted and may be considered by the Court in its
23 discretion. *See All Star Seed v. Nationwide Agribusiness Ins. Co.*, No. 12CV146 L BLM,
24 2014 WL *1286561, at * 15 (S.D. Cal. Mar. 31, 2014) (citing *Koerner v. Grigas*, 328 F.3d
25 1039, 1048-49 (9th Cir. 2003) ("[w]e have discretion to review an issued not raised by
26 [movant]... when it is raised in the [movant's] brief.") Accordingly, Plaintiff's motion to
27 strike Defendant Adam's reply declaration is DENIED.

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CONCLUSION

For the foregoing reasons, Plaintiff’s motions to compel and to strike Defendants’ reply declaration are **DENIED**.

This order terminates Docket No. 39.

IT IS SO ORDERED.

Dated: March 4, 2019


BETH LABSON FREEMAN
United States District Judge