UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

RAYNARD VALLERY, Plaintiff, v. J. BROWN, et al., Defendants.	Civil No. 08cv00095 DMS(RBB) **ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION TO COMPEL DISCLOSURE AND COOPERATION IN DISCOVERY [ECF NO. 69]**

Plaintiff Raynard Vallery, a California prisoner proceeding pro se and in forma pauperis, filed an action under 42 U.S.C. § 1983 [ECF Nos. 1, 5, 47], which now proceeds against named Defendants Bell, Bourland, Brown, Dee, and Stratton for First, Fourth, and Eighth Amendment violations.[1] The allegations in Vallery's Second Amended Complaint surround Correctional Officer Brown's purported sexual assault of Plaintiff at Calipatria State Prison ("Calipatria"), as well as the other prison officials' endorsement of officer Brown's misconduct. (See Second Am. Compl.

[1] These Defendants have successfully moved to dismiss several causes of action over the course of the litigation [ECF Nos. 15, 32, 45, 48, 50, 55].

10-12, 14, ECF No. 47.)[2] Since Defendants Bell, Bourland, Brown, Dee, and Stratton filed an Answer [ECF No. 56], the parties have commenced discovery and have several disputes [ECF Nos. 67, 69, 81].

This Motion to Compel Disclosure and Cooperation in Discovery was filed nunc pro tunc to May 25, 2011 [ECF No. 69]. The Plaintiff seeks further responses to his requests for production of documents, requests for admissions, and interrogatories. (Mot. Compel 4, 15, 24, ECF No. 69.) Defendants' Opposition to Plaintiff's Motion to Compel Disclosure and Cooperation in Discovery was filed on July 19, 2011, along with the Declaration of John P. Walters and exhibits [ECF No. 86]. In addition to raising substantive objections, Defendants Bell, Bourland, Brown, Dee, and Stratton argue that the Motion should be denied because it is untimely, and it seeks responses to discovery that was untimely served. (See Opp'n Mot. Compel 2-8, ECF No. 86.) On August 26, 2011, Plaintiff's Reply to Defendants' Opposition to Motion to Compel was filed [ECF No. 94].

The Court finds the Motion to Compel suitable for resolution on the papers, pursuant to Civil Local Rule 7.1. See S.D. Cal. Civ. R. 7.1(d)(1). The Court has reviewed Vallery's Motion, the Defendants' Opposition, and Plaintiff's Reply. For the reasons stated below, Plaintiff's Motion to Compel Disclosure and Cooperation in Discovery is **GRANTED in part** and **DENIED in part**.

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[2] Because the Second Amended Complaint is not consecutively paginated, the Court will cite to it using the page numbers assigned by the Court's electronic case filing system.

I.

FACTUAL BACKGROUND

The allegations in the Second Amended Complaint surround events that occurred while Vallery was housed at Calipatria. (Second Am. Compl. 1, ECF No. 47.) The Plaintiff contends that on April 15 and 17, 2004, Correctional Officer Brown sexually assaulted Vallery by improperly searching him while Brown's superior, Correctional Sergeant Dee, observed. (Id. at 6-8, 12-13.)

Vallery argues that Defendant Brown violated the Fourth and Eighth Amendments when he improperly searched Plaintiff for sexual gratification. (Id. at 12.) Defendant Dee is alleged to have violated the Eighth Amendment because she was aware of Brown's misconduct but did nothing to prevent it. (Id.) The Plaintiff asserts that Warden Bourland, Correctional Lieutenant Stratton, and Appeals Coordinator Bell violated his Eighth Amendment rights by acting with deliberate indifference to the risk that Brown would assault Vallery. (See id. at 10-12, 14.) Finally, Plaintiff maintains that unnamed mailroom employees violated the First Amendment by preventing the delivery of Plaintiff's letter to the FBI. (Id. at 14.) The mailroom workers also violated the Eighth Amendment by their "actions which resulted from deliberate indifference." (Id.)

II.

LEGAL STANDARDS

It is well established that a party may obtain discovery regarding any nonprivileged matter that is relevant to any claim or defense. Fed. R. Civ. P. 26(b)(1). Relevant information need not

be admissible at trial so long as the discovery appears to be reasonably calculated to lead to the discovery of admissible evidence. Id. Relevance is construed broadly to include any matter that bears on, or reasonably could lead to other matter that could bear on, any issue that may be in the case. Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978) (citing Hickman v. Taylor, 329 U.S. 495, 501 (1947)) (footnote omitted). Rule 37 of the Federal Rules of Civil Procedure enables the propounding party to bring a motion to compel responses to discovery. Fed. R. Civ. P. 37(a)(3)(B). The party opposing discovery bears the burden of resisting disclosure. Miller v. Pancucci, 141 F.R.D. 292, 299 (C.D. Cal. 1992).

"In general, pro se representation does not excuse a party from complying with a court's orders and with the Federal Rules of Civil Procedure." Fingerhut Corp. v. Ackra Direct Mktg. Corp., 86 F.3d 852, 856-57 (8th Cir. 1996) (citing Jones v. Phipps, 39 F.3d 158, 163 (7th Cir. 1994); Anderson v. Home Ins. Co., 724 F.2d 82, 84 (8th Cir. 1983)). Above all, plaintiffs who choose to represent themselves must abide by the rules of the court in which they litigate. Carter v. Comm'r, 784 F.2d 1006, 1008-09 (9th Cir. 1986); see also Bias v. Moynihan, 508 F.3d 1212, 1223 (9th Cir. 2007) (discussing the pro se litigant's violation of local rules). "[W]hile pro se litigants may be entitled to some latitude when dealing with sophisticated legal issues, acknowledging their lack of formal training, there is no cause for extending this margin to straightforward procedural requirements that a layperson can comprehend as easily as a lawyer." Jourdan v. Jabe, 951 F.2d 108, 109 (6th Cir. 1991); Cone v. Rainbow Play Sys., No. CIV 06-4128,

2008 U.S. Dist. LEXIS 17489, at *4 (D.S.D. Mar. 5, 2008) (explaining that pro se litigants must follow procedural rules).

III.

DISCUSSION

A. Requests for Production of Documents

A portion of the relief Vallery seeks in this Motion to Compel responses to his document requests duplicates the relief he sought his Motion for Order of Disclosure and In Camera Review. (Compare Mot. Compel 4-12, ECF No. 69, with Mot. Order Disclosure 1-2, ECF No. 67.) The Court issued a separate ruling on the requests for production of documents to which Vallery sought responses in his separate Motion for Order of Disclosure [ECF No. 102]. When analyzing this Motion to Compel, the Court will only consider the document requests that it has not already addressed. At issue in this Motion, then, are Vallery's requests for production of documents 32 and 33 in set one, and requests 2, 3, and 4 in set two.

1. Request for Production of Documents 32: Set One

Vallery asks the Defendants to produce "[t]he full names (first, middle, last) of each member of the Calipatria Prison mailroom in July of 2004." (Opp'n Mot. Compel Attach. #2 Ex. A, at 10, ECF No. 86.)[3] Defendants object that the request is improper because it asks them to create a list as opposed to produce documents already in existence. (Id.; see also Opp'n Mot. Compel 2, ECF No. 86.) In response, Vallery maintains that request 32 solicits already-generated records reflecting the names of the

[3] Both Plaintiff and Defendants include with their briefs copies of the discovery at issue. The Court will reference both papers when citing to the discovery requests and responses.

mailroom employees employed in July 2004 and does not require Defendants to create a list or answer an interrogatory. (Mot. Compel 12-13, ECF No. 69; Reply Mot. Compel 2, ECF No. 94.)

A party may serve on another party a request to produce any designated documents that are in the responding party's possession, custody, or control. Fed. R. Civ. P. 34(a)(1). Nonetheless, a party is not required to prepare new documents solely for their own production. Alexander v. FBI, 194 F.R.D. 305, 310 (D.C. Cir. 2000). "Therefore, Rule 34 only requires a party to produce documents that are already in existence." Id.

Defendants maintain that they must create a list of names of the Calipatria mailroom employees in order to respond to the document request. (See Opp'n Mot. Compel 2, ECF No. 86.) If there are no documents that identify individuals working in the Calipatria Prison mailroom in July of 2004, a request for production of documents is not the proper vehicle for obtaining the information. See Alexander, 194 F.R.D. at 310 (denying plaintiffs' request to compel a list of people whose background summaries were requested by the White House because there was no evidence that the Executive Office of the President possessed such a list); Goolsby v. Carrasco, No. 1:09-cv-01650 JLT(PC), 2011 U.S. Dist. LEXIS 71627, at *20-21 (E.D. Cal. July 5, 2011) (finding that a document request asking for the names of employees who supervised the prison cage yard is not a proper request under Federal Rule of Civil Procedure 34(a)); Robinson v. Adams, No. 1:08-cv-01380-AWI-SMS PC, 2011 U.S. Dist. LEXIS 60370, at *53 (E.D. Cal. May 27, 2011) (denying plaintiff's motion to compel responses to a document request seeking the names of prison employees working in building

two during a certain time period because the request did not seek an identifiable document).

Defendants are correct that they are not required to create a list of employees in response to a request for documents. Nevertheless, to the extent that there are any documents in Defendants' custody, control, or possession that identify one or more individuals who worked in the Calipatria Prison mailroom in July of 2004, the documents should be produced. Otherwise, Vallery's Motion to Compel a response to request 32 is **DENIED**.

2. Request for Production of Documents 33: Set One

Next, the Plaintiff requests documents involving any state tort claims actions and § 1983 civil rights actions that have been filed against each Defendant. (Opp'n Mot. Compel Attach. #2 Ex. A, at 10, ECF No. 86.) The Defendants object because Plaintiff asks for public records that are equally available to him and because the request is overly broad. (Id.) Vallery limits the scope of request 33 to include only actions for conduct of the sort alleged in the Second Amended Complaint; Plaintiff narrowed this request on February 9, 2011, yet the Defendants ignore the modification altogether. (Mot. Compel 13, 35, 39, ECF No. 69.) He contends that he lacks access to the documents because he is indigent and incarcerated. (Id. at 13.) Also, Vallery represents that Defendants refuse to provide him with identifying information that would help him find such records. (Id.)

a. Overbreadth

Despite Plaintiff's narrowing of the request to actions for conduct similar to that alleged in this lawsuit, the Defendants continue to argue that request 33 seeks irrelevant information

because it seeks information about unrelated claims. (Opp'n Mot. Compel 2, ECF No. 86.) This objection is **OVERRULED**.

The Defendants further object that the request is overly broad because it seeks attorney notes, deposition transcripts, court files, and other documents. (Id.) Plaintiff clarifies the scope in his Reply, in which he seeks "deposition testimony, admissions, and interrogatory responses from Defendants, Plaintiff's and witnesses." (Reply Mot. Compel 2, ECF No. 94.) Defendants' overbreadth objection is **OVERRULED** for documents relating to discovery generated during litigation.

b. Equal access

Defendants also assert that Plaintiff has equal access to the material sought because lawsuits are matters of public record. (Id.) "A court may refuse to order production of documents of public record that are equally accessible to all parties." 7 James Wm. Moore, et al., Moore's Federal Practice, § 34.12[5][b], at 34-53 (3d ed. 2011) (footnote omitted). "However, production from the adverse party may be ordered when it would be excessively burdensome . . . for the requesting party to obtain the documents from the public source rather than from the opposing party." Id. (footnote omitted).

Vallery expressly states that he has inadequate access because his custody prevents him from obtaining the records on his own, and Defendants do not challenge his contention. (Mot. Compel 13, ECF No. 69); see Lal v. Felker, No. CIV S-07-2060 GEB EFB P, 2010 U.S. Dist. LEXIS 21046, at *9-10 (E.D. Cal. Feb. 10, 2010) (granting plaintiff's motion to compel records contained in his central and medical files because defendants do not rebut plaintiff's assertion

that he has inadequate access to the files). The Plaintiff argues that "Defendants refuse to disclose identifying information which might enable Plaintiff to obtain said court documents." (Mot. Compel 13, ECF No. 69.) There is contrary authority. See Robinson, 2011 U.S. Dist. LEXIS 60370, at *43-44 (denying pro se incarcerated plaintiff's motion to compel complaints and case numbers of lawsuits filed against defendants for the same conduct, and noting that plaintiff could retain someone to retrieve the records where the defendants were not in possession, custody, or control of responsive documents). If Defendants assert that they have documents that are protected from disclosure because of the attorney-client privilege, attorney work product doctrine, or court-imposed protective order, the Defendants shall compile a privilege log identifying those documents, the privilege claimed, and sufficient facts for the Court to determine the basis of the privilege claim. See Perry v. Schwarzenegger, 591 F.3d 1147, 1153 (9th Cir. 2010) (amended); Fed. R. Civ. P. 26(b)(5)(A)(ii).

Vallery's Motion to Compel production of documents in response to request 33 is **GRANTED**, except to the extent that nonprivileged documents are not in Defendants' custody, possession, or control. For those items, Plaintiff should attempt to obtain the publicly filed court documents himself.

3. Requests for Production of Documents 2, 3, and 4: Set Two

Vallery asks for documents identifying the names of the correctional officers assigned to Calipatria's C-Facility kitchen during the period between April and December 2004. (Opp'n Mot. Compel Attach. #2 Ex. B, at 17-18, ECF No. 86.) Among other

objections, Defendants argue that the requests violate the Court's scheduling order because they were served after the March 21, 2011 deadline. (Id.) In response, Vallery acknowledges the deadline but insists that it only applies to interrogatories, not requests for production of documents. (Reply Mot. Compel 3, ECF No. 94.)

On March 28, 2011, Plaintiff served his second set of document requests on defense counsel, and counsel served Defendants' responses on April 27, 2011. (Opp'n Mot. Compel Attach. #1 Decl. Walters 2, ECF No. 86.)[4] This Court's Case Management Conference Order Regulating Discovery and Other Pretrial Proceedings provides, "All interrogatories and document production requests must be served by March 21, 2011." (Case Management Conference Order 1-2, ECF No. 61.) Vallery's second set of requests for production of documents was served one week beyond the Court-imposed deadline, and Plaintiff does not address the untimeliness. (See id.; Mot. Compel 13-14, ECF No. 69.)

Despite his pro se status, Vallery is not entitled to any latitude for the untimeliness. See Fingerhut Corp., 86 F.3d at 856-57 (stating that pro se representation does not excuse a litigant from complying with court orders); Jourdan, 951 F.2d at 109 (explaining that although courts should liberally construe pro se plaintiffs' legal arguments, courts should strictly construe

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[4] The date Vallery submitted the requests to prison authorities constitutes the date Defendants were served. See Schroeder v. McDonald, 55 F.3d 454, 459 (9th Cir. 1995) (quotation and citations omitted); see also Faile v. Upjohn Co., 988 F.2d 985, 986, 988 (9th Cir. 1993), overruled on other grounds, McDowell v. Calderon, 197 F.3d 1253 (9th Cir. 1999) (finding that an incarcerated § 1983 pro se plaintiff served his discovery responses at the time he submitted them to prison authorities for forwarding to the party being served).

their compliance with procedural requirements); see also Carter, 784 F.2d at 1008-09 (noting that pro se plaintiffs must follow the rules of the court). Accordingly, Plaintiff's Motion to Compel responses to the second set of documents requests is **DENIED** as untimely.

B. Requests for Admissions

The Defendants argue that Vallery's Motion to Compel responses to the requests for admissions should be denied on timeliness grounds as well as on the merits. (See Opp'n Mot. Compel 3-6, ECF No. 86.)

1. Timeliness

Defendants Bell, Bourland, Brown, Dee, and Stratton argue that this Motion is untimely because it was filed nearly six months after Defendants' responses were served. (Id. at 3.) The requests for admissions were served on December 21, 2010, and Defendants provided responses between January 6 to 20, 2011. (Id. Attach. #1 Decl. Walters 2.) After exchanging several letters in an attempt to meet and confer, Plaintiff then served amended requests for admissions on April 3, 2011. (Id.) According to Defendants, the amended requests are identical to the original requests; defense counsel notified Vallery of the error on April 25, 2011, and Defendants did not respond to the amended requests. (Opp'n Mot. Compel 3, ECF No. 86; id. Attach. #1 Decl. Walters 3.) Because any motion to compel must be filed within thirty days of service of the response, and Plaintiff has not served any additional requests for admission, the Motion to Compel is untimely by almost 180 days.[5]

[5] Because Plaintiff's Motion to Compel was filed nunc pro tunc to May 25, 2011, it is unclear how the Defendants calculate a 180-day delay based on the record before the Court. (See Mot.

(Id. Attach. #1 Decl. Walters 3-4 (citing Case Management Conference Order 1-2, ECF No. 61).)

In his Reply, Vallery insists that his April 3, 2011 amended requests for admissions differ from the original requests because they contain additional admissions marked, "AMENDED." (Reply Mot. Compel 3-4, ECF No. 94.) "Defendants' erroneous notification of error, served April 25, 2011, constitutes their response to the amended request." (Id. at 4.) Plaintiff urges that any motion to compel would be due thirty days later, and his May 25, 2011 Motion is therefore timely. (Id.) Furthermore, Plaintiff explains that the parties were attempting to meet and confer during the time between Defendants' January 20, 2011 response and the April 3, 2011 amended requests. (Id.)

a. Defendants Brown, Bell, Bourland, and Stratton

Plaintiff asks for an order compelling Brown to respond to requests for admissions 6, 8, and 12, Bell to respond to requests 4 and 7, Bourland to respond to request 5, and Stratton to answer requests 4 and 5. (Mot. Compel 16-18, 21-23, ECF No. 69.)

This Court issued an order regulating discovery, which provides as follows:

> All discovery shall be completed by all parties on or before May 23, 2011; this includes discovery ordered as a result of a discovery motion. All motions for discovery shall be filed no later than thirty (30) days following the date upon which the event giving rise to the discovery dispute occurred. For oral discovery, the event giving rise to the dispute is the completion of the transcript of the affected portion of the deposition. For written discovery, the event giving rise to the discovery dispute is the service of the response.

Compel 1, ECF No. 69.)

(Case Management Conference Order 1-2, ECF No. 61.) Although the Defendants recently requested that the scheduling order be modified, the discovery-related deadlines that had already elapsed were unaffected [ECF Nos. 97, 101].

Vallery's Motion to Compel is untimely as to these Defendants on two grounds. First, the Motion to Compel was filed nunc pro tunc to May 25, 2011, which is two days beyond the May 23, 2011 discovery cutoff date outlined in the Court's Case Management Order. Second, Plaintiff's Motion was filed more than thirty days following the service of Defendants' responses to the requests for admissions. Defendants Brown, Bell, Bourland, and Stratton served their responses to Vallery's initial requests for admissions on January 6 (Brown and Bourland), 10 (Stratton), and 20 (Bell), 2011. (Opp'n Mot. Compel Attach. #1 Decl. Walters 2, ECF No. 86.) At the very latest, Plaintiff had until February 22, 2011, to file a motion, which is thirty days after he received the last response from Bell on January 20, 2011. See Fed. R. Civ. P. 6(a)(1) (stating that when computing time, if the last day is a weekend or legal holiday, the period continues to run until the next day); S.D. Cal. Civ. R. 7.1(c) (adopting the provisions of Federal Rule of Civil Procedure 6). On February 9, 2011, the deadline for moving to compel Responses from Defendants Brown and Bourland, and three days before the deadline to compel from Defendant Stratton, Plaintiff sent defense counsel a "Reply to Defendants' Response to Request for Admissions" in an attempt to meet and confer; Vallery did not receive a response until March 18, 2011. (Mot. Compel 40-

49, ECF No. 69; Opp'n Mot. Compel Attach. #1 Decl. Walters 2-3, ECF No. 86.)[6]

Although the Plaintiff properly attempted to confer with defense counsel prior to filing a motion to compel, his attempt was late, and any delay by counsel in responding does not suspend the thirty-day time limit for filing motions to compel. See S.D. Cal. R. 26.1(a); In re Miles, No. C 10-4725 SBA, 2011 U.S. Dist. LEXIS 97371, at *4 (N.D. Cal. Aug. 30, 2011) ("Self-representation is not an excuse for non-compliance with court rules.") Vallery could have filed a motion before the various February 2011 deadlines and explained his attempt to comply with the meet and confer requirement. See S.D. Cal. R. 26.1(b); Carter, 784 F.2d at 1008-09 ("Although pro se, he is expected to abide by the rules of the court in which he litigates."). Plaintiff also could have sought to extend the thirty-day deadline for filing a motion to compel so that the parties could adequately confer.

Instead, Vallery allowed the various February 2011 deadlines to elapse while he awaited for a letter from defense counsel, which did not arrive until March 18, 2011; Plaintiff responded to defense counsel's letter on March 30, 2011. (Opp'n Mot. Compel Attach. #1 Decl. Walters 2-3, ECF No. 86.) Vallery then served amended requests for admissions as well as another meet and confer letter

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[6] The proof of service for the letter was dated February 9, 2011, yet defense counsel submits that he did not receive it until March 14, 2011. (Mot. Compel 49, ECF No. 69; Opp'n Mot. Compel Attach. #1 Decl. Walters 2, ECF No. 86.) Counsel claims that the letter was mailed from the prison on February 9, but was returned to the prison due to postage issues before it was mailed again. (Mot. Compel 55, ECF No. 69.) The Court treats Vallery's February 9, 2011 declaration of service by mail as the date he gave the discovery reply to prison authorities and therefore served Defendants. See Faile, 988 F.2d at 986, 988.

to Defendants on April 3, 2011. (Id. at 3; see id. Attach. #4 Ex. H, at 62-73; see also Mot. Compel 57-60, ECF No. 69.) The original requests for admissions to Brown, Bell, Bourland, and Stratton are identical to the requests Plaintiff refers to as his "Amended Requests for Admissions" to Brown, Bell, Bourland, and Stratton. (Compare Opp'n Mot. Compel Attach. #3 Ex. C, at 20-45, ECF No. 86, with id. Attach. #4 Ex. H, at 62-73.) Plaintiff cannot restate his requests for admissions as "Amended Requests for Admissions" in an attempt to avoid being untimely.

Thus, the Motion to Compel responses to the requests for admissions from Brown, Bell, Bourland, and Stratton filed nunc pro tunc to May 25, 2011, was approximately three months late.

b. Defendant Dee

The Motion to Compel responses from Defendant Dee to requests for admissions 5, 12, 15, and 16 is untimely on the same two grounds. (Mot. Compel 18-21, ECF No. 69.) First, the Motion was filed beyond the May 23, 2011 discovery cutoff date. (See Case Management Conference Order 1-2, ECF No. 61; Mot. Compel 1, ECF No. 69.) Second, Plaintiff's Motion was filed more than thirty days after the service of Defendant Dee's response. (See Case Management Conference Order 1-2, ECF No. 61.) Because Dee served her responses to the original requests for admissions on January 12, 2011, any motion to compel must have been filed within thirty days, or by February 11, 2011. (Opp'n Mot. Compel Attach. #1 Decl. Walters 2, ECF No. 86). As outlined above, Vallery sent a meet and confer letter to defense counsel on February 9, 2011, but did not receive a response until March 18, 2011. (Id. at 2-3.) In the February 9, 2011 letter, Vallery appears to amend request for

admission 17 to Dee by dividing it into requests 17(a) and 17(b). (Mot. Compel 45, ECF No. 69.)

The thirty-day deadline was not suspended while Vallery awaited a response from counsel to Plaintiff's meet and confer letter. Before the February 11, 2011 deadline, Vallery could have filed a motion to compel describing his attempt to confer with Dee's attorney, or he could have sought to continue the deadline. The Motion to Compel responses from Dee was filed approximately three and one-half months late.

The result is the same even if Plaintiff believed he properly awaited Dee's response to requests 17(a) and 17(b) before seeking Court intervention because Vallery is not moving to compel Dee to respond to request for admission 17. (See Mot. Compel 18-21, ECF No. 69 (seeking responses from Dee to the original requests for admissions numbers 5, 12, 15, and 16 only). Furthermore, although Dee amended her response to initial request for admission 8 on March 18, 2011, that request is also not at issue in this Motion to Compel. (Id.; Opp'n Mot. Compel Attach. #3 Ex. E, at 52, ECF No. 86.)

On April 3, 2011, Plaintiff served Dee amended request 17, and included an additional request 19, to which Dee provided responses. (Opp'n Mot. Compel Attach. #4 Ex. G, at 59-61, ECF No. 86; see id. Ex. H, at 70.) The amended requests for admissions to Defendant Dee differ from the original requests to Dee. (Compare Opp'n Mot. Compel Attach. #4 Ex. H, at 68-70, ECF No. 86, with id. Attach #3 Ex. C, at 34-40.) Even so, Vallery is not seeking answers from Dee to the amended requests for admissions. (See Mot. Compel 18-21, ECF No. 69.) For all of these reasons, Plaintiff's Motion to

Compel Dee to provide further responses to the original requests is also untimely.

As discussed above, Vallery's representation that his amended requests for admissions differ from the original requests is without merit. (See Reply 3-4, ECF No. 94.) Similarly, the Court is not persuaded that Plaintiff's delay is excused by his attempt to meet and confer. (See id.) Vallery has not established cause for the untimely Motion or provided legitimate reasons for his approximate three-month delay. The Motion to Compel all five Defendants to respond to the requests for admissions is **DENIED** as untimely. See Farier v. City of Mesa, 384 F. App'x 683, 684 (9th Cir. 2010) (finding that the district court did not abuse its discretion when denying a motion to compel because it was untimely by more than six months and failed to establish good cause to excuse the delay); see also Cone, 2008 U.S. Dist. LEXIS 17489, at *4 (explaining that plaintiffs who represent themselves are expected to follow all procedural rules).

C. Interrogatories

Although Plaintiff moves to compel answers to his original interrogatories served February 9, 2011, as well as his amended interrogatories served May 9, 2011,[7] Vallery does not distinguish between the two sets of discovery in the Motion to Compel. (See

[7] Defendants' service is determined by the date that Plaintiff submitted the interrogatories to prison authorities. See Schroeder, 55 F.3d at 459 (quoting Faile, 988 F.2d at 988). The proofs of service for the interrogatories and amended interrogatories are dated February 9 and May 8, 2011, respectively. (Mot. Compel 76, ECF No. 69; Opp'n Mot. Compel Attach. #1 Decl. Walters 3-4, ECF No. 86.) Thus, February 9 and May 9, 2011, the Monday following Sunday, May 8, 2011, constitute the dates on which the Defendants were served. Fed. R. Civ. P. 6(a)(1)(C); see S.D. Cal. Civ. R. 7.1(c).

Mot. Compel 24-31, ECF No. 69; Opp'n Mot. Compel 6, ECF No. 86 (clarifying that when Vallery refers to his "5-7-11 Rule 37 pleading," he is referring to the amended interrogatories.) Plaintiff also seeks answers to the "additional interrogatories" to Defendant Brown served along with the amended interrogatories on May 9, 2011. (Mot. Compel 30-31, ECF No. 69.) The Court will consider the original, amended, and additional interrogatories separately.

1. Original Interrogatories

Plaintiff asks the Court to order Defendants Dee, Bell, Bourland, and Stratton to respond to interrogatories 16, 10, 9, and 8, respectively. (Id. at 24-31.) The interrogatories ask whether each Defendant would be willing to take a polygraph examination. (Opp'n Mot. Compel Attach. #4 Ex. I, at 79, 85, 91-92, 108, ECF No. 86.)

Defendants object that the discovery is argumentative, seeks irrelevant information, and should be excluded under Federal Rule of Evidence 403. (Opp'n Mot. Compel 6, ECF No. 86.) Polygraph examination evidence is generally inadmissible, and none of the exceptions apply. (Id. (citing United States v. Cordoba, 991 F. Supp. 1199, 1200-01 (C.D. Cal. 1998) ("Cordoba II")).) According to Defendants, the interrogatories are also inadmissible because the probative value is substantially outweighed by prejudicial impact. (Id. (citing United States v. Benavidez-Benavidez, 217 F.3d 720, 725 (9th Cir. 2000)).)

Vallery counters that polygraph evidence is admissible if it satisfies the standards regarding the admissibility of expert evidence set forth in Federal Rule of Evidence 702. (Reply Mot.

Compel 7-8, ECF No. 94.) Further, the interrogatories seek relevant information because an unwillingness to take the polygraph test would bear on each Defendant's credibility. (See Mot. Compel 26-27, 29-30, ECF No. 69 (arguing that refusal to take a polygraph would suggest that the Defendant is not being "forthcoming" or has something to hide).) Plaintiff also maintains that the relevance relating to the Defendants' credibility is "strong," while undue prejudice is "virtually nonexistent." (Id. at 26 (citing Fed. R. Civ. P. 403).)

With the exception of interrogatory 17 to Brown, Vallery expressly moves to compel answers to each interrogatory inquiring about each Defendant's willingness to submit to polygraph examining. (See id. at 24 (asking Brown to answer interrogatory 6 as well as additional interrogatories 18 through 23 served on May 9, 2011).) Yet, in his Reply, Plaintiff urges that interrogatory 17 to Brown is not objectionable for the same reasons that the polygraph-related interrogatories to the other Defendants are not objectionable. (See Reply 8-9, ECF No. 94.) Although courts should not give pro se plaintiffs latitude in complying with procedural requirements, courts must construe self-represented litigants' pleadings liberally to give them any benefit of the doubt. Jourdan, 951 F.2d at 109; Karim-Panahi v. Los Angeles Police Dep't, 839 F.2d 621, 623 (9th Cir. 1988). This rule of liberal construction is "particularly important in civil rights cases." Ferdik v. Bonzelet, 963 F.2d 1258, 1261 (9th Cir. 1992). The Court interprets Vallery's Motion to include interrogatory 17 to Defendant Brown, which asks Brown if he would be willing to take a polygraph examination.

At issue is whether interrogatories 8, 9, 10, 16, and 17 could reasonably lead to the discovery of admissible evidence. Fed. R. Civ. P. 26(b)(1). Ninth Circuit jurisprudence concerning the admissibility of polygraph evidence has been in flux since the Supreme Court's decision in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). Prior to Daubert, unstipulated polygraph evidence was per se inadmissible. Brown v. Darcy, 783 F.2d 1389, 1395 (9th Cir. 1986). Then, in United States v. Cordoba, 104 F.3d 225 (9th Cir. 1997) ("Cordoba I"), the Ninth Circuit acknowledged that although Daubert had implicitly overruled the bright line rule in Brown barring polygraph evidence, such evidence remained suspect. Cordoba I, 104 F.3d at 228. Courts must therefore engage in a particularized factual inquiry into the scientific validity of polygraph evidence. Id. at 228, 230. On remand, the district court conducted a Daubert hearing and excluded the evidence under Federal Rules of Evidence 702 and 403. Cordoba II, 991 F. Supp. at 1208. In United States v. Cordoba, 194 F.3d 1053 (9th Cir. 1999) ("Cordoba III"), the Ninth Circuit affirmed the district court's ruling in Cordoba II. The appellate court recently described its Cordoba decisions as confirming that district courts have wide discretion in excluding polygraph evidence. Benavidez-Benavidez, 217 F.3d at 724.

Although Vallery solicits responses to the interrogatories under Federal Rules of Evidence 702 and 403, district courts are not required to conduct both analyses. See id. at 724-25. At this stage in the litigation, neither party has requested a Daubert hearing to determine the scientific validity of the polygraph evidence; as a result, the exclusion of expert testimony under Rule

702 is not appropriate. See Ramirez-Robles, 386 F.3d at 1245; Dixon v. City of Coeur D'Alene, No. 2:10-cv-00078-LMB, 2010 U.S. Dist. LEXIS 124393, at *4 (D. Idaho Nov. 23, 2010). Consequently, the Court will consider whether the interrogatories could lead to the discovery of admissible evidence under Federal Rule of Evidence 403 only. Dixon, 2010 U.S. Dist. LEXIS 124393, at *4 (analyzing plaintiff's motion under Rule 403 only because neither party requested a Daubert hearing); see Ramirez-Robles, 386 F.3d at 1246 ("The relevant question is whether the record supports the exclusion of the evidence under Rule 403."); Benavidez-Benavidez, 217 F.3d at 724-25 (explaining that Rule 403 alone provides courts with ample opportunity for excluding polygraph evidence).

a. Probative value versus prejudicial effect

Courts may exclude polygraph evidence under Rule 403 of the Federal Rules of Evidence if the probative value is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Cordoba III, 194 F.3d at 1062-63. This weighing process is primarily for the district courts to perform. Id. at 1063. "Trial judges have wide discretion to exclude evidence . . . because the considerations arising under Rule 403 are 'susceptible only to case-by-case determinations, requiring examination of the surrounding facts, circumstances, and issues.'" R.B. Matthews, Inc. v. Transamerica Transp. Servs., Inc., 945 F.2d 269, 272 (9th Cir. 1991) (quotation omitted).

Courts have held that lie detector evidence has "powerful persuasive value" and a "misleading reputation as a truth teller." Ramirez-Robles, 386 F.3d at 1245; United States v. Marshall, 526 F.2d 1349, 1360 (9th Cir. 1975). This evidence is disfavored

because it has the potential to replace a jury's independent credibility determination. See United States v. Awkard, 597 F.2d 667, 671 (9th Cir. 1979) (noting that credibility is for the jury, and the jury is the lie detector in the courtroom); Dixon, 2010 U.S. Dist. LEXIS 124393, at *10 (determining that evidence of the mere fact of the examinations, even without the disclosure of results, is prejudicial). Nonetheless, "[p]olygraph evidence might be admissible if it is introduced for a limited purpose that is unrelated to the substantive correctness of the results of the polygraph examination." United States v. Miller, 874 F.2d 1255, 1261 (9th Cir. 1989).

Here, Vallery seeks answers to interrogatories asking whether each Defendant would be willing to submit to polygraph examining because the answers would bear on the Defendants' credibility. In general, the use of polygraph evidence merely to bolster an individual's credibility is "highly prejudicial." United States v. Sherlin, 67 F.3d 1208, 1217 (6th Cir. 1995); see Cordoba III, 194 F.3d at 1063. Many courts have therefore determined that evidence relating to an individual's willingness to submit to polygraph testing should be excluded. United States v. Vigliatura, 878 F.2d 1346, 1349 (11th Cir. 1989); Ortega v. Clark, No. 2:08-cv-1657-KJM TJB, 2011 U.S. Dist. LEXIS 21333, at *60 (E.D. Cal. Mar. 3, 2011) (explaining the inadmissibility of such evidence in criminal proceedings); United States v. Koebele, No. CR 07-2015-MWB, 2008 U.S. Dist. LEXIS 519, at *13 (N.D. Iowa Jan. 3, 2008) (doubting that a criminal defendant's willingness or unwillingness to take a polygraph test has any probative value); see Jones v. Geneva Pharmaceuticals, Inc., 132 F. App'x 772, 776 (10th Cir. 2005);

United States v. Russon, 796 F.2d 1443, 1453 (11th Cir. 1986); United States v. Bursten, 560 F.2d 779, 785-86 (7th Cir. 1977); Baker v. Holman, No. 1:09CV36-A-D, 2011 U.S. Dist. LEXIS 63108, at *19, 29-30 (N.D. Miss. June 13, 2011) (excluding the evidence under Rule 403). "[A]ny weight jurors might give to evidence that a defendant was willing or unwilling to take a polygraph examination would likely be based on an improper emotional response, making such evidence unfairly prejudicial." Koebele, 2008 U.S. Dist. LEXIS 519, at *13-14.

Vallery merely asks whether each Defendant would be willing to take a lie detector test. Not only has there not been any examination administered, there is no indication that Defendants will ever submit to actual polygraph testing. Contra Waters v. United States Capitol Police Bd., 216 F.R.D. 153, 159-60 (D.D.C. 2003) (granting plaintiff's motion to compel in part and ordering disclosure of information surrounding the employees who had been ordered to take a polygraph test). When contemplating the likelihood that the evidence would ultimately be admissible, the probative value of the information is substantially outweighed by the danger of unfair prejudice. See United States v. Dinga, 609 F.3d 904, 908-09 (7th Cir. 2010) (finding that evidence was only marginally probative of the individual's credibility because no test had even been taken, and there was a real potential for confusing the issues and misleading the jury); United States v. Harris, 9 F.3d 493, 502 (6th Cir. 1993) (holding that a defendant's willingness to take a polygraph is only "marginally relevant" to credibility); Wolfel, 823 F.2d at 975. As a result, interrogatories 8, 9, 10, 16, and 17 are unlikely to lead to the

discovery of admissible evidence, and Plaintiff's Motion to Compel responses is **DENIED**.

2. Amended Interrogatories

The amended interrogatories that Vallery seeks answers to are numbers 6 to Brown, 10 to Dee, 9 and 9(a) to Bell, 7 and 7(a) to Bourland, and 4 and 4(a) to Stratton. (Mot. Compel 24-30, ECF No. 69; Reply 8, 10, ECF No. 94.) The Defendants object on timeliness and substantive bases. (Opp'n Mot. Compel 7, ECF No. 86.)

a. Timeliness

Defendants allege that Plaintiff's amended interrogatories, which include both amended and additional interrogatories, are untimely because they were served beyond the March 21, 2011 deadline to serve interrogatories. (Id.; see id. Attach. #4 Ex. J, at 61, ECF No. 86.)

The Court's order regulating discovery specifies that all interrogatories must be served by March 21, 2011. (Case Management Conference Order 2, ECF No. 61.) The only request to modify the scheduling order occurred after the discovery cutoff had passed, and only affected the trial-related deadlines [ECF Nos. 97, 99, 101]. Because Vallery did not serve his amended interrogatories until May 9, 2011, forty-nine days late, the interrogatories were untimely, and the Motion to Compel responses should be denied on that basis.

The Plaintiff advances several arguments in an attempt to overcome the defect. First, Vallery submits that some of the questions included in the amended interrogatories are merely earlier interrogatories rewritten to secure responses. (Reply 8, ECF No. 94 (stating that numbers 6, 10, 9, 9(a), 7, and 4, 4(a) to

Brown, Dee, Bell, Bourland, and Stratton, respectively, were merely rewritten).) This is an over-simplification. In the amended interrogatories served on May 9, 2011, Vallery modified original interrogatories 4, 6, 7, 9, and 10 (timely served on February 9, 2011), and drafted additional interrogatories 4(a), 7(a), and 9(a). (Compare Mot. Compel 63, 66, 68, 70, 74, ECF No. 69, with Opp'n Mot. Compel Attach. #4 Ex. I, at 45, 77, 84-85, 91, 107, ECF No. 86; see also Mot. Compel 68, 70, 74, ECF No. 69.) For example, original interrogatory 6 to Brown asks, "Were you put on notice that Plaintiff posed a threat of any kind? Please include and identify all documents that contain information which supports your response." (Opp'n Mot. Compel Attach. #4 Ex. I, at 45, ECF No. 86.") Defendant Brown objected on vague, ambiguous, and compound grounds. (Id.) In his amended interrogatories, Vallery states, "In an attempt to cure any vagueness and ambiguity, Plaintiff amends number six [to Brown] as follows: On the day of the incidents set forth in the second amended complaint and prior to your searches of Plaintiff, were you put on notice by another officer(s) of facts justifying the searches?" (Mot. Compel 63, ECF No. 69 (emphasis added).)

Second, Plaintiff alleges that interrogatories 8, 9, 10, 16, and 17, involving polygraph examinations, were actually part of the original, timely interrogatories. (Reply 9, ECF No. 94.) This argument misses the point because at issue is the timeliness of amended interrogatories 6, 10, 9, 9(a), 7, 7(a), and 4, and 4(a), not 8, 9, 10, 16 and 17. Third, Plaintiff maintains that the other interrogatories included in the May 9, 2011 discovery, numbers 1 and 7 to Stratton, and 17 to Brown, are restated original

interrogatories. (Id.) This, too, is inconsequential. Vallery is not moving to compel original interrogatories 1 and 7 to Stratton, and as addressed above, the Court construed Vallery's briefs liberally and has already considered interrogatory 17 to Brown.

Self-represented litigants are not excused from complying with a court's orders, and Plaintiff's Motion to Compel responses to amended interrogatories 4, 4(a), 6, 7, 7(a), 9, 9(a), and 10 is **DENIED**.

3. Additional Interrogatories to Brown

Lastly, the Plaintiff moves to compel answers to "additional interrogatories for Defendant Brown," which appear to be amended interrogatories 18 through 23 to Brown served on May 9, 2011. (Mot. Compel 30-31, 64-65, ECF No. 69; Reply 11, ECF No. 94; see also Opp'n Mot. Compel 8, ECF No. 86.) Additional interrogatory 18 inquires whether Sergeant Dee, who was Brown's supervisor at the time, asked Brown about the strip search after Vallery had left Brown's presence. (Mot. Compel 64-65, ECF No. 69.) Number 19 asks what, if anything, Sergeant Dee asked Brown about the search, and how Brown responded. (Id. at 65.) Additional interrogatory 20 inquires whether, after Brown strip searched Vallery on April 17, 2004, Dee said or implied that Brown's behavior toward Vallery was unacceptable. (Id.) Next, number 21 requests what other officer was present in the "MTA's office" after the April 17th strip search, in addition to Sergeant Dee. (Id.) Additional interrogatory 22 solicits the names of the officers present on April 17, 2004 to assist Brown as he escorted Vallery to the MTA's office. (Id.) Finally, in number 23, Plaintiff asks Brown what

officers were present during and immediately after Brown's April 15, 2004 search of Vallery, other than Defendant Dee. (Id.)

a. Timeliness

On May 17, 2011, after receiving the additional interrogatories, Defendant Brown served Plaintiff objections to the additional interrogatories and mailed Vallery a letter explaining the objections. (Opp'n Mot. Compel Attach. #1 Decl. Walters 4, ECF No. 86 (citing id. Attach. #4 Ex. J, at 111-12); see Mot. Compel 77, ECF No. 69.) The Defendant argues that these interrogatories similarly violate the March 21, 2011 deadline for serving interrogatories and document production requests. (Opp'n Mot. Compel 8, ECF No. 86; see Mot. Compel 77, ECF No. 69; see also Case Management Conference Order 2, ECF No. 61.)

Vallery argues, "Aside from timeliness, Defendants lodge no specific objections to [additional] interrogatories numbers 18-23 (for Brown)." (Reply 11, ECF No. 94.) Plaintiff ignores the deadline for serving interrogatories; he then construes the Defendant's timeliness objection as relating only to the May 23, 2011 discovery cutoff. Vallery alleges that if Defendant was unable to respond to the additional interrogatories in the two week time period between the May 9, 2011 service and the May 23, 2011 discovery cutoff, Brown should have sought an extension of the May 23, 2011 deadline. (Mot. Compel 30-31, ECF No. 69; see also id. at 77 (explaining to Vallery that the discovery cutoff is May 23, 2011, but responses would not be due until June).) Plaintiff further asserts that any delay was caused by his good faith attempt to resolve the dispute with counsel. (Id. at 31; Reply 11, ECF No. 94.) Also, discovery proceedings were delayed for one month due to

the prison's delay in delivering Vallery's original interrogatories dated February 9, 2011, to Brown. (Mot. Compel 31, ECF No. 69; Reply 11, ECF No. 94.) The Plaintiff argues that to address the mailing problems, he has filed a Motion to Appoint Counsel, which is still pending. (Mot. Compel 31, ECF No. 69; see Reply 11, ECF No. 94.)[8]

Because Vallery served additional interrogatories 18 through 23 on May 9, 2011, far beyond the March 21, 2011 deadline for serving interrogatories, the discovery is untimely. Plaintiff's Motion to Compel Brown to respond to additional interrogatories 18 through 23 is **DENIED**.

IV. CONCLUSION

Subject to a protective order, the Plaintiff's Motion is **GRANTED in part and DENIED in part** for the reasons set forth above. IT IS HEREBY ORDERED:

1. Plaintiff's Motion to Compel a response to document request numbers 32 in set one, and 2, 3, and 4 in set two, is **DENIED**, except to the extent outline above. The Motion to Compel a response to document request number 33 in set one is **GRANTED** as explained. The Motion to Compel Brown to respond to requests for admission 6, 8, and 12; Bell to respond to requests 4 and 7; Bourland to respond to request 5; Stratton to respond to requests 4 and 5; and Dee to respond to requests 5, 12, 15, and 16; is **DENIED**. Vallery's Motion to Compel answers to his February 9 interrogatories (8, 9, 10, 16, and 17) and May

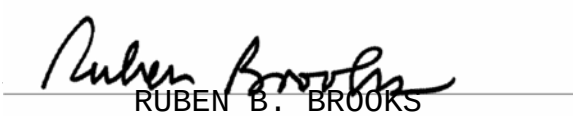
[8] Since the filing of his Motion to Compel, Vallery's Motion for Appointment of Counsel has been denied [ECF No. 74].

9, 2011 amended (6, 9, 9(a), 7, 7(a), 4, and 4(a)) and additional interrogatories (18-23) is **DENIED**.

2. The hearing on Defendants' Motion for Summary Judgment is currently set for November 21, 2011, at 10:00 a.m. Plaintiff may file one supplemental opposition that is limited to arguments based on the evidence produced as a result of this Motion to Compel or Plaintiff's separate Motion for Order of Disclosure and In Camera Review. Vallery may file the comprehensive supplemental brief by November 4, 2011.

4. The Defendants may file a reply to Plaintiff's Opposition [ECF No. 79] and any supplemental opposition by November 11, 2011.

DATE: October 6, 2011



RUBEN B. BROOKS
United States Magistrate Judge

cc: Judge Sabraw
All Parties of Record