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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

IMMANUEL PRICE,

Plaintiff,

v.

J. WIESE,

Defendant.

Case No.: 3:16-cv-1174-CAB-AHG

ORDER:

**(1) DENYING AS MOOT
PLAINTIFF’S MOTION FOR
DISCOVERY; and**

**(2) SUA SPONTE REOPENING
DISCOVERY ON A LIMITED BASIS
AND EXTENDING PRETRIAL
MOTIONS DEADLINE**

[ECF No. 87]

I. BACKGROUND

On March 4, 2019, the Court filed its initial Scheduling Order setting deadlines of July 12, 2019 for fact discovery and September 27, 2019 for expert discovery. ECF No. 63. Two days before the close of fact discovery, Defendant moved to take Plaintiff’s deposition out-of-time on September 9, 2019, on the basis that depositions at the institution where Plaintiff was currently incarcerated were booked “more than eight weeks out[.]”

1 ECF No. 72.¹ The Court granted Defendant’s request. ECF No. 73. On July 23, 2019,
2 Plaintiff also sought an extension of time to complete fact discovery, which the Court
3 granted despite finding Plaintiff had not diligently pursued discovery up to that point, on
4 the basis that his *pro se* status warranted some leniency. ECF Nos. 77, 82. Based on that
5 extension, both fact and expert discovery in this matter closed on September 27, 2019. *See*
6 ECF No. 82.

7 The six-week interim between the Court’s August 16, 2019 order extending fact
8 discovery and the September 27, 2019 fact discovery deadline is riddled with scheduling
9 snafus and delays beyond the parties’ control. First, Plaintiff was transferred to the Salinas
10 Valley State Prison, resulting in Defendant rescheduling the deposition for September 20,
11 2019. *See* ECF No. 88 at 3. Defendant sent notice of the rescheduling to Plaintiff on
12 September 3, 2019. *Id.* On September 17, 2019, Defendant once again sent notice to
13 Plaintiff that the deposition was rescheduled for September 23, 2019 due to a cancellation
14 by Defendant’s court reporter. *Id.* Meanwhile, on September 13, 2019, Plaintiff received
15 the September 3rd notice and drafted the Motion for Discovery that is presently before the
16 Court, asking the Court to reschedule his deposition and allow Plaintiff to depose
17 Defendant as well as four other police officers who were eyewitnesses to the arrest incident
18 underlying this litigation as part of a “universal deposition.” ECF No. 87. However, the
19 Motion was not filed until September 26, 2019 due to the ordinary delays associated with
20 prisoner mail. Thus, before Plaintiff’s Motion for Discovery was filed, Defendant’s counsel
21 traveled more than 400 miles each way to Salinas Valley State Prison to take Plaintiff’s
22 deposition on September 23, 2019. ECF No. 88 at 3. Defendant contends Plaintiff refused
23 to participate or provide any testimony and represents that defense counsel is currently
24

25
26 ¹ September 9, 2019 is eight weeks and five days after July 10, 2019, when Defendant
27 filed the motion for an extension. Thus, although not expressly stated in Defendant’s
28 Motion, it appears Defendant did not attempt to arrange Plaintiff’s deposition until the
final days of the discovery period.

1 preparing a motion on that issue. *Id.* at 3, 5; ECF No. 88-1.

2 II. DISCUSSION

3 Defendant correctly notes that Plaintiff’s Motion for Discovery is now moot because
4 the date of his deposition has passed. Consequently, the Court **DENIES** Plaintiff’s Motion
5 (ECF No. 87) **as moot**. Nonetheless, in light of the unique circumstances of this case and
6 for the reasons explained more fully below, the Court finds good cause to extend the pretrial
7 deadlines in the current scheduling order by approximately six weeks for the limited
8 purpose of permitting Defendant to take Plaintiff’s deposition and, if Plaintiff is able to
9 make the requisite showing, to permit him to take Defendant’s deposition as well.

10 “Public policy favors disposition of cases on the merits.” *Pagtalunan v. Galaza*, 291
11 F.3d 639, 643 (9th Cir. 2002). Although this principle is usually invoked in cases involving
12 default judgment, the Court finds it apposite here given that absent depositions of either
13 party, the record will be nearly if not entirely devoid of facts going to the merits. The
14 parties’ October 25, 2019 deadline to file summary judgment motions is fast approaching.
15 However, “summary judgment is disfavored where relevant evidence remains to be
16 discovered, particularly in cases involving confined *pro se* plaintiffs.” *Jones v. Blanas*, 393
17 F.3d 918, 930 (9th Cir. 2004). Thus, if Defendant were to file a summary judgment motion
18 on the sparse record before the Court and Plaintiff sought “additional discovery to explore
19 facts essential to justify [his] opposition” due to lack of discovery, the Court may decide
20 to stay its ruling and reopen discovery at that juncture pursuant to Rule 56(d) and the
21 relevant case law in this Circuit. *Id.* (quoting *Crawford-El v. Britton*, 523 U.S. 574, 599
22 n.20 (1998)); *see also* Fed. R. Civ. P. 56(d)(2). Although neither party has yet filed such a
23 motion, the Court finds it prudent to head off such an issue at the pass.

24 “At the same time, a case that is stalled or unreasonably delayed by a party’s failure
25 to comply with deadlines and discovery obligations cannot move forward toward resolution
26 on the merits.” *In re PPA Prod. Liability Litig.*, 460 F.3d 1217, 1228 (9th Cir. 2006); *see*
27 *also Liguori v. Hansen*, No. 2:11-CV-00492-GMN, 2012 WL 760747, at *7 (D. Nev. Mar.
28 6, 2012) (“The preference for deciding cases on the merits does not grant litigants a license

1 to ignore or disregard discovery deadlines.”). Therefore, the Court would not ordinarily
2 extend deadlines simply because the discovery taken during the discovery period is
3 severely lacking. As outlined above, however, the dearth of discovery in this case results
4 at least in part from a series of mail and filing delays causing a serious miscommunication
5 about the nature of the September 23, 2019 deposition. From Plaintiff’s perspective, he had
6 an outstanding request to the Court to continue the deposition and permit him to depose
7 defense witnesses on the same date. It is also unclear from the record whether Plaintiff
8 received Defendant’s notice, sent by overnight mail on September 17, 2019, that the
9 deposition had been rescheduled for a third time. While neither Plaintiff’s misconception
10 nor potential lack of notice excuses his refusal to participate, the result—a threadbare
11 evidentiary record—benefits no one, and the reopening of discovery down the road may
12 be required in the interest of justice under Rule 56(d). *See, e.g., J & J Sports Prod., Inc. v.*
13 *Bailey*, No. 1:14-CV-01353-DAD-JLT, 2016 WL 6648638, at *7 (E.D. Cal. Nov. 9, 2016)
14 (*sua sponte* reopening discovery at the summary judgment stage “in the interest of justice”
15 because “additional relevant evidence likely remains to be discovered”); *Harris v. Pate*,
16 440 F.2d 315, 318-19 (7th Cir. 1971) (reversing the district court’s denial of a *pro se*
17 prisoner plaintiff’s request for a continuance to obtain additional evidence to oppose a
18 summary judgment motion, reasoning that “Plaintiff was not represented by counsel and,
19 because of his incarceration, he was less able than an ordinary party to obtain affidavits
20 effectively and expeditiously|. . . . The failure to grant [plaintiff’s] motion deprived him of
21 a reasonable opportunity to present all material made pertinent to such a motion by Rule
22 56.”) (internal quotations omitted).

23 Moreover, “[w]e construe liberally the filings and motions of a *pro se* inmate in a
24 civil suit.” *Thomas v. Ponder*, 611 F.3d 1144, 1150 (9th Cir. 2010). Therefore, while the
25 precise relief requested in Plaintiff’s Motion for Discovery (ECF No. 87) is moot since the
26 date of his deposition has passed, construed liberally, the motion requests permission
27 generally to take the depositions of Defendant and the percipient witnesses named in the
28 motion. On July 17, 2019, Plaintiff previously made a similar request to depose Defendant

1 and other witnesses that only went unaddressed because it was raised in response to
2 Defendant’s ex parte motion to take Plaintiff’s deposition, *after* the Court had already ruled
3 on the relevant motion. *See* ECF No. 74 at 3-4. Had Plaintiff instead filed an affirmative
4 motion seeking the relief requested in his response during the discovery period, it would
5 have been considered by the Court.

6 Importantly, during the discovery period, Plaintiff was entitled to take the
7 depositions of Defendant and other witnesses in this case. *See* Fed. R. Civ. P. 30(a)(1);
8 *Sinegal v. Duarte*, No. 11CV2534-BEN-JMA, 2013 WL 5408602, at *1 (S.D. Cal. Sept.
9 25, 2013) (noting that a *pro se* prisoner plaintiff “as a matter of procedure, does not require
10 leave of Court to take Defendants’ depositions.”). However, the Court could not have
11 granted Plaintiff’s request for a “universal deposition” for several reasons. First, it lacks
12 the “reasonable notice” required by Rule 30. Second, it is at least implied in his Motion
13 that Plaintiff expected Defendant or the Court to bear the cost of the deposition. *See* ECF
14 No. 87 at 2 (requesting permission to depose eyewitness police officers “in one ‘universal
15 deposition hearing,’ for fairness.”). To take depositions in compliance with the Rules,
16 Plaintiff must (1) give reasonable notice to the party or parties he wishes to depose; (2) pay
17 all costs associated with the deposition(s). *See* Fed. R. Civ. P. 30(b)(1) – (b)(3). Third,
18 Plaintiff would have to provide a transcript of any deposition testimony he would want to
19 use as evidence and pay for those transcription costs. Fed. R. Civ. P. 32(c).

20 Alternatively, Plaintiff could take depositions of the witnesses by written questions,
21 but such depositions must also be taken before an officer authorized to administer oaths by
22 federal or California law, a person appointed by the Court to administer oaths and take
23 testimony, or another officer stipulated by the parties. Fed. R. Civ. P. 28(a); Fed. R. Civ.
24 P. 29(a). And again, Plaintiff would have to bear all costs associated with delivering a copy
25 of his questions to the officer and the officer’s carrying out of his or her duties under Rule
26 31(b). *See Lopez v. Horel*, No. C 06-4772 SI PR, 2007 WL 2177460, at *2 (N.D. Cal. July
27 27, 2007) (“If plaintiff wants to depose defendant on written questions, plaintiff needs to
28 set up such a deposition, arrange for a court reporter and arrange for the attendance of the

1 witness. It is not defendant’s obligation or the court’s obligation to do so”), *aff’d*, 367 F.
2 App’x 810 (9th Cir. 2010). The same court noted, however, “[t]he deposition upon written
3 questions procedure may sound like an inexpensive way for a prisoner to do discovery but
4 usually is not.” *Id.* at *2 n.2.

5 The fact that Plaintiff is proceeding *in forma pauperis* does not alter his
6 responsibility to bear the costs of any deposition he wishes to take, either orally or by
7 written questions. *See Sinegal*, 2013 WL 5408602, at *1 (finding the *pro se* incarcerated
8 plaintiff “must bear responsibility for the costs of recording any deposition he notices[,]
9 . . . would be responsible for arranging the presence of an officer authorized to administer
10 oaths either by federal law or by the law in the place of examination . . . , and would be
11 required to bear any costs related thereto, at any deposition he takes.”); *Miller v. Rufion*,
12 No. 08CV01233-BTM-WMC, 2010 WL 2572842, at *2 (E.D. Cal. June 22, 2010)
13 (“[P]arties proceeding in forma pauperis remain responsible for conducting and paying for
14 their own discovery”); *Brooks v. Tate*, No. 1:11-CV-01503 AWI, 2013 WL 4049053, at *1
15 (E.D. Cal. Aug. 7, 2013) (“[Plaintiff]’s in forma pauperis status does not entitle Plaintiff to
16 free services such as scheduling, conducting and recording the deposition. If Plaintiff
17 wishes to conduct oral or written depositions, he must review Federal Rules of Civil
18 Procedure 28, 30, 31, and 45.”).

19 Perhaps the most significant barrier to Plaintiff’s request to take depositions is that,
20 as Defendant notes, all witnesses Plaintiff wishes to depose live outside the 100-mile radius
21 of Rule 45 and thus Plaintiff cannot compel their attendance. *See* ECF No. 88 at 4; Fed. R.
22 Civ. P. 45(c)(1)(A). However, the 100-mile limitation does not apply to a party who lives
23 or is employed in the same state where the deposition will take place. Fed. R. Civ. P.
24 45(c)(1)(B). Therefore, if Plaintiff shows he can meet all other requirements, the Court will
25 reconsider his request to take **Defendant’s deposition only** during the reopened discovery
26 period.

27 In light of the foregoing considerations, the Court *sua sponte* finds good cause to
28 reopen discovery under Rule 16(b)(4) until **November 22, 2019** for the limited purpose of

1 allowing the parties to take one another's depositions. Defendant may depose Plaintiff
2 during the reopened discovery period. If Plaintiff refuses to participate in the deposition
3 once more, he will be subject to sanctions. *See* Fed. R. Civ. P. 37(a)(3)(B)(I); (a)(5)(A).
4 Plaintiff is warned that the undersigned will likely recommend to the District Judge the
5 sanction of dismissal of the case. Plaintiff is also permitted to refile a motion to take
6 Defendant's deposition **if** he makes the requisite showing that the requirements of the
7 governing Rules (e.g., Rules 28, 29, 30, 31, and/or 45) can be met. Plaintiff shall not be
8 permitted to take depositions of other witnesses under any circumstances.

9 Additionally, the Court notes that, following the transfer of this case to the
10 undersigned, the Mandatory Settlement Conference ("MSC") was reset from October 10,
11 2019 to a date approximately six weeks later, on November 26, 2019. *See* ECF No. 86. As
12 a result, extending the discovery and pretrial motions deadlines by approximately six weeks
13 does not significantly alter the existing Scheduling Order. Accordingly, the Court will also
14 *sua sponte* extend the pretrial motions deadline to **December 9, 2019**.

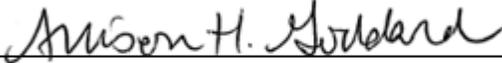
15 **III. CONCLUSION**

16 For the reasons explained above, the Court (1) **DENIES as moot** Plaintiff's Motion
17 for Discovery (ECF No. 87); (2) **REOPENS FACT DISCOVERY** until **November 22,**
18 **2019**; and (3) **RESETS** the pretrial motions deadline to **December 9, 2019**.

19 All other deadlines set in the Court's previous Scheduling Order (ECF No. 63)
20 remain in place.

21 **IT IS SO ORDERED.**

22 Dated: October 9, 2019

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24 _____
25 Honorable Allison H. Goddard
26 United States Magistrate Judge
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