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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

KYLE ROBERT JAMES,

Plaintiff,

v.

BARBARA LEE, et al.,

Defendants.[1]

Case No.: 16-cv-01592-AJB (JLB), consolidated with 17-cv-00859-AJB (MDD)

ORDER ON PLAINTIFF'S MISCELLANEOUS MOTIONS

[ECF Nos. 140; 142; 155]

Before the Court are several miscellaneous motions filed by Plaintiff Kyle Robert James. For the reasons set forth below, Plaintiff's motion for copies (ECF No. 140 at 1–2), motion for additional interrogatories (ECF No. 142), and motion to exclude evidence (ECF No. 155) are **DENIED**, and Plaintiff's motion to compel (ECF No. 140 at 3–8) is **GRANTED in part and DENIED in part**.

I. MOTION FOR COPY OF INTERROGATORIES

Plaintiff requests that the Court direct the Clerk of Court to send him a free copy of the exhibits he attached to his motion to compel (ECF No. 140 at 10–16), which are

[1] Defendant Mark Kania is the only remaining defendant in this case. Therefore, all references to "Defendant" in this Order are to Defendant Kania.

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excerpts of Defendant's responses to his interrogatories. (*Id.* at 1.) Defendant provides in opposition that he has since mailed a copy of the requested exhibits to Plaintiff. (ECF Nos. 143 at 1; 147 at 2.) Plaintiff's request is therefore **DENIED as moot**. Additionally, although Plaintiff is proceeding *in forma pauperis* (ECF No. 3), he is not entitled to free photocopies at the Court's expense simply because of his *in forma pauperis* status. The statute providing authority to proceed *in forma pauperis*, 28 U.S.C. § 1915, does not include the right to obtain court documents without payment. *See Sands v. Lewis*, 889 F.2d 1166, 1169 (9th Cir. 1990) (per curiam) (stating that prisoners have no constitutional right to free photocopy services), *overruled on other grounds by Lewis v. Casey*, 518 U.S. 343, 350–55 (1996); *see also In re Richard*, 914 F.2d 1526, 1527 (6th Cir. 1990) (stating that 28 U.S.C. § 1915 "does not give the litigant a right to have documents copied and returned to him at government expense").

II. MOTION TO COMPEL

Plaintiff moves the Court for an order compelling Defendant to provide further responses to his Interrogatory Nos. 1, 7, 16, 18, and 19. (ECF No. 140 at 5–8.) Defendant opposes Plaintiff's motion, and argues that the Court it should deny it as untimely and on the merits. (ECF No. 147 at 2–4.)

A. Legal Standard

A party is entitled to seek discovery of any non-privileged matter that is relevant to his claims and proportional to the needs of the case. Fed. R. Civ. P. 26(b)(1). Federal Rule of Civil Procedure 33 provides that a party may serve on any other party interrogatories that relate to any matter within the scope of discovery defined in Rule 26(b). Fed. R. Civ. P. 33(a)(2). If a party fails to answer an interrogatory, or if the response provided is evasive or incomplete, the propounding party may bring a motion to compel. Fed. R. Civ. P. 37(a). "The party seeking to compel discovery has the burden of establishing that his request satisfies the relevancy requirements of Rule 26(b)(1)." *Bryant v. Ochoa*, No. 07cv200 JM (PCL), 2009 WL 1390794, at *1 (S.D. Cal. May 14, 2009) (citing *Soto v. City of Concord*, 162 F.R.D. 603, 610 (N.D. Cal. 1995)). District courts have broad discretion to determine

relevancy for discovery purposes. *See Hallett v. Morgan*, 296 F.3d 732, 751 (9th Cir. 2002). "Thereafter, the party opposing discovery has the burden of showing that the discovery should be prohibited, and the burden of clarifying, explaining[,] or supporting its objections." *Bryant*, 2009 WL 1390794, at *1 (citing *DIRECTV, Inc. v. Trone*, 209 F.R.D. 455, 458 (C.D. Cal. 2002)).

B. Timeliness of Plaintiff's Motion

Defendant first argues that Plaintiff's motion should be denied because it is untimely per the Court's Civil Chambers Rules, which provide that "[a]ny discovery disputes must be brought to the Court no later than 30 calendar days after the date upon which the event giving rise to the dispute occurred." (ECF No. 147 at 2–3 (quoting J. Burkhardt Civ. Chambers R. § IV.F.).) Defendant provides that he served a response to Interrogatory No. 1 on July 2, 2018, a response to Interrogatory No. 2 on August 20, 2018, and responses to Interrogatory Nos. 16, 18, and 19 on June 17, 2019, making Plaintiff's motion "extremely untimely." (*Id.* at 3.)

The Court acknowledges that Plaintiff's motion is more than a year late with respect to Interrogatory Nos. 1 and 2 and approximately four months late with respect to Interrogatory Nos. 16, 18, and 19. Moreover, Plaintiff was provided leave to reply to Defendant's opposition (ECF No. 145), yet he did not file a timely reply and has not otherwise offered any justification for his delay in bringing the motion. The Court could deny Plaintiff's motion solely due to its untimeliness. However, the Court ordinarily warns litigants of the consequences of failing to comply with Chambers Rules on discovery disputes in its scheduling orders. As a scheduling order has yet to issue in this case, the Court has not yet cautioned Plaintiff that he must comply with Chambers Rules. Taking into consideration that this is Plaintiff's first warning and that Plaintiff is a *pro se*, incarcerated litigant, the Court will address Plaintiff's motion on the merits.

C. Merits of Plaintiff's Arguments

1. Interrogatory Nos. 1 and 7

Interrogatory Nos. 1 and 7 and Defendant's responses thereto are as follows:

Interrogatory No. 1:

Why did you "hogtie" plaintiff Kyle James naked instead of putting clothes on him first?

Response to Interrogatory No. 1:

Responding party objects to the interrogatory on the grounds that it is vague and ambiguous as to time and the term "hogtie." Responding party also objects on the grounds that the interrogatory lacks foundation and assumes facts. Specifically, the interrogatory incorrectly contends that Responding Party "hogtied" Plaintiff and had Plaintiff "naked instead of putting clothes on him first." Subject to and without waiving the foregoing objections, Responding Party responds as follows.

Plaintiff has a long history of violent and disruptive behavior while in custody, including: fighting with deputies, secreting tools to facilitate escape, threatening to harm and kill deputies and other inmates, possessing makeshift weapons, failing to obey staff, and interfering with jail operations.

On July 3, 2014, Plaintiff was found to have secreted a handcuff key and a key used to unlock waist chains in his rectum, in a plot to escape Sheriff's custody. At the time Sheriff's deputies made contact with Plaintiff to investigate the unknown contraband he was hiding in his rectum, Plaintiff was wearing only underwear. Plaintiff was strapped to a gurney by jail staff so he could be x-rayed and to give him the opportunity to remove the contraband himself. In order to do so safely and maintain the security of the facility, Plaintiff's underwear was removed and he was properly restrained. Plaintiff initially refused to cooperate, threatened jail staff, and emphatically denied being in possession of any contraband. After approximately one hour, Plaintiff admitted to possessing keys and eventually retrieved both keys from his rectum.

Interrogatory No. 7:

In your response to Plaintiff[']s] Interrogatory No.1 (One), No.2 (Two), No.3 (Three), and No.6 (Six) you state[,] "Plaintiff has a long history of violent and disruptive behavior while in custody, including: fighting with deputies, secreting tools to facilitate escape, threatening to harm and kill deputies and other inmates, possessing makeshift weapons, failing to obey staff, and interfering with jail operations." How is it possible that you could have known on 7/3/14 that Kyle James fought with deputies on 1/23/16 and

was found with on 2/24/15 what was alleged by deputies to be "Jail made weapons"? (Which were events that took place after 7/3/14).

Response to Interrogatory No. 7:

Responding Party objects to the interrogatory on the grounds that it is vague, ambiguous, and unintelligible so as to make a response impossible without speculation as to the meaning of Plaintiff's request. Responding Party also objects to the interrogatory on the grounds that it lacks foundation and assumes facts regarding the events and timeline of events referenced in Responding Party's prior discovery responses. Subject to and without waiving the foregoing objections, Responding Party responds as follows:

Plaintiff has a long history of violent and disruptive behavior while in custody. This includes threatening physical harm and death to jail staff and other inmates prior to July 3, 2014.

(ECF No. 140 at 10–12.)

Plaintiff argues that Defendant's response to Interrogatory No. 1 is "evasive and deficient" because it is "perjured and impeachable." (*Id.* at 5.) Plaintiff contends that as of July 3, 2014, the date of the incident in this case, Defendant could not have known that Plaintiff had a history of possessing makeshift weapons or fighting with other deputies, because those events took place after July 3, 2014. (*Id.*) Plaintiff further argues that Defendant's responses to Interrogatory Nos. 1 and 7 are "so evasive" they are "tantamount to no answers at all." (*Id.* at 6.)

In opposition, Defendant argues that his responses to Interrogatory Nos. 1 and 7 included "appropriate objections to the argumentative phrasing and terminology" in the interrogatories. (ECF No. 147 at 3.) Defendant further argues that, despite his objections, he provided substantive responses, and "[t]he fact that Plaintiff does not like the answers or disputes the factual contentions in the responses is not [a] ground to compel supplemental responses." (*Id.* at 3–4.)

The Court finds that, notwithstanding Defendant's objections to Interrogatory No. 1, he has sufficiently responded to it. Defendant's response substantively addresses

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Plaintiff's interrogatory, and as Defendant asserts, the fact that Plaintiff may not agree with the response does not render it deficient.

With respect to Interrogatory No. 7, the Court finds that, notwithstanding Defendant's objections, he has sufficiently responded to it. Defendant's response substantively addresses Plaintiff's interrogatory by stating that Plaintiff's "long history of violent and disruptive behavior while in custody . . . includes threatening physical harm and death to jail staff and other inmates prior to July 3, 2014." Again, the fact that Plaintiff may not agree with Defendant's response does not render it deficient.

Accordingly, Plaintiff's request to compel further responses to Interrogatory Nos. 1 and 7 is **DENIED**.

2. Interrogatory No. 16

Interrogatory No. 16 and Defendant's response thereto are as follows:

Interrogatory No. 16:

> As watch commander on date 7-3-2014 at GBDF during the handcuff key incident involving the Plaintiff Kyle James, you ordered the restraints to be applied to Kyle James in the fashion that was applied that day. Is it true it was you [sic] responsibility to ensure medical personal [sic] to be present during the retention and use of the restraint equipment used on Kyle James on 7-3-2014 at least twice every thirty minutes, but as frequent as possible to ensure no unexpected health concerns or injuries occur?

Response to Interrogatory No. 16:

> Responding Party objects to the interrogatory on the grounds that it is vague, ambiguous, compound, unintelligible, and therefore incapable of eliciting a meaningful response. Responding Party further objects that the interrogatory is irrelevant and not likely to lead to the discovery of admissible evidence because it lacks foundation as it incorrectly assumes a cord cuff restraint was applied to Plaintiff until he was transported to San Diego Central Jail and implies that Plaintiff required medical care. Subject to and without waiving the foregoing objections, Responding Party responds as follows:
>
> Plaintiff has a long history of violent and disruptive behavior while in custody, including: fighting with deputies, secreting tools to facilitate escape, threatening to harm and kill deputies and other inmates, possessing makeshift

> weapons, failing to obey staff, and interfering with jail operations. On July 3, 2014, Plaintiff was found to have secreted a handcuff key and a key used to unlock waist chains in his rectum, in a plot to escape Sheriff's custody. To safely secure Plaintiff and maintain institutional security, Plaintiff was properly restrained to prevent him from attacking jail staff or destroying evidence. After Plaintiff complained that his handcuffs were too tight, deputies immediately checked his handcuffs and addressed the issue. Plaintiff did not suffer any medical complications and he did not require medical assistance at any point during the incident.

(ECF No. 140 at 13–14.)

Plaintiff argues that Defendant did not directly answer Interrogatory No. 16 and "evasively 'beats around the bush' regarding the issue of" responsibility. (*Id.* at 7.) In opposition, Defendant argues that he provided "specific objections to the interrogatory given the argumentative phrasing and provided a substantive response," in addition to documents setting forth his "duties and responsibilities as watch commander." (ECF No. 147 at 4.) Defendant further contends that "if Plaintiff wants an admission or denial, then the proper discovery device to use would be a request for admission." (*Id.*)

Defendant included various objections in his response to Interrogatory No. 16, but does not specifically mention them or argue their merits in his opposition. Instead, Defendant states merely that he "provided specific objections to the interrogatory given the argumentative phrasing."[2] (ECF No. 147 at 4.) The Court agrees with Plaintiff that

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[2] "When ruling on a motion to compel, a court 'generally considers only those objections that have been timely asserted in the initial response to the discovery request and that are subsequently reasserted and relied upon in response to the motion to compel." *SolarCity Corp. v. Doria*, Case No.: 16cv3085-JAH (RBB), 2018 WL 467898, at *3 (S.D. Cal. Jan. 18, 2018) (quoting *Medina v. County of San Diego*, Civil No. 08cv1252 BAS (RBB), 2014 WL 4793026, at *8 (S.D. Cal. Sept. 25, 2014)); *see also Black Mountain Equities, Inc. v. Players Network, Inc.*, Case No.: 3:18-cv-1745-BAS-AHG, 2020 WL 2097600, at *3 (S.D. Cal. May 1, 2020) (declining "to address Defendant's objections raised in its discovery responses because it did not reassert them within an opposition" to the motion to compel (citing *SolarCity Corp.*, 2018 WL 467898, at *3)). As mentioned,

Defendant's response does not directly answer Interrogatory No. 16. Although the Court agrees with Defendant that Interrogatory No. 16 is phrased as a request for admission, the Court does not find this to be an adequate basis in this case for Defendant to avoid answering the interrogatory, especially when it was propounded by a *pro se* litigant. Accordingly, Plaintiff's request to compel a further response to Interrogatory No. 16 is **GRANTED**, and Defendant is ordered to provide a supplemental response no later than **September 11, 2020**.

3. Interrogatory No. 18

Interrogatory No. 18 and Defendant's response thereto are as follows:

Interrogatory No. 18:

> Has an inmate in the custody of the San Diego Sheriff's Department ever went into medical distress while in restraint equipment resulting in serious bodily injury or death?

Response to Interrogatory No. 18:

> Responding Party objects to the interrogatory on the grounds that it is vague, ambiguous, and overbroad. Specifically, the request is vague as to the terms "medical distress," "restraint equipment," and "serious bodily injury." The interrogatory is also improper because it seeks medical information of unrelated individuals and therefore violates third-party privacy rights. Responding Party further objects that the interrogatory seeks information that is irrelevant to the subject matter of this action, not reasonably calculated to lead to the discovery of admissible evidence, and not proportional to the needs of the case in light of the factors set forth in [the] Federal Rules of Civil Procedure, [R]ule 26(b)(1). Lastly, the interrogatory seeks information that calls for expert medical opinion.

(ECF No. 140 at 15.)

Plaintiff argues that he is "seeking a simple yes or no answer to" Interrogatory No. 18. (*Id.* at 7.) In his opposition, Defendant stands on his objections that the request is "too

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Defendant does not argue in support of any of his specific objections. "Argumentative" is not an objection Defendant made in his discovery response. (*See* ECF No. 140 at 13.) Therefore, Defendant's objections are overruled.

vague and broad to provide a response" and contends again that Plaintiff is mistaken about "the proper discovery tool to use when seeking a 'simple yes or no answer.'" (ECF No. 147 at 4.)

The Court agrees with Defendant and finds Interrogatory No. 18 vague and ambiguous as to the terms "medical distress" and "serious bodily injury" and overly broad as to time. Therefore, Defendant's objections are SUSTAINED. Further, although Defendant did not reassert his relevancy objection in his opposition, Plaintiff has not met his burden to show the relevancy of this request, and the Court cannot otherwise determine its relevance. Accordingly, Plaintiff's request to compel a response to Interrogatory No. 18 is **DENIED**.

4. Interrogatory No. 19

Interrogatory No. 19 and Defendant's response thereto are as follows:

Interrogatory No. 19:

> What is your reason or excuse for not ensuring medical personal (sic) was present (as supposed to be in-line or in alignment with San Diego County Sheriff's Department Detention Services Bureau-Manuel of Policies and Procedures Number I.93 use of Restraint Equipment II Monitoring and Retention A-F (CSD000108-CSD00019) and/or page 1-2)?

Response to Interrogatory No. 19:

> Responding Party objects to the interrogatory on the grounds that it is vague, ambiguous, overbroad, unintelligible, and therefore incapable of eliciting a meaningful response. Responding Party further objects that the interrogatory is irrelevant and not likely to lead to the discovery of admissible evidence because it lacks foundation as it incorrectly assumes a cord cuff restraint was applied to Plaintiff until he was transported to San Diego Central Jail and implies that Plaintiff required medical care. Subject to and without waiving the foregoing objections, Responding Party responds as follows:
>
> Plaintiff has a long history of violent and disruptive behavior while in custody, including: fighting with deputies, secreting tools to facilitate escape, threatening to harm and kill deputies and other inmates, possessing makeshift weapons, failing to obey staff, and interfering with jail operations. On July 3, 2014, Plaintiff was found to have secreted a handcuff key and a key used to

> unlock waist chains in his rectum, in a plot to escape Sheriff's custody. To safely secure Plaintiff and maintain institutional security, Plaintiff was properly restrained to prevent him from attacking jail staff or destroying evidence. Plaintiff did not suffer any medical complications and he did not require medical assistance at any point during the incident.

(ECF No. 140 at 15–16.)

Plaintiff argues that Defendant's response to Interrogatory No. 19 does "not explain why he did not have medical present during the 7-3-14 incident where . . . [P]laintiff was in full restraints." (*Id.* at 8.) In his opposition, Defendant stands on his objections that the interrogatory lacks foundation, for "it incorrectly states that a cord cuff restraint was applied to Plaintiff" and "implies that Plaintiff required medical care." (ECF No. 147 at 4.)

The Court finds that, notwithstanding Defendant's objections, he has sufficiently responded to Interrogatory No. 19. Defendant's response substantively addresses Plaintiff's interrogatory by stating his reasons for not ensuring the presence of medical personnel during the incident in question. Again, the fact that Plaintiff may not agree with Defendant's response does not render the response deficient. Accordingly, Plaintiff's request to compel a further response to Interrogatory No. 19 is **DENIED**.

III. MOTION FOR ADDITIONAL INTERROGATORIES

Plaintiff requests leave to propound more than twenty-five interrogatories on Defendant. (ECF No. 142.) Defendant opposes Plaintiff's request. (ECF No. 147 at 5.)

A. Legal Standard

Federal Rule of Civil Procedure 33 limits interrogatories to twenty-five per party, including discrete subparts, but a court may grant leave to serve additional interrogatories to the extent consistent with Rule 26(b)(1) and (2). Fed. R. Civ. P. 33(a). The twenty-five-interrogatory limit is not intended "to prevent needed discovery, but to provide judicial scrutiny before parties make potentially excessive use of this discovery device," and "[i]n many cases, it will be appropriate for the court to permit a larger number of interrogatories . . . ." Fed. R. Civ. P. 33 advisory committee's note to 1993 amendment. Generally, a

party requesting additional interrogatories must make a "particularized showing" as to why additional discovery is necessary. *Roberts v. Hensley*, Case No.: 15cv1871-LAB (BLM), 2017 WL 715391, at *2 (S.D. Cal. Feb. 23, 2017) (quoting *Ioane v. Spjute*, No. 1:07–cv–00620–AWI–GSA, 2015 WL 1984835, at *1 (E.D. Cal. Apr. 20, 2015)).

B. Discussion

Plaintiff argues that because the case is "complex," good cause exists for leave to propound more than twenty-five interrogatories. (ECF No. 142 at 4.) Plaintiff contends that he must "prove" the following "prior to summary [judgment]":

- Defendant's lack of medical treatment was intentional;
- Defendant's use of force was unreasonable and excessive;
- Defendant's treatment of Plaintiff was degrading to human dignity;
- Defendant acted with a culpable state of mind;
- The deprivation of medical care was sufficiently serious;
- Defendant acted with reckless disregard for Plaintiff's health and safety;
- Defendant acted in bad faith and qualified immunity does not apply;
- Malice; and
- Knowledge

(*Id.* at 4–5.) Plaintiff further argues that, due to his incarceration, he "has no way to earn the funds required to [d]epose" Defendant. (*Id.* at 6.)

In opposition, Defendant argues that Plaintiff has "failed to provide good cause to justify additional interrogatories." (ECF No. 147 at 5.) Contrary to Plaintiff's assertion that the case is complex, Defendant contends that the case is "very limited in scope," as "[i]t involves one defendant, one discrete incident on one day, and only two causes of action." (*Id.*) Defendant further contends that the interrogatories Plaintiff has already propounded have been "argumentative, conclusory, and vague," and Plaintiff "will likely continue [this] pattern of conduct" if the Court grants him leave to serve additional interrogatories. (*Id.*)

Good cause may exist to grant Plaintiff leave to serve additional interrogatories due to his status as an incarcerated litigant proceeding *pro se* and *in forma pauperis*. However,

Plaintiff has not made the particularized showing necessary for the Court to grant his request. Plaintiff argues that the case is "complex" and lists several things he contends he must "prove prior to summary [judgment]." (ECF No. 142 at 4.) However, Plaintiff has not submitted any proposed interrogatories for review and does not provide what discovery he has already propounded, why that discovery is inadequate, and what topics remain that are necessary for him to explore by interrogatory. Plaintiff does not even specify the number of additional interrogatories he is seeking to propound on Defendant. Moreover, Defendant has moved to dismiss the 5AC, and the Court has recommended that Defendant's Motion to Dismiss be granted in part. (ECF Nos. 144; 149.) Therefore, which of Plaintiff's claims will survive dismissal, if any, and the issues in dispute in this case are not yet certain.

Although the Court agrees with Defendant that this case is not particularly complex, the Court will take into consideration Plaintiff's status as a *pro se*, incarcerated litigant in any future motion for additional interrogatories Plaintiff files after Defendant's Motion to Dismiss is decided. *See, e.g.*, *McClellan v. Kern Cnty. Sheriff's Office*, Case No. 1:10–cv–0386–LJO–MJS (PC), 2015 WL 5732242, at *1 (E.D. Cal. Sept. 29, 2015) ("An incarcerated party's highly limited ability to conduct a deposition in prison may contribute to a finding of good cause to file additional interrogatories."); *McNeil v. Hayes*, No. 1:10–cv–01746–AWI–SKO (PC), 2014 WL 1125014, at *2 (E.D. Cal. Mar. 20, 2014) (granting the *pro se* inmate plaintiff leave to serve additional interrogatories and reasoning that "depositions, which would relieve some of the pressure created by having to respond to [additional] interrogatories, are simply not a realistic option, as incarcerated pro se litigants are rarely in the position to conduct depositions"). In any future motion, Plaintiff should include his proposed interrogatories and state specifically why those additional interrogatories are necessary in light of the interrogatories already propounded on Defendant. Additionally, Defendant's argument that Plaintiff will only continue his pattern of propounding "argumentative, conclusory, and vague requests" if granted leave to serve additional interrogatories is not well taken. Given Plaintiff's *pro se* status, some

imprecision in his discovery requests can be expected. Accordingly, Plaintiff's request for additional interrogatories is **DENIED without prejudice**.

IV. MOTION TO EXCLUDE EVIDENCE

Finally, Plaintiff requests that the Court "permanently exclude the (all) statements by [D]efendant and his witnesses to refrain from claiming 'Plaintiff had a plot to escape,' due to the fact the [D]efendant has no evidence to support his claim of 'actual plan to escape." (ECF No. 155 at 1.) Plaintiff argues that, although he "had in his possession a handcuff key and master lock key," that "does not itself prove a 'plan' or 'plot' to escape as [D]efendant['s] counsel and [D]efendant keep claiming." (*Id.* at 2.) Plaintiff also requests the Court for an order compelling Defendant "to produce sufficient and reliable evidence to support [his] claim of 'plot'/'plan' to escape" and argues that "if [he] cannot produce sufficient evidence . . . then the [C]ourt should order the [him] to [a]mend his [M]otion to [D]ismiss." (*Id.*) Plaintiff also argues that Defendant "commit[ed] perjury" in his interrogatory responses by stating that "Plaintiff has a long history of violent and disruptive behavior while in custody." (*Id.* at 2–3.)

The Court will not address a motion to exclude evidence in a vacuum. Plaintiff may raise any appropriate objections to evidence proffered by Defendant[3] in the context of the proceeding at issue (such as at trial or in response to a motion for summary judgment). Accordingly, Plaintiff's motion (ECF No. 155) is **DENIED without prejudice**.

IT IS SO ORDERED.

Dated: August 31, 2020

Jill Burkhardt

Hon. Jill L. Burkhardt
United States Magistrate Judge

[3] Assertions in a pleading, except when sworn to under penalty of perjury, do not ordinarily constitute evidence.