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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 Robert McCullock,  
12 Plaintiff,  
13 v.  
14 Robert Brown, et al.,  
15 Defendants.

Case No.: 18-cv-00548-WQH-JLB

**ORDER DENYING AS  
PREMATURE PLAINTIFF'S  
MOTION TO COMPEL**

**[ECF No. 38]**

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18 Before the Court is Plaintiff Robert McCullock's Motion to Compel. (ECF No. 38.)  
19 Plaintiff requests that the Court issue an order compelling Defendants "to produce for  
20 inspection and copying the documents requested on [January 18, 2019] in compliance with  
21 Federal Rule of Civil Procedure [] 26." (*Id.* at 1.) Although Plaintiff requests an order  
22 compelling Defendants to produce documents, it appears that Plaintiff is actually seeking  
23 responses to his second set of interrogatories ("Interrogatories"), for Plaintiff attached his  
24 Interrogatories to his motion. (*Id.* at 3–5.) Also attached to Plaintiff's motion is the Proof  
25 of Service by Mail corresponding to these Interrogatories, which is dated January 18, 2019.  
26 (*Id.* at 2.)

27 On March 26, 2018, Defendants filed a response in opposition to Plaintiff's Motion  
28 to Compel. (ECF No. 39.) Defendants first argue that Plaintiff's motion should be denied

1 because it is premature. (*Id.* at 2.) To their motion, Defendants attached the declaration of  
2 defense counsel Aseil Mohmoud, which states that Defendants did not receive service of  
3 Plaintiff’s Interrogatories until March 1, 2019. (*Id.*; ECF No. 39-1 ¶ 2.) As such,  
4 Defendants argue that their responses to Plaintiff’s Interrogatories are not due until April  
5 3, 2019. (ECF No. 39 at 2.)

6 Defendants also argue that Plaintiff’s motion is procedurally deficient because  
7 Plaintiff “failed to meet and confer or make any attempt to resolve this premature discovery  
8 dispute prior to filing this motion,” as required by Federal Rule of Civil Procedure 37(a)(1).  
9 (*Id.*) Defendants request \$340 in sanctions for the time spent responding to Plaintiff’s  
10 motion. (*Id.* at 3.)

11 The Court agrees with Defendants and finds that Plaintiff’s motion is premature.  
12 Under Federal Rule of Civil Procedure 33(b)(2), a responding party has 30 days after being  
13 served with interrogatories to serve its responses and any objections. Additionally, if  
14 service is made by mail, an additional three days are added to the response deadline. Fed.  
15 R. Civ. P. 6(d). The Proof of Service by Mail attached to Plaintiff’s Interrogatories  
16 indicates that Plaintiff sent Defendants the Interrogatories on January 18, 2019, which  
17 would have made Defendants’ responses due by February 20, 2019. However, Defendants  
18 have provided in a declaration under penalty of perjury that they did not receive the  
19 Interrogatories until March 1, 2019. (ECF No. 39-2 ¶ 2.) Defendants could not have  
20 responded to Plaintiff’s Interrogatories before they received them. Therefore, the Court  
21 sets April 4, 2019, as the deadline for Defendants to respond to Plaintiff’s Interrogatories.  
22 As this deadline had not yet passed at the time of filing, Plaintiff’s Motion to Compel is  
23 premature.

24 As to Defendants argument that Plaintiff’s motion is procedurally deficient because  
25 he did not comply with Rule 37(a)(1)’s meet and confer requirement, the Court is not  
26 unsympathetic to the difficulties that this requirement poses for an incarcerated litigant.  
27 Therefore, the Court will not fault Plaintiff for failing to meet and confer with Defendants  
28 prior to filing the instant motion. However, as Defendants highlight, Plaintiff did not

1 “make any attempt” to contact Defendants before filing his motion. (ECF No. 39 at 2.) In  
2 the future, the Court would accept either written correspondence or a telephonic conference  
3 with defense counsel in satisfaction of the meet and confer requirement. *See, e.g., Madsen*  
4 *v. Risenhoover*, No. C 09–5457 SBA (PR), 2012 WL 2873836, at \*3 (N.D. Cal. June 28,  
5 2012) (finding that the meet and confer requirement applies to incarcerated individuals but  
6 noting that the incarcerated plaintiff may send a letter to the defendants). Accordingly, the  
7 Court will not entertain any additional motions to compel filed by Plaintiff absent  
8 certification that Plaintiff has at least attempted to meet and confer with Defendants. *See*  
9 *Rogers v. Giurbino*, 288 F.R.D. 469, 478 (S.D. Cal. 2012) (waiving the meet and confer  
10 requirement for a *pro se*, incarcerated plaintiff’s motion to compel but cautioning the  
11 plaintiff against further failure to comply).

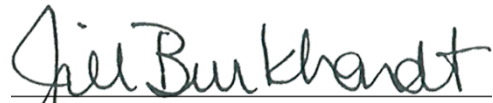
12 Finally, the Court declines to award Defendants sanctions for opposing Plaintiff’s  
13 motion. Rule 37(a)(5)(B) states that if a motion to compel is denied, the Court “must, after  
14 giving an opportunity to be heard, require the movant . . . to pay the party . . . who opposed  
15 the motion its reasonable expenses incurred in opposing the motion, including attorney’s  
16 fees.” Fed. R. Civ. P. 37(a)(5)(B). However, “the court must not order this payment if the  
17 motion was substantially justified or other circumstances make an award of expenses  
18 unjust.” *Id.*

19 Here, Defendants contend that “there is no justification for Plaintiff’s filing of a  
20 motion to compel just days after serving the [Interrogatories] on Defendants, and an award  
21 of expenses is not unjust because Plaintiff gave Defendants no opportunity to respond.”  
22 (ECF No. 39 at 3.) However, from the Proof of Service by Mail corresponding to Plaintiff’s  
23 Interrogatories, it appears that Plaintiff sent his Interrogatories to Defendants on January  
24 18, 2019, and constructively filed the instant motion on March 5, 2019. (ECF No. 38 at 1,  
25 2.) From the briefing before the Court, it is unclear why Defendants did not receive the  
26 Interrogatories until March 1, 2019. Nevertheless, given that it appears Plaintiff mailed  
27 his Interrogatories on January 18, 2019, the Court finds that Plaintiff was not unreasonable  
28 in believing Defendants’ responses were overdue.

1           Because the deadline for Defendants to respond to Plaintiff's Interrogatories had not  
2 yet passed at the time of filing, Plaintiff's Motion to Compel (ECF No. 38) is hereby  
3 **DENIED AS PREMATURE.** Additionally, the Court declines to award Defendants fees  
4 for opposing Plaintiff's motion.

5           **IT IS SO ORDERED.**

6 Dated: April 3, 2019

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8 Hon. Jill L. Burkhardt  
9 United States Magistrate Judge

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