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3 **UNITED STATES DISTRICT COURT**
4 **DISTRICT OF NEVADA**

5 KENNETH FRIEDMAN,

6 Plaintiff,

7 v.

8 ISIDRO BACA, *et al.*,

9 Defendants.

Case No.: 3:17-cv-00433-MMD-WGC

ORDER

Re: ECF No. 122

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11 On June 3, 2019, Plaintiff filed a Motion to Compel, identified by Plaintiff as “First
12 Motion.” (ECF No. 122.) This filing was actually Plaintiff’s *third* motion to compel, following
13 two previous motions to compel, ECF Nos. 108 and 114. On June 19, 2019, the court extended
14 Defendants’ response deadline to July 18, 2019. (ECF No. 134.) At a motion hearing conducted
15 that same date (i.e., June 19, 2019), the court directed that Plaintiff’s reply to Defendants’
16 opposition would be due by August 8, 2019 (ECF No. 135). However, it does not appear that
17 Defendants have responded to Plaintiff’s motion to compel (ECF No. 122), which may be due in
18 part to the voluminous filings in just the past ninety (90) days in this case, i.e., approximately sixty
19 (60) filings.¹

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23 ¹ Subsequent to the unsuccessful mediation of this matter a little over a year ago, there have been close to
160 filings in this case.

1 The court's minute order of August 27, 2019, scheduled a hearing on Plaintiff's motion to
2 compel (ECF No. 122) and on other matters for September 24, 2019. (ECF No. 176.) In the court's
3 initial preparation for the hearing, the court more closely examined Plaintiff's motion to compel
4 (ECF No. 122) and finds that it fails to comply with LR 26-7(b), which requires movant to "set
5 forth in full the text of the discovery originally sought and any response to it." Instead, Plaintiff
6 attaches a copy of a lengthy letter Plaintiff wrote to Deputy Attorney General Hardcastle wherein
7 he objects to:

- 8 (1) Eight (8) responses by "Defendants" to Plaintiff's First Request for Production
9 ("Defendants" in general with no specification as to which Defendant was responding);
- 10 (2) Four (4) responses by "Defendants" to Plaintiff's Second Request for Production;
- 11 (3) Defendant Aranas two (2) responses to twelve (12) of Plaintiff's Requests for
12 Admissions;
- 13 (4) Defendant Walsh's responses to thirteen (13) of Plaintiff's specified interrogatories;
- 14 (5) Defendant Walsh's responses to thirty-six (36) of Plaintiff's specified Requests for
15 Admissions;
- 16 (6) Defendant Conlin's responses to nine (9) of Plaintiff's specified interrogatories;
- 17 (7) Defendant Conlin's responses to twenty-six (26) of Plaintiff's specified Requests for
18 Admissions;
- 19 (8) Defendant Pence's responses to sixteen (16) of Plaintiff's specified interrogatories;
- 20 (9) Defendant Pence's responses to seventeen (17) of Plaintiff's specified Requests for
21 Admissions; and

1 (10) Defendant Richard’s responses to twenty-two (22) of Plaintiff’s specified Requests
2 for Admissions.

3 (Plaintiff’s letter to counsel, ECF No. 122, pp. 3-5.)

4 The remainder of Plaintiff’s thirty-nine (39) page letter appears to be a more specific
5 discussion of certain Defendants’ discovery responses. However, while Plaintiff’s letter references
6 ten (10) “exhibits,” none of the “exhibits” accompanied Plaintiff’s motion to compel. Plaintiff’s
7 letter does not comply with the LR 26-7(b) obligation of a party pursuing a discovery motion to
8 set forth “in full the text of the discovery and any response to it.”

9 Plaintiff’s motion to compel (ECF No. 122) is **DENIED**, albeit without prejudice.
10 However, before re-filing a motion to compel should Plaintiff choose to do so, Plaintiff should
11 take heed of amended Fed. R. Civ. P. 26(b)(1) which requires discovery to be *specifically tailored*
12 to the issues presented by the pleadings (i.e., relevant to any party’s claim or defense), *proportional*
13 to the needs of the case and subject more intensive supervision by the court over the discovery
14 process.

15 Fed. R. Civ. P. 26(b)(1) defines the scope of permissible discovery as follows:

16 Parties may obtain discovery regarding any
17 nonprivileged matter that is *relevant* to any party’s claim
18 or defense and *proportional* to the needs of the case,
19 considering the importance of the issues at stake in the
20 action, the amount in controversy, the parties’ relative
access to relevant information, the parties’ resources, the
importance of the discovery in resolving the issues, and
whether the burden or expense of the proposed discovery
outweighs its likely benefit.

21 *See* Fed. R. Civ. P. 26(b)(1) (emphasis added). Thus, to be discoverable under Fed. R. Civ. P.
22 26(b)(1), the information sought must be (1) “relevant to any party’s claim or defense” and

1 (2) “proportional to the needs of the case.” Not having been presented with Plaintiff’s discovery
2 requests and each Defendant’s responses (as LR 26-7 requires), the court is unable to make a
3 specific determination of whether Plaintiff’s discovery satisfies this criteria. However, from
4 reviewing Plaintiff’s letter and his discussion of the claimed shortcomings of the Defendants’
5 responses, the court is skeptical Plaintiff’s discovery will comply with the proportional mandate
6 of Rule 26. The court is denying Plaintiff’s motion, albeit without prejudice, meaning Plaintiff
7 may technically renew a motion compel. However, to perhaps provide some parameters to
8 Plaintiff’s discovery, the court will discuss the import of the discovery rules and how this court
9 will enforce the Rule, particularly with regard to proportionality.

10 **A. Relevancy**

11 Under the first prong of this test, for information to be discoverable, it must be “relevant
12 to any party’s claim or defense.” *Id.* The term “relevant” is not defined in the Rules, but relevance
13 is generally construed broadly. However, to be relevant, the discovery has to pertain to a claim,
14 issue or defense that is pleaded in the case. *Amgen, Inc. v. Hospira, Inc.*, 866 F.3d 1355, 1361
15 (Fed. Cir. 2017).

16 **B. Proportionality**

17 Under the second part of the Fed. R. Civ. P. 26(b)(1) test, to be discoverable, information
18 must be “proportional to the needs of the case.” The 2015 amendments added the proportionality
19 requirement for permissible discovery—relevancy alone is no longer sufficient. As the Rule states,
20 when determining whether discovery is “proportional to the needs of the case,” the court must
21 examine the information requested in light of six factors: “[1] the importance of the issues at stake
22 in action, [2] the amount in controversy, [3] the parties’ relative access to relevant information, [4]

1 the parties' resources, [5] the importance of the discovery in resolving the issues, and [6] whether
2 the burden or expense of the proposed discovery outweighs its likely benefit." *See* Fed. R. Civ. P.
3 26(b)(1).

4 Fed. R. Civ. P. 26(b)(2)(C) further restricts discovery. It requires the court to limit the
5 frequency or extent of discovery if the court determines that the discovery sought is
6 (1) "unreasonably cumulative or duplicative, or can be obtained from some other source that is
7 more convenient, less burdensome, or and to less expensive"; (2) "the party seeking discovery has
8 had ample opportunity to obtain the information by discovery in the action;" and (3), as
9 particularly pertinent to the discovery requests propounded by Plaintiff, "the proposed discovery
10 is outside the scope of Rule 26(b)(1)." *See* Fed. R. Civ. P. 26(b)(2)(C). In deciding whether to
11 restrict discovery under Fed. R. Civ. P. 26(b)(2)(C), the court "should consider the totality of the
12 circumstances, weighing the value of the material sought against the burden of providing it, and
13 taking into account society's interest in furthering the truth-seeking function in the particular case
14 before the court." *See Roberts v. Clark Cty. Sch. Dist.*, 312 F.R.D. 594, 602 (D. Nev. 2016)
15 (quoting *Smith v. Steinkamp*, 2002 WL 1364161, at *6 (S.D. Ind. May 22, 2002)).

16 Magistrate Judge Peggy Leen, who authored the *Roberts* decision, provided an excellent
17 overview of the genesis of the amendments to Rule 26, which are worthy of review at this point in
18 this court's analysis of Plaintiff's motion to compel:

19 Since the late 1970s, the Supreme Court and the
20 Advisory Committee on the Civil Rules have encouraged
21 trial courts to exercise their broad discretion to limit and
22 tailor discovery to avoid abuse and overuse. The trial
23 courts have been urged to actively manage discovery to
accomplish the goal of Rule 1 of the Federal Rules of
Civil Procedure—"to secure the just, speedy, and

1 inexpensive determination of every action and
2 proceeding.”

3 In 1983, Rule 26 was amended to add subsection (g),
4 which provides that a lawyer filing a discovery request,
5 response or objection certifies by signing the document
6 that it is “not interposed for any improper purpose, *such*
7 *as to harass, cause unnecessary delay, or needlessly*
8 *increase the cost of litigation.*”

9 * * *

10 Rule 26(g) was added to address the reluctance of judges
11 to impose sanctions on attorneys who abuse the
12 discovery rules. *See* Brasil, *Civil Discovery: Lawyers'*
13 *Views of its Effectiveness, Principal Problems and*
14 *Abuses*, American Bar Foundation (1980). As one well-
15 respected treatise observed, “Rule 26(b) was amended in
16 1983 to promote judicial limitation of the amount of
17 discovery on a case-by-case basis *to avoid abuse or*
18 *overuse of discovery through the concept of*
19 *proportionality.*” 8 Charles Alan Wright & Arthur R.
20 Miller, *Federal Practice & Procedure* § 2008.1 (3d ed.
21 2015). The Advisory Committee notes reported that
22 “Rule 26(g) makes explicit the authority judges now
23 have to impose appropriate sanctions and requires them
to use it. This authority derives from Rule 37, 28 U.S.C.
§ 1927, and the court’s inherent power.” (citation
omitted.)

In 1998, the Supreme Court wrote that “Rule 26 vests the
trial judge with broad discretion *to tailor discovery*
narrowly and to dictate the sequence of discovery.”
Crawford–El v. Britton, 523 U.S. 574, 599, 118 S.Ct.
1584, 140 L.Ed.2d 759 (1998). The Supreme Court
recognized that under Rule 26(b)(2), the trial court may,
on its own motion, limit the frequency or extent of use of
discovery methods *if it determines the burden or expense*
of proposed discovery outweighs its likely benefits. *Id.*
Rule 26(c) gives the trial court authority on motion, or
on its own initiative, to limit the time, place, and manner
of discovery, or bar discovery altogether on certain
subjects, as required “*to protect a party or person from*
annoyance, embarrassment, oppression, or undue

1 *burden or expense.*” *Id.* Similarly, under Rule 26(d), the
2 court may set the timing and sequence of discovery. *Id.*
3 The Crawford–El decision emphasized that the trial
4 court has broad discretion under Rule 26 in managing
5 discovery “to facilitate prompt and efficient resolution of
6 the lawsuit.” *Id.*

7 In 2000, Rule 26 was again amended to call attention to
8 the limitations of Rule 26(b)(2)(C). The Advisory
9 Committee Notes indicate that the Advisory Committee
10 was repeatedly told “that courts have not implemented
11 these limitations with the vigor that was contemplated.”
12 192 F.R.D. 340, 390 (2000). Thus, Rule 26 was amended
13 to add an “otherwise redundant cross-reference ... to
14 emphasize the need *for active judicial use of subdivision*
15 *(b)(2) to control excessive discovery.*” *Id.* (citing
16 Crawford–El, 523 U.S. at 598, 118 S.Ct. 1584).

17 Recently, Chief Justice John Roberts issued his Year-
18 End Report on the Federal Judiciary in which he
19 addressed the 2015 amendments to the Federal Rules of
20 Civil Procedure at length.¹ The Chief Justice traced the
21 “elaborate and time-consuming” procedure for
22 promulgating and amending the rules which began in
23 2010 when the Advisory Committee on the Civil Rules
24 sponsored a symposium on civil litigation attended by
25 federal and state judges, law professors, plaintiff and
26 defense lawyers, and representatives from business,
27 government, and public interest organizations. The
28 symposium identified the need for procedural reforms to:
29 (1) encourage greater cooperation; (2) *focus discovery on*
30 *what is truly needed to resolve cases*; (3) engage judges
31 in early and active case management; and (4) address
32 serious problems associated with vast amounts of
33 electronically stored information. *Id.* at 4–5.

34 * * *

35 The 2015 amendments to Rule 26(b)(1) emphasize the
36 need to impose “reasonable limits on discovery through
37 increased reliance on the common-sense concept of
38 proportionality.” *Id.* The fundamental principle of
39 amended Rule 26(b)(1) is “that lawyers *must size and*
40 *shape their discovery requests to the requisites of a*
41 *case.*” *Id.* at 7. The pretrial process must provide parties

1 with efficient access to what is needed to prove a claim
2 or defense, *but eliminate unnecessary or wasteful*
3 *discovery. This requires active involvement of federal*
judges to make decisions regarding the scope of
discovery.

4 *Roberts*, 312 FRD at 602-604; emphasis in italics added.

5 As Judge Leen further discussed in the *Roberts* decision, Fed. R. Civ. P. 26 gives the court
6 broad discretion to “tailor discovery narrowly and to dictate the sequence of discovery” and
7 emphasized that the trial court has broad discretion under Rule 26 in managing discovery in order
8 “to facilitate prompt and efficient resolution of the lawsuit.” *See Crawford-El v. Britton*, 523 U.S.
9 574, 599 (1998).

10 In addition, Rule 26(b)(2)(C)(iii) now requires that the court, either on a motion of party,
11 or on its own, “must limit the frequency or extent of discovery otherwise allowed” by the Federal
12 Rules if such discovery is outside the scope of that permitted by Rule 26(b)(1) - *i.e.*, not
13 proportional to the needs of the case. Fed. R. Civ. P. 26(b)(C)(iii). The Advisory Committee Notes
14 state that this amendment was included to reflect both the transfer of the proportionality factors to
15 the scope of discovery and to indicate “that the court must still limit the frequency or extent of
16 discovery if it is not proportional to the needs of the case.” Courts, thus, have a “*duty to pare down*
17 *overbroad discovery requests* under Rule 26(b)(2).” *See Rowlin v. Alabama Dep’t. of Pub. Safety*,
18 200 F.R.D. 459, 461 (M.D. Ala. 2001). (emphasis added.)

19 Plaintiff should bear these discovery parameters in mind both as to any discovery which
20 may be served in this case or as to any discovery motions Plaintiff may pursue.

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1 **CONCLUSION**

2 Plaintiff's Motion to Compel (ECF No. 122) is **DENIED** without prejudice. In view of
3 this order denying Plaintiff's motion to compel, the court will not be addressing ECF No. 122 at
4 the September 24, 2019, discovery/status conference.

5 **IT IS SO ORDERED.**

6 Dated: September 10, 2019.

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8 WILLIAM G. COBB
9 UNITED STATES MAGISTRATE JUDGE
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