UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

DAVID E. KATES,	
Plaintiff,	CIVIL ACTION NO. 3:13-cv-01525
v.	(CAPUTO, J.) (SAPORITO, M.J.)
C.O. ROBERT PACKER, et al.,	
Defendants.	

MEMORANDUM

This is a fee-paid *pro se* prisoner civil rights action. At the time of his alleged injury, plaintiff David E. Kates was a prisoner at USP Lewisburg, located in Union County, Pennsylvania. He is currently incarcerated at FCI Forrest City, located in St. Francis County, Arkansas.

On June 7, 2013, the Court received and filed a *pro se* complaint against 21 separate defendants in which Kates alleged the violation of his federal constitutional rights pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). (Doc. 1; Doc. 2).[1] In the complaint, Kates alleged that, on May 24, 2012, he was severely

[1] Upon receipt, the Clerk docketed the complaint as two separate items, labeled as a complaint and a supporting memorandum of law. The "memorandum," however, is largely a recitation of factual allegations,
(continued on next page)

beaten by several correctional officers, that he was refused appropriate medical care in the days and weeks that followed his alleged beating, and that his rights were further violated in the conduct of a related disciplinary hearing, which resulted in his being sanctioned with the loss of good conduct time.

On August 25, 2015, we recommended dismissal of the plaintiff's claims for prospective declaratory and injunctive relief as moot, and dismissal of the remainder of his complaint for failure to state a claim upon which relief can be granted. (Doc. 179). On March 29, 2016, the Court adopted our recommendation in part and rejected it in part. (Doc. 186; Doc. 187). What remains are two damages claims under *Bivens*: (1) an Eighth Amendment excessive force claim against defendants Packer, Wise, Stroud, and Wagner; and (2) an Eighth Amendment failure to protect/intervene claim against defendants Brandt, Packer, Wise, Stroud, Wagner, Booth, and Eroh. (*See* Doc. 186; Doc. 187). Since then, the parties have been engaged in an extended period of discovery, complicated

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elaborating upon the mostly conclusory allegations of the preprinted form docketed as a "complaint." Mindful of its obligation to liberally construe the filings of *pro se* litigants, especially those who are incarcerated, these items are construed together as the plaintiff's complaint. *See generally Mala v. Crown Bay Marina, Inc.*, 704 F.3d 239, 244–46 (3d Cir. 2013).

somewhat by the plaintiff's incarceration and his multiple transfers from one federal correctional institution to another.

This matter is now before the Court on the plaintiff's Rule 37(a) motion to compel. (Doc. 215). According to the parties' motion papers, the plaintiff has served the defendants with Rule 33 interrogatories and Rule 34 requests for the production of documents, but the defendants have failed to answer the interrogatories or to produce responsive documents to the plaintiff's satisfaction. We address these discovery requests below, seriatim. As explained below, the plaintiff's motion will be granted in part and denied in part.

A. Interrogatory No. 5

Interrogatory No. 5 is directed to defendant Stroud, asking him to answer two separate questions: (a) "the name of the other two officers who assisted you [in] escort[ing] Mr. Kates down the range on May 24, 2012"; and (b) "are you aware that another officer on May 24, 2012[,] stated 'inmate Collins bit R. Packer" (yes or no). (Doc. 216, at 6).

The defendants have objected to this interrogatory on the grounds that it is overly broad and vague, explaining that it "is not clear whether [the plaintiff] is requesting information as to staff who escorted him from

his cell to the shower area or from the shower area to the new cell assignment." (Doc. 225-1, at 69). The defendants have further objected that "information regarding escorting officers (memoranda of staff concerning this incident) had been previously provided to Kates . . . and is part of the record." (*Id.*).

Starting with the second objection, we note that, under Rule 33(d), when a response to an interrogatory may be derived from business records and when the burden of deriving the answer from the records is substantially the same for both sides, the production of these business records sufficiently answers the interrogatory. *See* Fed. R. Civ. P. 33(d). This provision "relat[es] especially to interrogatories which require a party to engage in burdensome or expensive research into his own business records in order to give an answer." Fed. R. Civ. P. 33 advisory committee note (1970). "[I]f an answer is readily available in a more convenient form, Rule 33([d]) should not be used to avoid giving the ready information to a serving party." *Daiflon, Inc. v. Allied Chem. Corp.*, 534 F.2d 221, 226 (10th Cir. 1976). This interrogatory does not seek information that should require the defendants to engage in burdensome research or analysis of their business records to answer. It seeks information readily available to

defendant Stroud from his *personal knowledge*—the names of two other officers who assisted him in escorting the plaintiff on May 24, 2012, and whether defendant Stroud is personally aware that another officer stated that inmate Collins, the plaintiff's cellmate, bit defendant Packer.

Moreover, we find the interrogatory neither unreasonably vague nor overly broad. Kates's surviving claims concern the alleged use of excessive force in an unmonitored area while being escorted from his original cell to the shower area. In context, it is clear that the interrogatory concerns that leg of Kates's movements under escort that day. The defendants' objection provides no basis for their failure to answer and identify the other two officers who joined defendant Stroud in escorting Kates from his original cell to the shower area. To the extent the defendants believe it necessary to clarify this distinction—between the first leg of Kates's movements under escort, from original cell to shower area, and his second leg, from shower area to new cell—they were, and remain, free to qualify Stroud's answer to this interrogatory. *See Pulsecard, Inc. v. Discover Card Servs., Inc.*, No. CIV. A. 94-2304-EEO, 1996 WL 397567, at *8 (D. Kan. July 11, 1996) ("Plaintiff may determine whether to qualify its answer. The possibility of qualification does not, however, make the interrogatory

objectionable. Fed. R. Civ. P. 33(b)([3]) contemplates the possibility of qualification. It directs parties to answer interrogatories to the extent they are not objectionable.").

Accordingly, the defendants' objections to Interrogatory No. 5 will be overruled, the motion will be granted with respect to this interrogatory, and defendant Stroud will be directed to answer both parts of this interrogatory, identifying the other two officers who assisted in escorting Kates from his cell to the shower area on May 24, 2012, and stating whether he is aware that another officer stated that inmate Collins bit defendant Packer.

B. Interrogatory No. 7

Interrogatory No. 7 is directed to defendants Wagner and Stroud, asking each respectively to answer one of two unrelated questions: (a) "the name of the second officer who was alle[ged]ly bit[t]en by Mr. Kates," directed to Wagner; and (b) "what body part on Mr. Kates [did] you assi[s]t[] in controlling on May 24, 2012," directed to Stroud. (Doc. 216, at 6).

The defendants have objected to this interrogatory on the grounds that it is vague and a compound question, explaining that the "two

separate requests/statements in [this interrogatory] make it confusing to determine what is being requested." (Doc. 225-1, at 70). The defendants have further objected that "information regarding all memoranda of staff and incident reports regarding this incident have been provided to Kates and are part of the record," and advised that "[s]taff injury assessments are attached for Kates'[s] convenience." (*Id.*).[2]

As noted above, under Rule 33(d), reference to business records in lieu of a straightforward answer to an interrogatory is generally reserved for "interrogatories which require a party to engage in burdensome or expensive research into his own business records in order to give an answer." *See* Fed. R. Civ. P. 33(d) & advisory committee note (1970). "[I]f an answer is readily available in a more convenient form, Rule 33([d]) should not be used to avoid giving the ready information to a serving party." *Daiflon, Inc.*, 534 F.2d at 226. This interrogatory does not seek information that should require the defendants to engage in burdensome research or analysis of their business records to answer. It seeks information readily available to defendants Wagner and Stroud from their

[2] The staff injury assessments were actually attached to the defendants' response to Kates's request for production of documents. (*See* Doc. 225-1, at 38–39).

personal knowledge—from Wagner, the name of a second officer who was allegedly bitten by Kates, and from Stroud, the part of Kates's body over which Stroud exercised control during his movement from his original cell to the shower area on May 24, 2012.

The defendants object that this interrogatory poses a compound question, but the mere fact that an interrogatory addresses multiple topics does not render it unduly burdensome. *See Parks, LLC v. Tyson Foods, Inc.*, No. 5:15-cv-00946, 2015 WL 5042918, at *5 n.3 (E.D. Pa. Aug. 26, 2015) ("Rule 33(a)(1) provides that a 'discrete subpart' of an interrogatory counts separately toward the twenty-five interrogatory limit imposed by the Rule, but the Rule does not require an interrogatory that contains multiple parts to separately identify each part.").

> When Rule 33(a) was amended to limit the number of interrogatories that can be propounded, the draftsmen appreciated that the numerical restriction could be evaded by "joining as 'subparts' questions that seek information about discrete separate subjects." Fed. R. Civ. P. 33 advisory committee's note [(1993)]. Therefore, the numerical limitation in the rule is stated as "not exceeding 25 in number including all discrete subparts." Fed. R. Civ. P. 33(a).

Banks v. Office of Senate Sergeant-at-Arms, 222 F.R.D. 7, 10 (D.D.C. 2004). As we have recently held, "a subpart is discrete and regarded as a separate

interrogatory when it is logically or factually independent of the question posed by the basic interrogatory." *Pulchalski v. Franklin Cty.*, CIVIL NO. 15-CV-1365, 2017 WL 57143, at *4 (M.D. Pa. Jan. 5, 2017) (quoting another source) (brackets omitted). The two parts to Kates's Interrogatory No. 7 are clearly discrete subparts, and thus this interrogatory should be counted as two for the purpose of the 25-interrogatory limit. But there is no suggestion in the record before the Court that construing Interrogatory No. 7 in this manner would cause Kates to exceed the 25-interrogatory limit, and our own review of the full set of interrogatories propounded by Kates suggests that he is well within the limit even if all discrete subparts are counted separately. (*See* Doc. 216).

Nor do we find the interrogatory to be unreasonably vague. Although it poses two separate questions to two separate defendants, it is clear what information Kates seeks from each. From defendant Wagner, Kates seeks to identify a second officer who was allegedly bitten by Kates, and from defendant Stroud, Kates seeks to identify the body part of his over which Stroud exercised control while escorting Kates from his original cell to the shower area on May 24, 2012.

Accordingly, the defendants' objections to Interrogatory No. 7 will be

overruled, the motion will be granted with respect to this interrogatory, defendant Wagner will be directed to answer the first part of this interrogatory, identifying the second officer whom Kates is alleged to have bitten, and defendant Stroud will be directed to answer the second part of this interrogatory, identifying the body part of Kates's over which Stroud exercised control while escorting Kates from his original cell to the shower area on May 24, 2012.

C. Interrogatory No. 8

Interrogatory No. 8 is directed to defendant Packer, asking him to answer three separate questions: (a) identify "the exact place or spot [on the range] [where] Mr. Kates alle[ged]ly bit you . . . on May 24, 2012"; (b) identify the location on the range where Kates was "taken down" after he allegedly bit Packer; and (c) identify the location on the range where Kates was "taken down" after the "alle[ged] second biting." (Doc. 216, at 6).

The defendants have objected to this interrogatory on the grounds that it is vague and a compound question, explaining that the "three separate questions/statements in [this interrogatory] make[] it confusing to determine what is being requested." (Doc. 225-1, at 71). The defendants have further objected that "information regarding all memoranda of staff

and incident reports regarding this incident have been provided to Kates and are part of the record." (*Id.*).

As noted above, under Rule 33(d), reference to business records in lieu of a straightforward answer to an interrogatory is generally reserved for "interrogatories which require a party to engage in burdensome or expensive research into his own business records in order to give an answer." *See* Fed. R. Civ. P. 33(d) & advisory committee note (1970). "[I]f an answer is readily available in a more convenient form, Rule 33([d]) should not be used to avoid giving the ready information to a serving party." *Daiflon, Inc.*, 534 F.2d at 226. This interrogatory does not seek information that should require the defendants to engage in burdensome research or analysis of their business records to answer. It seeks information readily available to defendant Packer from his *personal knowledge*—the particular location within the prison where Kates allegedly bit Packer, the particular location within the prison where Kates was allegedly "taken down" after he bit Packer, and the particular location within the prison where Kates was allegedly "taken down" a second time after he allegedly bit a second officer.

The defendants object once again that this interrogatory poses a

compound question, but, as noted above, the mere fact that an interrogatory addresses multiple topics does not render it unduly burdensome. *See Parks, LLC*, 2015 WL 5042918, at *5 n.3. "[A] subpart is discrete and regarded as a separate interrogatory when it is logically or factually independent of the question posed by the basic interrogatory." *Pulchalski*, 2017 WL 57143, at *4; *see also Banks*, 222 F.R.D. at 10. In this instance, it is our impression that the three questions posed in Interrogatory No. 8 concern a single topic, but even assuming *arguendo* that they constitute discrete subparts counted separately for the purpose of the 25-interrogatory limit, there is nothing in the record before us to suggest that counting Interrogatory No. 8 as three discrete subparts would cause Kates to exceed the 25-interrogatory limit—as noted above, our own review of the full set of interrogatories propounded by Kates suggests that he is well within the limit even if all discrete subparts are counted separately. (*See* Doc. 216).

Accordingly, the defendants' objections to Interrogatory No. 8 will be overruled, the motion will be granted with respect to this interrogatory, and defendant Packer will be directed to answer all three parts of this interrogatory, identifying the particular location within the prison where

Kates allegedly bit Packer, the particular location within the prison where Kates was allegedly "taken down" after he bit Packer, and the particular location within the prison where Kates was allegedly "taken down" a second time after he allegedly bit a second officer.

D. Request for Production of Documents No. 1

Document Request No. 1 seeks the production of "all documents or things described, referenced, or identified in" the defendants' answers to interrogatories. (Doc. 216, at 7).

The defendants have objected to this document request on the grounds that it is overly broad and vague, explaining that "numerous documents referenced in the responses to interrogatories" were previously produced, and that documents related to May 24, 2012, incident are already part of the record. (Doc. 225-1, at 71). The defendants failed to articulate any basis for their vagueness objection. (*See id.*).

In response to the defendants' objections, the plaintiff served a document labeled as his second set of requests for production of documents, but instead of promulgating additional new requests, in this document Kates sought to "clarify" his previous document requests. (*Id.* at

89–94).[3] With respect to Document Request No. 1, Kates clarified that "plaintiff *only* need[s] the documents on who participated in the investigation on remaining defendants and the nature thereof (i.e.) [Special Investigative Services,] internal affairs[,] etc." addressed in his Interrogatory No. 1, and documents concerning each defendant's work duties and disciplinary history, addressed in his Interrogatory No. 3. (*Id.* at 89).

The defendants have objected to "clarified" Document Request No. 1 on the grounds that it is "vague and unclear as to what is being requested," explaining that:

> To the extent the Plaintiff is requesting documentation regarding the investigation of Defendant Packer, the Defendant states production of such investigation would jeopardize the safety and security of the institution. To the extent the Plaintiff is requesting documentation related to investigations of other defendants related to the claims herein, the Defendants state none of the other defendants were investigated related to the underlying claims in this action. To the extent the Plaintiff is requesting information regarding disciplinary investigations of the defendants of incidents unrelated to the claims in the instant law suit, the Defendants state such incidents would be irrelevant to

[3] Kates later served the defendants with a second copy of the very same document. (Doc. 225-1, at 98–103). Except for the date, the second copy was identical to the first.

this matter.

(*Id.* at 110). Except for investigation-related documents, the defendants represent that they have produced all responsive documents. (Doc. 225, at 12).

We agree with the defendants that the disciplinary history of the defendants concerning incidents unrelated to the events giving rise to this action are irrelevant, and we will deny the motion to compel with respect to such documents. Concerning the investigation of defendant Packer, we are sensitive to the institutional security concerns raised by the defendants, and thus we will order the defendants to produce any responsive documents to the Court for *in camera* inspection, together with a properly supported memorandum of law and an affidavit or declaration outlining the basis for their position that these documents should be withheld from the plaintiff based on institutional security.[4] *See Sloan v. Murray*, Civil No. 3:CV-11-0994, 2013 WL 5551162, at *3 (M.D. Pa. Oct. 8, 2013) ("A conclusory objection reciting a mantra of institutional

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[4] The responsive documents, memorandum of law, and affidavit or declaration should be submitted to chambers *ex parte*. In our review, we will determine whether any of these materials should be filed and entered into the record of this case, and whether such filing should be under seal.

security . . . is insufficient. A party wishing to obtain a protective order to prevent the disclosure of information through the discovery process has the burden of demonstrating that 'good cause' exists for the order."). Concerning any investigation of the other defendants, the defendants have disclosed that no responsive documents exist because none of the other defendants were investigated in connection with the events giving rise to this action; a party "cannot be compelled to produce what she does not possess," and thus the motion to compel will be denied with respect to such documents. *Dipietro v. Jefferson Bank*, 144 F.R.D. 279, 281 (E.D. Pa. 1992).

Accordingly, the defendants' objections to Document Request No. 1 will be sustained in part and the motion denied in part, with a ruling on documents regarding the investigation of defendant Packer deferred pending the *ex parte* production of responsive documents concerning the Packer investigation to the Court for *in camera* inspection.

E. Request for Production of Documents No. 3

Document Request No. 3 seeks production of "the hand-held camera footage on second floor, from May 24, 2012[,] that was operated by Dennis Campbell and B. Mattern, [and] also the range video footage from [May 24,

2012].” (Doc. 216, at 7). In April 2016, Kates was permitted to view the range video footage per his request. (Doc. 225, at 14; Doc. 225-1, at 33 (“The video of the incident that has been retained was shown to Kates in April 2016.”)). Kates seeks an order compelling the defendants to produce hand-held video footage recorded by former defendants Campbell and Mattern.[5] But Kates’s surviving claims solely concern the alleged use of excessive force in an unmonitored area while being escorted from his original cell to the shower area. It is undisputed that the hand-held video footage recorded by Campbell and Mattern is limited to footage of a medical assessment of Kates in the shower area and his movement from the shower area to a new cell; it does not document any conduct or events that occurred during the immediately prior, relevant time period during which Kates was escorted from his original cell to the shower area. (*See* Doc. 151-6, at 34–41). Accordingly, the motion will be denied with respect to Document Request No. 3.

F. Request for Production of Documents No. 4

Document Request No. 4 seeks production of “the pdf[] files, photos,

[5] Both of these defendants were dismissed from this case by the Court on March 29, 2016. (Doc. 186; Doc. 187).

medical reports, statements[,] etc. [with respect to] C.O. R. Packer and the unidentified officer who was alle[ged]ly bit[t]en by Mr. Kates." (Doc. 216, at 7).

The defendants objected to this document request on the grounds that it is vague and overly broad, explaining that:

> This request has no time frame and does not limit this request to the incident at issue. Medical records or photos of Defendant Packer would not have any relevance to this matter. Moreover, the medical records related to the incident of May 24, 2012[,] are a part of the record.

(Doc. 225-1, at 33). Notwithstanding their objection, the defendants produced a copy of an "Employee Injury Assessment and Followup (Medical)" form dated May 24, 2012, which documented an injury to defendant Packer's pinky finger, caused when he was "bit by inmate." (*Id.* at 39). They also produced a copy of an "Employee Injury Assessment and Followup (Medical)" form dated May 24, 2012, which documented an injury to the right thumb of a non-party correctional officer, Scott Buehendorf, caused when he was "bit by inmate Collins," Kates's cellmate. (*Id.* at 38).

As noted above, the plaintiff subsequently served a document labeled as his second set of requests for production of documents in which he

sought to "clarify" his previous document requests. (*Id.* at 89–94). With respect to Document Request No. 4, Kates clarified that "plaintiff *only* need[s] the pdf file photos, medical report[,] and statements from May 24, 2012[,] between 9:50–10:15 p.m. on the unidentified officer who was allegedly bitten by plaintiff Kates." (*Id.* at 90).

In turn, the defendants have objected to "clarified" Document Request No. 4 on the grounds that it is "irrelevant because the other officer was bitten by Plaintiff's cell mate." (*Id.* at 112). Nevertheless, "[i]n a good faith effort to be responsive, the staff medical evaluations [were produced,] as [was] a photo of the other staff member bitten by Plaintiff's cell mate." (*Id.*; *see also id.* at 117–19). The defendants further represent that there is no indication that Kates bit a second officer, and thus no responsive documents exist. (Doc. 225, at 15).

Accordingly, the defendants' objections will be sustained and the motion denied with respect to Document Request No. 4.

G. Request for Production of Documents No. 5

Document Request No. 5 seeks production of "any and all documents relating to the prison medical center, staff training[,] and education." (Doc. 216, at 7).

The defendants objected to this document request on the grounds that it is overly broad, vague, and irrelevant, explaining that:

> Defendants do not know what documents Kates is requesting. All documents relating to the prison medical center is overly burdensome (including all medical records of every inmate, all policies with no time frame or limited issues, etc.), would not be relevant to this case, and is not proportional to the needs of the case. Additionally, the request for staff training and education is vague and would require Defendants to decipher what Kates seeks, which they cannot do.

(Doc. 225-1, at 34).

As noted above, the plaintiff subsequently served a document labeled as his second set of requests for production of documents in which he sought to "clarify" his previous document requests. (*Id.* at 89–94). With respect to Document Request No. 5, Kates clarified that "plaintiff *only* need[s] the defendants['] staf training on [] use of force . . . and education certification in this same field, these request[s] are relevant and limited to defendants['] training and educational certification document[s] in this matter." (*Id.* at 91). Kates expressly withdrew his request with respect to documents relating to the medical center. (*Id.*).

In turn, the defendants answered "clarified" Document Request No. 5, advising that:

> Defendants have no records responsive to this request. In a good faith [effort to be responsive], however, the agency provides a redacted copy of the annual refresher training for 2012 and evidence that the defendants attended (including the course on use of force).

(*Id.* at 112–13).

Kates nevertheless seeks an order compelling the defendants to produce additional use-of-force training materials. But a party "cannot be compelled to produce what she does not possess." *Dipietro*, 144 F.R.D. at 281.

Accordingly, the defendants' objections will be sustained and the motion denied with respect to Document Request No. 5.

H. Request for Production of Documents No. 9

Document Request No. 9 seeks production of "the hand-held videotape of the medical examination and medical treatment that took place on May 24, 2012, by nurse Hicks in the USP Lewisburg hospital." (Doc. 216, at 8). As noted previously, Kates's surviving claims solely concern the alleged use of excessive force in an unmonitored area while being escorted from his original cell to the shower area. His deliberate indifference claims regarding medical treatment have been dismissed. Accordingly, the motion will be denied with respect to Document Request

No. 9.

An appropriate Order will follow.

Dated: July 21, 2017

s/ Joseph F. Saporito, Jr.
JOSEPH F. SAPORITO, JR.
United States Magistrate Judge