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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT TACOMA

9 LENIER AYERS,

10 Plaintiff,

11 v.

12 HENRY RICHARDS, *et al.*,

13 Defendants.

No. C08-5390 BHS/KLS

ORDER REGARDING PLAINTIFF'S
MOTIONS (DKTS. 111, 112, 113, 123, 127
and 130)

14
15 Before the Court are several discovery motions brought by Plaintiff Lenier Ayers. The
16 Court, having reviewed the motions, Defendants' responses, and balance of the record, finds and
17 orders as follows:

18 **A. Dkt. 111 – “Time Barring” Public Disclosure Evidence**

19 In the caption of his motion, Plaintiff ask the “Court to waive and subsequently refrain
20 from insisting on time barring relative public disclosure evidence previously requested on
21 Defendant’s Willie Stoddard, Leslie Sziebert and other listed defendant’s regarding reported
22 incidents prior to 2005.” Dkt. 111. Plaintiff states in his motion that the evidence is related to an
23 “on-going extensive six year history of apparent issues regarding the deliberate denial of
24 appropriate medical treatment.” *Id.*, p. 1. He states further that the Court should authorize him
25 to receive all previously requested public disclosure documents related to incidents that occurred
26

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1 before 2005. *Id.*, p. 2. Attached to his motion is a copy of Defendants' Second Supplemental
2 Response indicating that Defendants produced documents DEF1216-2760; and DEF 3965-
3 DEF5005 in response to Plaintiff's requests.

4 It is unclear from the motion whether Mr. Ayers seeks a ruling as to the admissibility of
5 the documents he received in discovery or whether he seeks to compel the production of further
6 information. To the extent Plaintiff is seeking at this juncture of the litigation to obtain a ruling
7 that certain documents he has obtained in discovery are not time-barred and are admissible at
8 trial, such a motion is premature and will not be granted at this time.

9
10 To the extent Plaintiff seeks to compel the discovery of further documents from
11 Defendants, the record reflects that Plaintiff is in possession of documents responsive to his
12 requests. According to counsel for Defendants, Plaintiff propounded one set of requests for
13 production on January 13, 2009. Defendants responded on February 13, February 20 and
14 February 27, 2009. Dkt. 115, and Attachment B. Mr. Ayers propounded no other discovery
15 after January 13, 2009. Dkt. 114, p. 2. Defendants state that they believe they have already
16 produced the documents in question to Plaintiff, identified as follows:
17

- 18 1) 2003 documents (bates stamped DEF 2855-2951, 2963-73, 3265, 3276-3462); 2004
19 documents (Bates stamped DEF 2952-62, 2992-3000, 3003-16, 3073, 3075-78, 3250-59);
20 2005 documents (bates stamped DEF 2974-91, 3001, 3017-47, 3074, 3079-3113, 3129-
21 30, 3133-46, 3184-3249, 3275);
- 22 2) DEF 5006-5236 –behavioural management reports, grievances and incident reports
23 regarding plaintiff during the years 2004 and 2005
- 24 3) DEF 2761- 3717 - 957 viewed and ordered public disclosure documents during the
25 period of Sept. 2007 (Request for Production No. 21), were produced to Plaintiff on
26 February 20, 2009.

Dkt. 114, p. 2; Dkt. 115; Dkt. 54-2; 54-3. (The issues raised by Mr. Ayers in Dkts. 112 and 113
are addressed separately by the Court below).

1 If Mr. Ayers disagrees that he has received all information sought in his January 13
2 requests for production, he must do two things. First, he must properly confer with opposing
3 counsel in a good faith attempt to secure the information or material without court intervention.
4 Second, if after conferring with counsel, Mr. Ayers still insists that a discovery motion is
5 required, he shall describe in detail the documents he believes the Defendants have not produced.
6 He must set forth the number of the request as well as the request itself, the documents produced
7 in response to the requests, if any, and he must provide the Court with an explanation of why
8 Defendants' response is incomplete and/or evasive.
9

10 In addition, Mr. Ayers' motion to compel must include a certification that he has in good
11 faith conferred or attempted to confer with the person or party failing to make the discovery in an
12 effort to secure the information or material without court intervention." Fed. R. Civ. P.
13 37(a)(2)(B). "A good faith effort to confer with a party or person not making a disclosure or
14 discovery requires a face-to-face meeting or a telephonic conference." Local Rule CR
15 37(a)(2)(A). The Court will not entertain any future discovery motion in this case unless it
16 contains a certification, which explains what efforts were made by the parties and why the parties
17 could not reach an agreement without the Court's intervention.¹
18

19 Based on the information presently before the Court, Plaintiff's motion asking the Court
20 to waive and refrain from time barring public disclosure evidence (Dkt. 111) is **DENIED**.
21
22
23

24 ¹ Defendants contend that Mr. Ayers failed to consult with opposing counsel before filing any of his discovery
25 motions, which is shown by Mr. Ayers' May 19, 2009 deposition testimony when he stated he "already" filed his
26 motion before conferring. Dkt. 117, Attachment A. However, the motion referred to by Mr. Ayers during his
deposition was filed on May 15, 2009. Dkt. 107. The motions presently before the Court were filed after Mr.
Ayers' deposition. Mr. Ayers includes descriptions of consultations with counsel in some of his motions (Dkts. 112,
123 and 130), but in others he does not. Because Mr. Ayers raises some issues more than once in his motions, it is
difficult for the Court to determine when the parties consulted or the scope of those consultations.

1 **B. Dkt. 112 – Motion to Compel Production of Evidence and Leave to**
2 **Electronically Depose Defendants and Other Witnesses**

3 In this motion, Plaintiff seeks to compel the production of various documents he states
4 were set forth in a “previously filed Subpoena Duces Tecum on October 27, 2008.” Dkt. 112, p.
5 1. There was no subpoena duces tecum filed on October 27, 2008. In July 2008, Mr. Ayers sent
6 a “subpoena duces tecum” to Donna J. Hamilton, AAG and to Defendants Dr. Henry J. Richards
7 and Becky Denny, for the production of certain documents before any defendants were served
8 with process. Dkt. 10. Mr. Ayers then filed a motion to compel the production of documents set
9 forth in that subpoena. Dkt. 61. The Court denied the motion to compel because the defendants
10 were under no obligation to respond to discovery requests before they were served with a
11 complaint. Dkt. 80.
12

13 As noted above, Mr. Ayers sent out one set of discovery requests to Defendants. To the
14 extent Mr. Ayers seeks to compel the production of records responsive to that set of discovery,
15 the Court will address those issues here. The Court will not address requests for new discovery
16 or for discovery pursuant to a subpoena that the parties were under no obligation to answer.
17

18 **1) SCC Policies 140, 253 and 404 (Request for Production No. 10A)²**

19 Mr. Ayers seeks the production of SCC Policies 140, 253 and 404. Defendants provided
20 Plaintiff with a copy of Policy 140 on February 13, 2009 (marked as DEF-00000001-13); a copy
21 of Policy 235 was sent to Plaintiff on June 5, 2009. Dkt. 117, p. 2.
22

23 As to Policy 404, Mr. Ayers argues that this policy is relevant to his claims that he was
24 forcefully and unnecessarily removed from his room and placed in administrative/disciplinary
25 isolation in many instances. Dkt. 112, p. 3.
26

² A copy of the Plaintiff’s Request for Production is found at Dkt. 117-3.

1 Defendants initially responded that SCC Policy 404 does not exist, but this was in error.
2 Dkt. 117, p. 2. The policy was withdrawn in April 2006 and no longer reflected where SCC
3 maintains active policies. *Id.* Defendants produced at least one page from Policy 404 (DEF-
4 00003100) in response to Plaintiff's requests for production; that document was contained within
5 one of Plaintiff's grievances. *Id.* In their February 13, 2009 response, the Defendants object to
6 the production of other 400-series policies on relevance grounds and to protect the security of the
7 SCC. Dkt.117, Attachment B. Cathi Davis, the Associate Superintendent of SCC, states that
8 SCC's past and present 400 series policies relate to institutional responses for various types of
9 threats to the safety and security of SCC staff, residents, visitors, and the community. Dkt. 118,
10 p. 1. Ms. Davis states that maintaining the confidentiality of these policies is crucial to the
11 effective security of the SCC. *Id.* However, the Plaintiff is only requesting a copy of Policy 404,
12 one page of which has already been produced.
13

14
15 In light of the security issues raised, Defendants are directed to a copy of SCC's Pollicy
16 404 (identified as "withheld from production as restricted confidential" in response to Request
17 for Production No. 10A) **to the Court only** for an *in camera* inspection. This copy shall be due
18 no later than **July 31, 2009**. The defendants shall also clearly identify the one page of this Policy
19 that has already been produced to the Plaintiff. After review, the Court shall determine if Policy
20 404 shall be produced. Until then, a ruling on Mr. Ayers' motion to compel production of Policy
21 404 shall be deferred.
22

23 **2) Criminal History Records for Sziebert**

24 In Request for Production No. 17A, the Plaintiff requested criminal records and
25 background information on defendant's "Stoddard, Sziebert, Wienberg, Dornfer, Hogan,
26 Richards, and any and all staff and residential abuse complaints that were filed against these

1 defendants.” Dkt. 117-3, p. 3. Defendants objected to criminal records and background
2 information as privileged and stated that they were not required to retain the information; they
3 also objected to relevance as to Dorfner and Hogan, who are not named as defendants and not
4 served. *Id.* Without waiving their objections, Defendants stated that they will supplement their
5 response as they receive further documentation regarding this request. *Id.*

6
7 In the Defendants’ supplemental response, they produced 25 pages. From the
8 information presented to the Court, it appears that the Defendants have responded. Thus,
9 Plaintiff’s motion to compel this information is denied.

10 **3) Rule 26(a) Disclosures and Conference Requirement**

11 Mr. Ayers argues that the parties are not permitted to begin discovery until after they
12 have met to plan discovery. Dkt. 112, p. 4. He seeks to compel Defendants’ participation in
13 “initial disclosures.” *Id.* However, Fed. R. Civ. P. 26(a)(1)(B)(iv) specifically exempts initial
14 disclosures in “action[s] brought without an attorney by a person in the custody of the United
15 States, a state, or a state subdivision.” Mr. Ayers is currently civilly detained at the SCC, a total
16 confinement facility operated by a subdivision of the state of Washington, and is appearing
17 without counsel in this matter. His motion for Rule 26(a) disclosures is, therefore, not proper.
18 The same exemption is applicable to subdivision (f)’s requirement for a meeting. Fed. R. Civ. P.
19 26(f)(1).
20

21 Discovery in this matter is governed by the Court’s Scheduling Order. Dkt. 65. Also, as
22 noted by Defendants, Mr. Ayers served requests for production on the Defendants without first
23 meeting to plan discovery. Thus, it is not credible now for him to claim that the parties are not
24 permitted to begin discovery until after they have met to plan discovery.
25
26

1 4) **Video Tapes (Request for Production No. 10B)**

2 Mr. Ayers complains that he has been denied access to various video tapes. Mr. Ayers
3 requested SCC unit security video for assault incidents occurring on 1-17-06, 9-11-07 and 6-1-
4 08. Dkt. 117-3, p. 2. Defendants advised Mr. Ayers that the videos are considered contraband
5 that cannot be possessed by a resident within the total confinement facility, but that the videos
6 were delivered to SCC Legal Coordinator Becky Denny and that he could view the videos by
7 making an appointment with her to do so. *Id.* According to Defendants, Mr. Ayers has never
8 made an appointment to view the videos. Dkt. 116, p. 4.

9
10 The Court finds that Defendants have complied with this discovery request by making the
11 videos available for Plaintiff to view at the SCC and that Plaintiff's motion to compel should be
12 denied.

13 **5) Unidentified Discovery Requests**

14 Throughout his motion, Mr. Ayers refers to various records he claims he has not
15 received. For example, Plaintiff complains he requested but has not received records relating to
16 Annette Rivers, Kenny Gordon, grievances, medical records, medical meals, criminal histories
17 for Russell Boatman and John Lewis, copies of previously filed abuse complaints and medical
18 records relating to his claim that Dr. Sziebert refused to allow him medically prescribed meals.
19 However, Mr. Ayers does not identify a previously propounded discovery request sent to
20 Defendants where these records were requested. As best as the Court can determine, his request
21 for information relating to Annette Rivers was included in Request for Production No. 13 and
22 Defendants have complied with this discovery request. Dkt. 117-3, p. 2. Plaintiff never made a
23 request for information relating to Kenny Gordon.
24
25
26

1 With regard to Mr. Ayers' requests for medical information (Requests for Production
2 Nos. 11, 12, 13, 14, 15, 31 and 32), the record reflects that Mr. Ayers received documents in
3 response to his requests for medical records. With regard to Requests for Production No. 16, it
4 appears that Mr. Ayers received "copies of all grievances and complaints submitted by the
5 plaintiff claiming medical abuse, abuse from Dr. Sziebert, the denial of medically prescribed
6 meals, requests for medical treatment, and the request for medical meals from 2004 to 2008."
7
8 *See, e.g.*, Dkt. 117-3, pp. 3, 9.

9 Based on the foregoing, it appears that Mr. Ayers' complaints that he has been denied
10 responses to these discovery requests are not well taken. A thorough review of Plaintiff's
11 Requests for Production (Dkt. 117-3) along with Defendants' initial responses and two
12 supplemental responses lead to the conclusion that all requested documents have been produced,
13 except as discussed below. If Mr. Ayers disagrees that he has received all information sought in
14 his January 13 requests for production, he must first confer in good faith with opposing counsel
15 in an attempt to secure the information. Only after all good faith efforts fail, may he file a
16 motion to compel and then, such a motion must describe with specificity the documents he seeks.
17 He must describe in detail for the Court why the information he has received to date in response
18 to his discovery requests are non-responsive or evasive and, he must include a certification that
19 he has first conferred with counsel pursuant to Fed. R. Civ. P. 37 (a)(2)(B).
20

21 **6) Statute of Limitations Objections**

22 In response to a number of requests for production, Defendants state that incidents prior
23 to 2005 are time barred and have produced only documents for incidents after 2005. *See*
24 Requests for Production No. 14 (2003 and 2004), No. 15 (2003 to 2008), No. 16 (2004 to 2008),
25 No. 17B (2003 to 2005) and No. 18 (2004 to 2008).
26

1 An objection as to the admissibility of evidence at the time of trial is not a proper defense
2 to the discoverability of the evidence. “Relevant information need not be admissible at the trial
3 if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.”
4 Fed. R. Civ.P. 26(b)(1).

5 Accordingly, Defendants are ordered to supplement their responses to Requests for
6 Production Nos. 14, 15, 16, 17B and 18 to cover the years prior to 2005 as requested therein.³ If
7 they have already produced documents responsive to these requests, Defendants may so advise
8 the Court in their supplement.
9

10 **7) Request for Production No. 33**

11 In this request, Plaintiff sought all residential and staff grievances, complaints and police
12 files on Jose David Garcia, Willie Stoddard and Richard Steinbach. Dkt. 117-3, p. 5.
13 Defendants responded that if responsive documents became available, they will produce them.
14 Defendants need to take affirmative steps to determine if there are records responsive to this
15 request as to Defendant Stoddard and to supplement their response to this request. Defendants
16 do not need to produce the requested documents as to the other named individuals as they are not
17 named in this lawsuit. Accordingly, the Court finds that Defendants shall provide a
18 supplemental response to Request for Production No. 33 **on or before July 31, 2009.**
19

20 **8) Depositions**

21 Mr. Ayers seeks to extend the discovery deadline, which expired on June 5, 2009, to take
22 31 depositions. Dkt. 112, pp. 10-11. He “recommends” that he be provided access to all the
23 named defendants and be given the full names and addresses of the additionally named
24 individuals for the purpose of taking the 31 depositions “electronically.” As early as October 31,
25

26

³ The Court is aware that Defendants have produced some documents prior to 2005. Dkt. 114, p. 2 n.1. However, it is unclear to which request these documents correspond.

1 2008, Mr. Ayers stated that he will need to take a large number of depositions. Dkt. 29, p. 4.
2 However, has failed to notice any depositions. Of the 31 individuals named, nine are residents of
3 the SCC, who appear to be Mr. Ayers' own witnesses. Dkt. 112, p. 11. According to
4 Defendants, Mr. James Schoenberger is an attorney who formerly represented Plaintiff and Mr.
5 Sam Elwonger is a former SCC ombudsman who left his position in December 2002, long before
6 the alleged events underlying Plaintiff's claims. Dkt. 117, p. 2.

7
8 Mr. Ayers does not explain why the testimony of any of the listed witnesses is relevant to
9 his case, why he was unable to obtain these depositions during the six month discovery period,
10 and why he was not able to obtain the information he needs from these witnesses through some
11 means other than a deposition. In addition, Mr. Ayers provides no explanation as to when and
12 in what manner these depositions are to be taken, other than that he desires that they be taken
13 "electronically." Mr. Ayers' *in forma pauperis* status does not waive the costs associated with
14 litigation other than the filing fee. Mr. Ayers must pay for all other costs of litigation, including
15 the cost of a court reporter if that is his chosen means of recording a deposition.
16

17 The Court will not grant an extension of the discovery deadline based on Mr. Ayers' last
18 minute decision to depose every defendant and every witness that comes to mind. It is clear that,
19 with the exception of one request for production, Mr. Ayers has done no other discovery. He
20 provides no explanation for this lack of diligence except to repeat his complaint that he cannot
21 exceed his monthly allotment of photocopying at the SCC. In light of Mr. Ayers' multiple
22 filings in this case, the Court is not persuaded that Mr. Ayers could not have made some attempt
23 to pursue additional discovery, including deposition discovery, within the time frame originally
24 allotted.
25
26

1 **9) Sanctions**

2 Mr. Ayers seeks sanctions against Assistant Attorney General Hamilton for failure to
3 produce evidence “in an appropriate sufficient and non-methodical and timely manner.” Dkt.
4 112, p. 5.

5 Rule 37 sanctions are appropriate only upon the granting of a properly filed motion to
6 compel (with a certification that the movant has in good faith conferred or attempted to confer in
7 an effort to obtain the discovery without court action), and the opposing party’s nondisclosure
8 was substantially unjustified. Fed. R. Civ. P. 37(a)(5)(A). It is clear that these circumstances do
9 not exist here.

10 Mr. Ayers accuses Attorney Hamilton of refusing to produce documents since October
11 27, 2008, thus delaying his ability to successfully complete his discovery by the June 5, 2009
12 discovery deadline. Dkt. 112, p. 5. However, the record reflects that Mr. Ayers sent only one
13 request in January 2008, and he admits that he received information responsive to that request.
14 *Id.* He complains only that the information was not received within a “reasonable 20, to 30-day
15 period of time.” Dkt. 112, p. 5. However, Mr. Ayers goes on to complain that Attorney
16 Hamilton “inferentially omitted the inclusion of evidence that would prove and corroborate
17 competency issues, criminal callousness and the lack of transparency of her client/defendants.”
18 *Id.* However, Mr. Ayers does not explain what evidence has been withheld from disclosure.

19 The Court finds no evidence that Ms. Hamilton has acted in bad faith and no evidence
20 that Ms. Hamilton has withheld documents from disclosure or interfered with Mr. Ayers’ ability
21 to prosecute his case.

22 Accordingly, Plaintiff’s motion to compel, for sanctions, and to take depositions shall be
23 denied, except that Defendants shall (1) produce a copy of SCC’s 404 Policy to the Court only
24

1 for an *in camera* inspection, (2) shall supplement their responses to RFP Nos. 14, 15, 16, 17B,
2 18 and 33 to provide all documents requested **on or before July 31, 2009**.

3 **C. Dkt. 113 – Plaintiff’s Request for Entry of Default/Motion for Sanctions for**
4 **Withholding of Public Disclosure/Key Evidence**

5 In this motion, Mr. Ayers asks that the Court sanction Defendants Becky Denny and
6 Kristal Wiitalla Knutson by entering a default against them because they withheld previously
7 requested public disclosure documents. Dkt. 113. Having reviewed Mr. Ayers’ motion,
8 Defendants’ response and balance of the record, the Court finds that Mr. Ayers’ motion is
9 without merit and should be denied.

10 In his January 19th request for production, Mr. Ayers requested the following documents:

11 Request for Production No. 21: The plaintiff requests copies of all 957 of viewed
12 and ordered public disclosure documents during the period of Sept. 2007. These
13 documents were denied the plaintiff due to his previous, and current indigent
14 status.

15 Dkt. 120, ¶ 2, Attachment A. The SCC defendants provided the 957 pages of documents on
16 February 20, 2009. Dkt. 120, ¶ 3, Attachment B. Mr. Ayers propounded no other discovery
17 request for documents identified as “public disclosure.” *Id.*

18 Plaintiff alleges that lack of public disclosure resulted in “compelling this plaintiff to be
19 unprepared to meet the Court’s June 5 discovery deadline date.” Dkt. 113, p. 2. However,
20 Plaintiff offers the Court no explanation of why, when he received the SCC discovery responses
21 in February 2009, he was unable to meet the June 2009 discovery deadline, what Defendants
22 have done to keep him from being prepared, and more importantly, what other discovery he has
23 sought before the discovery deadline.⁴ He failed to seek Court intervention until May 28, 2009,
24

25
26 ⁴ As in previous motions, Mr. Ayers alleges that he subpoenaed various documents in October 2008. However, as noted above, the Court denied that motion to compel (Dkt. 61) on December 29, 2008. Dkt. 80. At ¶ 18 of his motion, Mr. Ayers also refers to a civil rule regarding requests for admission, but according to defense counsel, he has not propounded requests for admission on any SCC defendant. Dkt. 120. Mr. Ayers also recounts his attempts
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1 merely a week prior to the discovery deadline. Mr. Ayers provides no explanation for this delay
2 or his lack of diligence.

3 Finally, the Court notes that Defendant Knutson has not been properly served (Dkt. 33)
4 and therefore, the Court lacks personal jurisdiction over her. See, e.g., *Jackson v. Hayakawa*,
5 682 F.2d 1344, 1347 (9th Cir. 1982) (defendant must be served in accordance with Fed. R. Civ.
6 P. 4 or court has no personal jurisdiction over that defendant).

7
8 Pursuant to Rule 4(m) of the Federal Rules of Civil Procedure, service of the summons
9 and complaint must be made upon a defendant within 120 days after the filing of the complaint.
10 Unless the plaintiff can show good cause for his failure to serve, the court shall dismiss the
11 action without prejudice as to that defendant or shall extend the time for service. Fed.R.Civ.P.
12 4(m). In cases involving a plaintiff proceeding *in forma pauperis*, a United States Marshall,
13 upon order of the court, shall serve the summons and complaint. Fed.R.Civ.P. 4(c)(2). “[A]n
14 incarcerated pro se plaintiff proceeding *in forma pauperis* is entitled to rely on the U.S. Marshal
15 for service of the summons and complaint and . . . should not be penalized by having his action
16 dismissed for failure to effect service where the U.S. Marshal or the court clerk has failed to
17 perform his duties.” *Walker v. Sumner*, 14 F.3d 1415, 1422 (9th Cir. 1994) (quoting *Puett v.*
18 *Blanford*, 912 F.2d 270, 275 (9th Cir. 1990)), abrogated on other grounds by *Sandin v. Connor*,
19 515 U.S. 472 (1995). “So long as the prisoner has furnished the information necessary to
20 identify the defendant, the marshal’s failure to effect service is ‘automatically good cause.’”
21 *Walker*, 14 F.3d at 1422 (quoting *Sellers v. United States*, 902 F.2d 598, 603 (7th Cir. 1990)).
22
23

24
25 to obtain documents before any of the defendants were served in this case and reiterates his complaints that the SCC
26 Defendants are impeding his access to the courts by refusing to advance him money for photocopying. The Court
has previously addressed these issues and denied each one. Dkts. 79, 80 (Dec. 29, 2008), 87 (Jan. 15, 2009), 100
(March 13, 2009), 105 (April 24, 2009), 110 (May 28, 2009). The Court will not entertain further motions on these
same issues again.

1 However, where a pro se plaintiff fails to provide the Marshal with accurate and sufficient
2 information to effect service of the summons and complaint, the court's sua sponte dismissal of
3 the unserved defendant is appropriate. *Walker*, 14 F.3d at 1421-22.

4 On October 21, 2008, the U.S. Marshal's Office filed a return of service noting that the
5 mail was returned "unexecuted 10-21-08 – Subject not at address." The U.S. Marshall attempted
6 to serve Defendant Knutson by mail, using the address supplied by Mr. Ayers. That service was
7 returned unexecuted. Dkt. 33. Despite Mr. Ayers' *in forma pauperis* status, he must supply the
8 information necessary to identify the defendants to be served. See *Walker v. Sumner*, 14 F.3d at
9 1415.
10

11 For the foregoing reasons, Plaintiff's motion for default (Dkt. 113) shall be **DENIED**.

12 **D. Dkt. 123 – Motion to Sign for and Be Provided Full Copy of Transcript**

13 In this motion, Mr. Ayers requests a full copy of his deposition transcript and an
14 opportunity to make corrections to his deposition transcript. Dkt. 123. In response, Defendants
15 state that on June 10, 2009, Mr. Ayers was provided with a complete copy of Volumes I and II of
16 the transcript of his deposition, with instructions to review for error and sign. Dkt. 125, pp. 1-2.
17

18 In his reply, Mr. Ayers again complains that he is being denied access to photocopies
19 above his monthly allotment at SCC. Dkt. 129. As noted above, the Court will not address this
20 issue again. Mr. Ayers also restates requests for default, for sanctions and to compel addressed
21 in previously filed motions (Dkts. 112 and 113).
22

23 As Mr. Ayers has been provided with a complete copy of his deposition transcript, this
24 motion (Dkt. 123) is moot and shall be **DENIED**. Mr. Ayers' motion for an extension of time to
25 review and submit corrections to his deposition transcript (Dkt. 130) is addressed below.
26

1 **E. Dkt. 127 – Motion for Continuance of Discovery Deadline**

2 On May 28, 2009, the Court advised Mr. Ayers that if he required a continuance of the
3 discovery deadline to complete his discovery, he must file a motion, setting forth his reasons for
4 the requested continuance. Dkt. 110. In this motion, Mr. Ayers states that he has been denied
5 production of “957 public disclosure documents,” criminal history information on certain
6 defendants, and SCC Policies 140, 235 and 404. *Id.*, p. 1. The production of SCC Policies 140,
7 234 and 404 were addressed in connection with Mr. Ayers’ motion to compel (Dkt. 112) above.
8

9 Mr. Ayers’ claim that he has been denied production of “957 public disclosure
10 documents,” was addressed in connection with Mr. Ayers’ motion to waive (Dkt. 111) above.

11 In response to Mr. Ayers’ January 19th request for criminal records “pertaining to RRC.
12 Jose David Garcia, Mike Hogan, and Jeramy Dorfner (RRC’s),” Defendants responded as
13 follows:

14 Objection, SCC does not retain criminal records on staff. Defendants also object
15 to this request as the persons plaintiff is seeking records about are not named
16 defendants in this case. Without waiving objections, defendant will supplement
17 this response as they receive further documentation regarding this request.

18 Dkt. 115, Attachment B, p. 10.

19 Thus, Plaintiff’s claim that he has been refused public disclosure documents is not true.
20 It is also not true that is has been refused “background criminal history on certain defendants.”
21 Defendants stated that they do not have the information requested. The Court further notes that a
22 request for production of documents relates to documents already under the possession and
23 control of the party. The Defendants are under no obligation to search out documents that are
24 not in their possession or control. There is no evidence before the Court that the Defendants
25 have given an untrue answer or are concealing evidence. The discovery deadline need not be
26

1 extended simply because a discovery response may be supplemented if the Defendants receive
2 further documentation.

3 The parties have had six months to complete discovery. The record reflects that during
4 that time, Mr. Ayers propounded one set of discovery requests and that Defendants responded to
5 that request in February 2009. Mr. Ayers knew for six months that the discovery cut-off was
6 June 5, 2009. Dkt. 65. He has not provided further good faith reason for an extension.
7

8 Accordingly, the Court finds that his motion for an extension (Dkt. 127) shall be **DENIED**.

9 **F. Dkt. 130 - Motion for Extension to Review and File Corrections to Deposition**

10 In this motion, Mr. Ayers seeks a seventeen day extension of time to review and file
11 corrections to his deposition transcript. Dkt. 130. Defendants object to Mr. Ayers' request for
12 additional time to file pleadings and papers with the Court. Dkt. 131. Defense counsel advised
13 Mr. Ayers that he need only review his deposition transcript for transcription errors, as when the
14 court reporter took down a word incorrectly. Dkt. 132. Mr. Ayers argues that he should be
15 allowed to make any changes or corrections in form or substance that he feels should be made
16 and that he may add additional sheets, if necessary. Dkt. 130, p. 2.⁵
17

18 Federal Rule of Civil Procedure 30(e) states:

19 If requested by the deponent or a party before completion of the deposition, the
20 deponent shall have 30 days after being notified by the officer that the transcript
21 or recording is available in which to review the transcript or recording and, if
22 there are changes in form or substance, to sign a statement reciting such changes
23 and the reasons given by the deponent for making them. The officer shall indicate
24 in the certificate prescribed by subdivision (f)(1) whether any review was

25 ⁵ Mr. Ayers also complains again that he has exhausted his free copies for the month. As noted above, the Court
26 will not revisit this issue. The Court also notes that Mr. Ayers' ability to file numerous motions and affidavits with
voluminous exhibits does not appear to be hampered by the limits on his SCC photocopy account. *See, e.g.* Dkts.
133, 134. Mr. Ayers recently filed an affidavit "in support of claims made" with attached exhibits, consisting of 92
pages. The affidavit is not affixed to a motion noted on the Court's docket, it does not request any relief, and was
not filed in response to any pending motion.

1 requested and, if so, shall append any changes made by the deponent during the
2 period allowed.

3 The requirement that a statement of reasons accompanies the corrections is important to
4 allow determination of whether the deponent has made the corrections for a legitimate purpose.
5 *Hambleton Brothers Lumber Co. v. Balkin Enterprises, Inc.*, 397 F.3d 1217, 1224-25 (9th Cir.
6 2005). Rule 30(e) may be utilized only for corrective, not contradictory changes, *Id.* at 1226,
7 and the statement of reasons will largely determine the category in which the changes fit. This
8 does not mean that substantive changes can never be made. However, a legitimate reason must
9 exist before the substantive change to sworn testimony will be allowed.
10

11 To the extent that Mr. Ayers wishes to set forth his changes which are corrective only,
12 accompanied by a statement of reasons for the corrective changes, he may do so. If he needs
13 additional sheets, he may request them of counsel or use blank sheets of paper and sign them at
14 the bottom. Mr. Ayers shall complete and return his correction sheets to counsel on or before
15 **July 31, 2009**. He shall not file them with the Court.

16 In summary, the Court **ORDERS**:

- 17 1) Dkt. 111 (Motion for Waiver on Time Bar) is **DENIED**.
- 18 2) Dkt. 112 (Motion to Compel and for Sanctions) is **DENIED, except that**
19 Defendants are **ORDERED** to produce SCC's 404 Policy **to the Court only** for
20 an *in camera* inspection, and shall supplement their responses to Requests for
21 Production Nos. 14, 15, 16, 18, 17B, and 33 on or before **July 31, 2009**.
- 22 3) Dkt. 113 (Motion for Default) is **DENIED**.
- 23 4) Dkt. 123 (Motion for Transcript) is **DENIED as moot**.
- 24 5) Dkt. 127 (Motion for Continuance of Discovery) is **DENIED**.
- 25
- 26

