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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

<p>OTIS THOMAS,</p> <p style="padding-left: 100px;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>M.S. EVANS, Warden,</p> <p style="padding-left: 100px;">Defendants.</p> <hr style="width: 50%; margin-left: 0;"/>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>No. C 06-3581 MMC (PR)</p> <p><b>ORDER DENYING PLAINTIFF'S MOTIONS TO COMPEL AND FOR SANCTIONS; GRANTING DEFENDANTS' MOTIONS FOR PROTECTIVE ORDER AND TO STAY DISCOVERY; LIFTING STAY OF MOTION TO DISMISS AND SCHEDULING FURTHER BRIEFING</b></p> <p><b>(Docket Nos. 21, 26, 30, 31, 32)</b></p>
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On June 5, 2006, plaintiff, a California prisoner currently incarcerated at Centinela State Prison and proceeding pro se, filed the above-titled civil rights action under 42 U.S.C. § 1983, alleging the violation of his constitutional rights by prison officials at Salinas Valley State Prison. On July 5, 2006, plaintiff filed an amended complaint; on December 11, 2006, the Court found plaintiff's allegations stated cognizable claims for relief, ordered the amended complaint served on defendants, and ordered defendants to file a dispositive motion or indicate they were of the opinion that plaintiff's claims could not be resolved by such a motion. After being granted an extension of time, defendants filed two separate motions. Specifically, on March 12, 2007, defendants filed a motion to dismiss plaintiff's Eighth Amendment claim pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, on the ground plaintiff had failed to exhaust his administrative remedies, and on April 11, 2007, defendants filed a motion for summary judgment on plaintiff's First Amendment and Equal Protection claims.

On April 9, 2007, plaintiff filed a motion to compel discovery and for sanctions. On

1 April 18, 2007, the Court ordered defendants to file an opposition to plaintiff's motions, and  
2 informed plaintiff he could file a reply to the opposition. The Court also entered a stay of  
3 defendants' motions to dismiss and for summary judgment pending resolution of the  
4 discovery motions.

5 On May 7, 2007, defendants filed their opposition to plaintiff's motions, and also filed  
6 a motion for protective order and to stay further discovery. On May 25, 2007, plaintiff filed  
7 three new motions to compel discovery and for sanctions. The Court now addresses the  
8 parties' pending motions.

### 9 DISCUSSION

#### 10 A. Plaintiff's Motions to Compel and For Sanctions

##### 11 1. Motion Filed April 9, 2007 (Docket No. 21)

12 On March 23, 2007, plaintiff signed and dated his first motion to compel discovery  
13 and for sanctions; the motion was filed in this court on April 9, 2007. In his motion, plaintiff  
14 alleges that as of the date he prepared the motion defendants had not responded to any of  
15 plaintiff's January 30, 2007 discovery requests; he asks the Court to compel them to do so.

16 In response, defendants argue the motion should be denied because (1) plaintiff agreed  
17 that defendants could have until March 30, 2007 to provide him with discovery responses,  
18 but he then attempted to renege on that agreement and did not make a good-faith effort to  
19 meet and confer with defendants' counsel before seeking court intervention; and (2) plaintiff  
20 filed his motion after defendants already had responded to his discovery requests, and he did  
21 not acknowledge in the motion that they had done so.

22 Defendants offer the following evidence in support of their argument. During a  
23 telephone conference on March 13, 2007, defendants and plaintiff reached an agreement that  
24 defendants would respond to plaintiff's discovery requests by March 30, 2007. (Decl. N.  
25 Huynh Supp. Defs.' Opp. ("Huynh Decl.") ¶ 8 & Ex. 6.) Immediately after the telephone  
26 conference, defendants' counsel memorialized the agreement and faxed a copy to plaintiff.  
27 (Id. ¶ 9 & Ex. 8.) The next day, March 14, 2007, plaintiff sent a meet-and-confer letter to  
28 defendants' counsel, stating his intention to file a motion to compel and for sanctions if

1 defendants did not respond to plaintiff's discovery requests by March 19, 2007. (Id. ¶ 10 &  
2 Ex. 7.) On March 20, 2007, defendants' counsel sent plaintiff a response to plaintiff's  
3 March 14 letter, informing plaintiff that the letter appeared to renege on the March 13, 2007  
4 agreement, and reminding him that defendants would respond to his discovery requests on or  
5 before March 30, 2007, as the parties previously had agreed. (Id. ¶ 12 & Ex. 8.) On  
6 March 30, 2007, defendants' counsel mailed 179 pages of discovery responses to plaintiff.  
7 (Id. ¶ 14 & Ex. 9.) On April 6, 2007, defendants' counsel received plaintiff's motion to  
8 compel and for sanctions. (Id. ¶ 15.) The motion is signed and dated March 23, 2007, (Mot.  
9 at 3), and the proof of service is dated April 4, 2007. (Proof of Service at 2.)

10 The Court will deny the motion to compel. If plaintiff had made a good-faith effort to  
11 meet and confer with defendants after he received the March 20, 2007 letter in which  
12 defendants' counsel reiterated the parties' March 13, 2007 discovery agreement, plaintiff  
13 would have realized that the motion to compel was unnecessary because, in accordance with  
14 said agreement, defendants would be providing plaintiff with their discovery responses by  
15 March 30, 2007. Further, by the time plaintiff filed his motion, defendants already had  
16 provided plaintiff with 179 pages of discovery responses, making the motion unnecessary.

17 Plaintiff seeks sanctions for defendants' alleged discovery violations and also for  
18 matters unrelated to discovery, concerning defendants' involvement in the incidents which  
19 form the basis for plaintiff's underlying claims in this action. Because the Court has found  
20 no discovery violations by defendants and sanctions are not a proper remedy for plaintiff's  
21 underlying claims of injury, the motion for sanctions will be denied.

22 2. Motions Filed May 25, 2007 (Docket Nos. 30-32)

23 On May 25, 2007, plaintiff filed three additional motions to compel discovery and for  
24 sanctions. In these motions plaintiff seeks to compel defendants to provide further responses  
25 to the following interrogatories: (1) interrogatories nos. 5, 6, 8, 9, 10 and 12 for defendant  
26 Kirchner; (2) interrogatories nos. 5, 6, 9, 10, 12 and 14 for defendant Ponder; and  
27 (3) interrogatories nos. 5, 6, 8, 9, 10, 11, 12, 15, 16 and 20 for defendant Evans. Plaintiff  
28 also seeks sanctions for defendants' alleged discovery violations.

1 Defendants oppose the motion to compel on the ground plaintiff failed to meet and  
2 confer in good faith with defendants' counsel before seeking court intervention. Specifically,  
3 defendants assert, defendants' counsel did not learn of plaintiff's objections to defendants'  
4 discovery responses until plaintiff filed the instant motion. (Opp. at 4 & Decl. N. Huynh  
5 Supp. Opp. ("Huynh Decl.") ¶ 3.)

6 Plaintiff may file a motion to compel discovery only after he satisfies the "meet and  
7 confer" requirements of the discovery rules. See Fed. R. Civ. P. 37(a)(2)(A); L. R. 37-1(a).  
8 It is clear from plaintiff's motions that he has not done so. Accordingly, plaintiff's additional  
9 motions to compel and for sanctions will be denied as premature.

10 B. Defendants' Motion for Protective Order and to Stay Discovery (Docket No. 26)

11 As noted above, defendants have filed two dispositive motions in this matter: (1) a  
12 motion to dismiss plaintiff's Eighth Amendment claim pursuant to Rule 12(b) of the Federal  
13 Rules of Civil Procedure, on the ground plaintiff has failed to exhaust his administrative  
14 remedies, and (2) a motion for summary judgment on plaintiff's First Amendment and Equal  
15 Protection claims, which motion includes, inter alia, defendants' assertion of the defense of  
16 qualified immunity. On May 7, 2007, defendants filed a motion to stay further responses to  
17 discovery until both dispositive motions have been ruled on.

18 With respect to their motion to dismiss, defendants ask the Court to enter a protective  
19 order, under Rule 26(c) of the Federal Rules of Civil Procedure, staying further responses to  
20 discovery related to the issue of exhaustion. See Fed. R. Civ. P. 26(c) (providing court may  
21 issue protective order staying discovery upon finding of good cause). Defendants argue a  
22 stay is appropriate because: they have attached to their motion to dismiss all available  
23 materials that are relevant to the issue whether plaintiff properly exhausted his available  
24 administrative remedies; plaintiff has access to his central prison file, which contains his  
25 inmate appeals; and, plaintiff has received defendants' discovery responses, which were  
26 served on plaintiff on March 30, 2007.

27 The Court finds good cause exists to grant defendants' request; accordingly, the Court  
28 will enter a protective order staying further responses to discovery related to the issue of

1 exhaustion until the Court has ruled on the motion to dismiss.

2 With respect to their motion for summary judgment, defendants ask the Court to stay  
3 further responses to discovery related to the motion for summary judgment until the Court  
4 has ruled on defendants' qualified immunity defense. As a general rule, a district court  
5 should stay discovery until the issue of qualified immunity is resolved. See Crawford-El v.  
6 Britton, 523 U.S. 574, 598 (1998); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).  
7 Defendants' motion for a stay of discovery will be granted; accordingly, the Court will enter  
8 a stay of further responses to discovery related to the motion for summary judgment until the  
9 Court has ruled on the issue of qualified immunity.

10 C. Previous Stay of Dispositive Motions

11 On April 18, 2007, the Court entered a stay of defendants' motions to dismiss and for  
12 summary judgment until plaintiff's discovery motions had been resolved. In light of the  
13 Court's resolution, in this order, of all pending discovery motions, the Court will lift the stay  
14 of defendants' motion to dismiss plaintiff's Eighth Amendment claim; a briefing schedule on  
15 said motion is set forth below. The stay of defendants' motion for summary judgment will  
16 remain in effect, however, until the motion to dismiss has been resolved. If the motion to  
17 dismiss is granted, the Court will lift the stay of the motion for summary judgment and set a  
18 briefing schedule on that motion. If the motion to dismiss is denied, defendants will be  
19 ordered to file a supplemental motion for summary judgment, addressing plaintiff's Eighth  
20 Amendment claim, and a briefing schedule on that motion and the currently pending motion  
21 for summary judgment will be set.

22 **CONCLUSION**

23 For the reasons stated above, the Court orders as follows:

- 24 1. Plaintiff's motions to compel discovery and for sanctions are hereby DENIED.  
25 (Docket Nos. 21, 30, 31 and 32.)
- 26 2. Defendants' motion for a protective order and to stay further discovery responses is  
27 GRANTED. (Docket No. 26.)
- 28 3. The stay of defendants' motions to dismiss entered on April 18, 2007 is hereby

1 LIFTED. The stay of defendants' motion for summary judgment remains in effect. (Docket  
2 No. 25.)

3 4. The briefing schedule on defendants' motions to dismiss is SET as follows:

4 a. Plaintiff's opposition to defendants' motions to dismiss shall be filed with  
5 the Court and served on defendants no later than **thirty (30)** days from the date of this order.<sup>1</sup>

6 b. Defendants shall file a reply brief to plaintiff's opposition no later than  
7 **fifteen (15)** days from the date the opposition is filed.

8 5. The motion shall be deemed submitted as of the date the reply brief is due. No  
9 hearing will be held on the motion unless the Court so orders at a later date.

10 6. All communications by plaintiff with the Court must be served on defendants'  
11 counsel by mailing a true copy of the document to defendants' counsel.

12 7. It is plaintiff's responsibility to prosecute this case. Plaintiff must keep the Court  
13 informed of any change of address and must comply with the Court's orders in a timely  
14 fashion. Failure to do so may result in the dismissal of this action for failure to prosecute  
15 pursuant to Federal Rule of Civil Procedure 41(b).

16 8. Any motion for an extension of time must be filed no later than the deadline sought  
17 to be extended and must be accompanied by a showing of good cause.

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19 <sup>1</sup>With respect to defendants' unenumerated motion to dismiss under Rule 12(b),  
plaintiff is cautioned as follows:

20 The defendants have made a motion to dismiss pursuant to Rule 12(b) of  
21 the Federal Rules of Civil Procedure, on the ground you have not exhausted  
22 your administrative remedies. The motion will, if granted, result in the  
23 dismissal of your case. When a party you are suing makes a motion to dismiss  
24 for failure to exhaust, and that motion is properly supported by declarations (or  
25 other sworn testimony) and/or documents, you may not simply rely on what  
26 your complaint says. Instead, you must set out specific facts in declarations,  
depositions, answers to interrogatories, or documents, that contradict the facts  
shown in the defendant's declarations and documents and show that you have  
in fact exhausted your claims. If you do not submit your own evidence in  
opposition, the motion to dismiss, if appropriate, may be granted and the case  
dismissed.

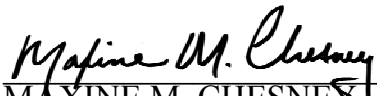
27 This notice is adapted from the summary judgment notice to be given to pro se  
28 prisoners as set forth in Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). See  
Wyatt v. Terhune, 315 F.3d at 1120 n.14.

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This order terminates Docket Nos. 21, 26, 30, 31 and 32.

**IT IS SO ORDERED.**

DATED: January 14, 2008

  
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MAXINE M. CHESNEY  
United States District Judge