

**UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
CALIFORNIA**

Landreth v. Lehil

Landreth · No. 2:20-CV-00472-DMC-P · Decided March 13, 2023

SUMMARY

This order addresses a pro se prisoner’s motions concerning discovery in a 42 U.S.C. § 1983 action involving the prescribing of transition or tinted eyeglass lenses. The court denies sanctions and further responses concerning several discovery requests directed to Defendant Posson, while granting in part and denying in part requests for additional discovery and related relief concerning Defendants Carrick and Posson. The court applies Federal Rules of Civil Procedure 26, 36, and 37 and discusses the scope of discovery, sufficiency of responses, and document control.

OPINION

1 2 3 4 5 6 7 8 IN THE UNITED STATES DISTRICT COURT 9 FOR THE EASTERN
DISTRICT OF CALIFORNIA 10 11 BRANDON MICHAEL LANDRETH, No. 2:20-CV-00472-
DMC-P 12 Plaintiff, 13 v. ORDER 14 BHUPINDER LEHIL, et al., 15 Defendants. 16 17
Plaintiff, a prisoner proceeding pro se, brings this civil rights action pursuant to 18 42 U.S.C. §
1983. Pending before the Court are Plaintiff’s motions relating to discovery 19 propounded to
Defendants Posson, Carrick, and Lehil, ECF Nos. 66, 69, 81, 95, 97.1 20 The purpose of
discovery is to “remove surprise from trial preparation so the 21 parties can obtain evidence
necessary to evaluate and resolve their dispute.” United States v. 22 Chapman Univ., 245 F.R.D.

646, 648 (C.D. Cal. 2007) (quotation and citation omitted). Federal 23 Rules of Civil Procedure
offers guidance on the scope of discovery permitted: 24 Parties may obtain discovery regarding
any nonprivileged information that is relevant to any party’s claim or defense and proportional to
the needs of 25 the case, considering the importance of the issues at stake in the action, the
amount in controversy, the parties’ relative access to relevant information, 26 the parties’
resources, the importance of the discovery in resolving the issues, and whether the burden or
expense of the proposed discovery 27 28 1 Plaintiff’s discovery motions at ECF Nos. 95 and 97
will be addressed separately.

1 outweighs its likely benefit. Information within this scope of discovery need not be admissible
in evidence to be discoverable. 2 Fed. R. Civ. P. 26(b)(1). 3 4 Under Rule 37 of the Federal Rules
of Civil Procedure, “a party seeking discovery 5 may move for an order compelling an answer,
designation, production, or inspection.” Fed. R. 6 Civ. P. 37(a)(3)(B).

The court may order a party to provide further responses to an “evasive or 7 incomplete disclosure, answer, or response.” Fed. R. Civ. P. 37(a)(4). “District courts have ‘broad 8 discretion to manage discovery and to control the course of litigation under Federal Rule of Civil 9 Procedure 16.’” Hunt v. County of Orange, 672 F.3d 606, 616 (9th Cir. 2012) (quoting Avila v. 10 Willits Envtl.

Remediation Trust, 633 F.3d 828, 833 (9th Cir. 2011)). 11 The party moving to compel bears the burden of informing the court (1) which 12 discovery requests are the subject of the motion to compel, (2) which of the responses are 13 disputed, (3) why the party believes the response is deficient, (4) why any objections are not 14 justified, and (5) why the information sought through discovery is relevant to the prosecution of 15 this action.

McCoy v. Ramirez, No. 1:13-cv-1808-MJS (PC), 2016 U.S. Dist. LEXIS 75435, 2016 16 WL 3196738, at *1 (E.D. Cal. June 9, 2016); Ellis v. Cambra, No. 1:02-cv-5646-AWI-SMS PC, 17 2008 U.S. Dist. LEXIS 24418, 2008 WL 860523, at *4 (E.D. Cal. Mar. 27, 2008).

The party 18 opposing discovery has the burden of showing that the discovery should be prohibited, and the 19 burden of clarifying, explaining or supporting its objections.” Bryant v. Ochoa, No. 07cv200 JM 20 (PCL), 2009 U.S. Dist. LEXIS 42339, 2009 WL 1390794, at *1 (S.D. Cal. May 14, 2009) 21 (internal citation omitted). 22 23 I. SUMMARY OF PENDING DISCOVERY MOTIONS 24 The various pending motions relating to discovery and relief requested are: 25 ECF No. 66 Plaintiff’s motion for sanctions and to compel discovery – Plaintiff seeks an order awarding sanctions against 26 Defendant Posson for failure to comply with a prior discovery order; Plaintiff also seeks an order compelling 27 further discovery responses from Defendant Posson.

Plaintiff has filed an “addendum” to his motion. See ECF 28 No. 70. Defendants oppose Plaintiff’s motion. ECF No. 1 71 (“Motion 1”). 2 ECF No. 69 Plaintiff’s motion to compel and for an extension of time to conduct discovery – Plaintiff asks the Court to 3 reconsider its prior discovery order of February 14, 2022; Plaintiff also seeks an order modifying the pre-trial 4 schedule to allow for additional time to conduct discovery.

Defendants have responded to Plaintiff’s motion. ECF 5 No. 72 (“Motion 2”). 6 ECF No. 81 Plaintiff’s motion to compel discovery – Plaintiff seeks an order compelling further discovery responses from 7 Defendant Carrick. Plaintiff separately filed exhibits in support of this motion. See ECF No. 83. Defendants 8 oppose Plaintiff’s motion. ECF No. 89 (“Motion 3”).

9 10 II. DISCUSSION 11 The Court previously addressed Plaintiff’s motion to compel further responses to 12 discovery propounded to Defendants Posson, Carrick, and Lehil on February 14, 2022. See ECF 13 No. 53. Defendants Posson and Carrick were ordered to provide further

discovery responses to 14 some, but not all, of Plaintiff's discovery request. See *id.* The Court did not at that time order 15 Defendant Lehil to provide any further responses.

See *id.* Now before the Court are Plaintiff's 16 additional motions related to discovery propounded to Defendants Posson, Carrick, and Lehil. 17 See ECF Nos. 66, 69, and 81. Defendants oppose. See ECF Nos. 71, 72, and 89. 18 A. Motion 1 (ECF No. 66) 19 Plaintiff argues in Motion 1 that, despite this Court ordering Defendant Posson to 20 respond to interrogatory numbers 3, 6, and 17, and requests for admissions number 7, he has 21 failed to do so.

See ECF NO. 66, pg. 1. Plaintiff claims that Defendant Posson's further 22 responses to Plaintiff's interrogatories are "evasive, incomplete, unintelligible, and unresponsive" 23 and that his further response to Plaintiff's request for admissions is simply "false." *Id.*, pgs. 1-2. 24 Plaintiff requests that sanctions be awarded against Defendant Posson for his failure to 25 sufficiently respond and requests the Court require Defendant Posson to supplement his responses 26 further.

See *id.*, pg. 12. For the below reasons, the Court denies Plaintiff's Motion 1. 27 / / / 28 / / / 1 1. Interrogatories 2 a. No. 3 3 Interrogatory No. 3: In the "Institution Level Response" to Plaintiff's Health Care Grievance, Tracking #CTF HC 18000861, you denied 4 Plaintiff's request for transition lenses, stating, "You do not meet the criteria and transition lenses are not currently clinically indicated." To the 5 best of your ability, please explain the criteria for transition lenses as thoroughly as possible. a) Please name the individual(s) by whom said 6 criteria was developed.

ECF No. 71, pg. 3. 7 Defendant Posson's response: Responding party objects to this request on the grounds that it is compound, and seeks information that is equally 8 available to Plaintiff. Without waiving these objections, on August 27, 2018, Plaintiff received an optometry consultation and the optometrist 9 provided education that transition lenses were not medically indicated.

Id. 10 Court's Prior ruling: Defendant's objections are overruled. The interrogatory is not compound, nor is the information equally available to 11 Plaintiff. Additionally, Defendant was not responsive to the interrogatory. Defendant Posson shall serve a supplemental response to interrogatory No. 12 3. ECF No. 53, pg. 5. 13 Defendant Posson's further response: Without waiving any objections, the criteria were developed by Dr. J. Carrick and members of the 14 Headquarters Durable Medical Equipment Committee.

ECF No. 71, pg. 3. 15 Defendant Posson's supplemental further response: Without waiving any objections, the Defendant's understanding of the criteria for 16 prescribing transition lenses follows: transition lenses may be clinically indicated for patients with photokeratitis and degenerative retinal diseases 17 who require ultra violet ray exclusion and/or decreased visible light intensity and who cannot be better accommodated through the use of 18 prescription clear

corrective lenses constructed out of a high refractive index plastic that intrinsically filters out ultra violet radiation, standard 19 sunglasses, and/or over-the-glasses sunglasses (“cocoon”).

Transition lenses and prescription clear lenses block ultraviolet light coming from the 20 front of the visual field only, and do not block ultraviolet light from the sides, bottom, or top of the visual field. But, “cocoon” block incoming 21 ultraviolet light from the top, bottom, sides, and front of the visual field and are superior for patients who require ultra violet ray reduction from 22 the top, bottom, and/or sides of the visual field, which encompasses most patients.

Transition lenses decrease visible light intensity but take time to 23 adjust to changing light conditions, such as when a patient moves from outdoors to indoors, or from indoors to bright sunlight. Patients who 24 require immediate adjustment to changes in light intensity in order to provide increased safety and decreased chances of colliding with other 25 persons or objects may be better served with “cocoon,” which can be used the moment the patient moves to an area with different light 26 intensity.

The criteria were developed by Dr. J. Carrick and members of the Headquarters Durable Medical Equipment Committee. Id., pgs. 4-5. 27 28 / / / 1 Plaintiff argues that Defendant Posson’s response is “vague, evasive, 2 contradictory” and fails to address the interrogatory. ECF No. 66, pg. 4. Plaintiff asserts that 3 there is a “secret CDCR document,” which establishes “the criteria for transition lenses,” but that 4 every effort to obtain it through discovery “has been met with denials that such criteria exist and 5 denials that any documents listing said criteria exist.” Id. Plaintiff then challenges the substance 6 of Defendant Posson’s response, arguing that it is “laughable” and Defendant Posson is making a 7 “mockery of the Court and insulting the intelligence of any human being” as to, among other 8 things, the meaning of “refraction” used in Defendant Posson’s response.

Id., pgs. 4-6. Lastly, 9 Plaintiff claims that Defendant Posson has told Plaintiff “nothing regarding the criteria for 10 prescribing transition lenses.” Id., pg. 6. 11 Defendant Posson argues that the interrogatory requested him to “explain” the 12 criteria for transition lenses and he did, “thoroughly and completely.” ECF No. 71, pg. 4. 13 Defendant Posson further argues the supplemental further response explained when a prescription 14 would and would not be appropriate.

See id. Defendant Posson’s primary argument is that 15 Plaintiff asked him to “explain” the criteria, rather than “state the criteria in verbatim.” Id., pgs. 4- 16 5. Thus, according to Defendant Posson, Plaintiff speculates another set of criteria “may exist,” 17 but does not provide any evidence in support. Id., pg. 4. 18 Defendant Posson has explained the criteria for prescribing transition lenses; in 19 other words, transition lenses may be clinically indicated for those patients: “with photokeratitis 20 and degenerative retinal diseases who require ultraviolet ray exclusion

and/or decreased visible light intensity” and who cannot be adequately treated with “prescription clear corrective lenses, standard sunglasses,” and/or cocoons.

The additional information provided by Defendant Posson elaborates on why cocoons may be preferred to other treatments. Thus, Defendant Posson has fully responded to interrogatory number 3. To the extent Plaintiff argues that Defendant Posson’s response to interrogatory number 3 is “laughable,” Defendant Posson is not required to prove the acceptability of his response—only explain it.

A motion to compel is not the appropriate vehicle in which to argue the overall merits of the case. *Hoffman v. Jones*, No. 2:15-CV-1748-EFB P, 2017 WL 5900086, 1 at *8 (E.D. Cal. Nov. 30, 2017), report and recommendation adopted, No. 2:15CV1748MCEEFBP, 2018 WL 497370 (E.D. Cal. Jan. 22, 2018). Thus, because the Court finds that Defendant Posson has adequately responded, no further response is required and Plaintiff’s Motion 1 as to interrogatory number 3 is denied.

Interrogatory No. 6: Please explain why you do or do not believe pigmented/tinted lenses are medically necessary for patients diagnosed with intermittent bilateral HSV keratitis. ECF No. 71, pg. 5. Defendant Posson’s response: Responding party objects to this request on the grounds that it is overly broad, presumes as true facts that have not been established as true, lacks foundations, and is an incomplete hypothetical.

Without waiving these objections, there are instances when such lenses may be medically necessary for patients. *Id.* Court’s Prior ruling: Defendant’s objections are overruled. Plaintiff’s interrogatory is not overly broad, does not presume as true facts that have not been established, does not lack foundation, and is not an incomplete hypothetical.

Defendant Posson adds that “there are instances when such lenses may be medically necessary for patients.” However, Defendant does not “explain why” [Defendant] believes that. Defendant Posson shall serve a supplemental response to interrogatory No. 6. ECF No. 53, pg. 6. Defendant Posson’s further response: Without waiving any objections, the determination whether pigmented/tinted lenses are medically necessary is made on a case-by-case basis.

Modern eyewear corrective lenses are constructed out of a high refractive index plastic that intrinsically filters out ultra violet radiation. Consequently, the medical need of filtering out harmful radiation frequently can be accomplished with sunglasses obtained from approved vendors via the quarterly package process. If the harmful radiation can be addressed with these sunglasses, pigmented/tinted lenses would not be medically necessary.

ECF No. 71, pgs. 5-6. Plaintiff asserts that Defendant Posson did not sufficiently respond to interrogatory number 6, contrary to this Court’s order to do so. See ECF Nos. 66, pg. 7 & 70,

pg. 1; see also 23 ECF No. 53, pg. 6. Plaintiff argues that Defendant Posson instead explains “why he does not 24 believe” transition lenses may be medically necessary.

ECF 70, pg. 1. Plaintiff further argues 25 that Defendant Posson’s statement that “the determination whether pigmented/tinted lenses are 26 medically necessary is made on a case-by-case basis” runs contrary to “Utilization Management 27 CDCR policy” because the Utilization Management Program shall “implement evidence based 28 medical necessity criteria statewide” and shall ensure ‘standardized processes and prescribing 1 practices’ relative to durable medical equipment such as prescription eyeglasses.” See ECF 66, 2 pg.

7. Plaintiff then argues as to the merits of Defendant Posson’s response. See *id.*, pgs. 8-9. 3 Lastly, Plaintiff claims that because there are 546 pages of emails “disucc[ing] transition lenses 4 and herpes simplex keratitis/ocular herpes” identified in response to Plaintiff’s PRA request that 5 Defendant Posson’s response that “pigmented/tinted lenses are medically necessary is made on a 6 case-by-case basis” is false.

Id., pg. 9 (“[a]re we to believe that no criteria – no determination of 7 medical necessity – has been established by CCHCS/CDCR throughout the course of a 546 page 8 discussion”). 9 Defendant Posson asserts that his response is full and complete because he 10 explained that the “construction of modern lenses adequately filters out ultra violet radiation” such 11 that pigmented/tinted lenses are not warranted.

ECF No. 71, pg. 5. Defendant Posson contends 12 that “implicit in his response” is that “if the harmful radiation cannot be addressed in this way, 13 pigmented/tinted lenses may be medically necessary.” *Id.* Further, Defendant Posson maintains 14 that Plaintiff has failed to demonstrate that the response was inadequate, only that Plaintiff 15 disagrees with the response.

Id., pgs. 5-6. 16 The Court finds no further response is required. In the Court’s prior order 17 regarding this interrogatory, the Court found that Defendant Posson did not explain when 18 transition lenses may be medically necessary and ordered a further response. Defendant Posson 19 has now responded and explained that the determination of whether transition lenses should be 20 prescribed is made on a case-by-case basis; relevant to that determination is whether the filtering 21 of harmful radiation can be accomplished by other treatment, such as sunglasses; if treatment by 22 alternative methods can filter harmful radiation, then transition lenses are not medically 23 necessary.

Plaintiff inasmuch concedes that Defendant Posson has explained in his response why 24 “he does not believe such lenses may be medically necessary,” ECF No. 70, pg. 1, and thus 25 responds Plaintiff’s interrogatory. 26 With respect to Plaintiff’s arguments as to the substance of Defendant Posson’s 27 response or his claims that Defendant Posson’s response is false because there are 546

pages of 28 emails discussing transition lenses and herpes simplex keratitis/ocular herpes—so there must be 1 criteria established, such claims are not appropriate here.

Discrepancies between facts and 2 evidence is not a basis to compel a further response or to attempt to force a party to change a 3 response; rather, it is fodder for a party to attempt to impeach a witness or to contradict testimony 4 at trial and/or dispositive motion. See *Jacobs v. Quinones*, No. 1:10-CV-02349-AWI-JL, 2015 5 WL 3717542, at *8 (E.D. Cal. June 12, 2015); see *Hoffman*, 2017 WL 5900086, at *8.

6 Therefore, because the Court finds that Defendant Posson has responded, no 7 further response to this interrogatory is required and Plaintiff's Motion 1 as to interrogatory 8 number 6 is denied. 9 c. No. 17 10 Interrogatory No. 17: What kind of clarification, instruction, or correction did you give to Defendant Ottenbacher relative to the 11 implementation of the policy referenced in the December 15, 2015 Memorandum as concerns the prescribing of transition lenses?

ECF No. 12 71, pg. 6. 13 Defendant Posson's response: Responding party did not speak with Dr. Ottenbacher regarding Plaintiff's treatment. Id. 14 Court's Prior ruling: The potential communications that could be 15 responsive to this interrogatory are not limited to "speaking".

As such, this Court finds the response incomplete and evasive, and orders Defendant [] 16 to supplement this response with specifics of whether Defendant provided any "Clarification, instruction or correction" to [Ottenbacher] on the 17 matters at issue. ECF No. 53, pg. 6. 18 Defendant Posson's further response: The responding party did not speak with Dr. Ottenbacher regarding Plaintiff's treatment.

The 19 responding party provided Dr. Ottenbacher with a copy of the December 15, 2015 Memorandum. ECF No. 71, pg. 6. 20 21 Plaintiff argues that Defendant Posson has "in no way whatsoever" responded to 22 the interrogatory, in contravention of this Court's order, because the interrogatory "presumes as 23 true the fact that Defendant Ottenbacher already possessed the December 15, 2015, 24 memorandum." ECF No. 66, pg.

10. Plaintiff claims that Defendant Posson "does not want to 25 admit or deny Defendant Ottenbacher's claim that Defendant Posson forbid him from prescribing 26 transition lenses." Id. pgs. 10-11. Plaintiff contends that, if it's Defendant Posson's position that 27 there were no clarifications, instructions, or corrections given to Defendant Ottenbacher, then "he 28 should be required to answer and swear to it." Id., pg.

11. 1 Defendant Posson argues that his further response complies with this Court's order 2 because it "explains all instructions provided to Dr. Ottenbacher." ECF No. 71, pg. 6. Defendant 3 Posson claims that he described all communications he had with Dr. Ottenbacher by responding 4 that he provided a copy of the December 15, 2015, memorandum. See id. 5 The Court finds no further response is required.

First, Defendant Posson did 6 communicate a “clarification, instruction, or correction” to Defendant Ottenbacher by way of 7 providing the December 15, 2015, memorandum to him. Thus, requiring Defendant Posson to 8 respond, “that there were no clarifications, instructions, or corrections given to Defendant 9 Ottenbacher,” would be to require Defendant Posson to make a false representation.

Second, there 10 is nothing in the way of this interrogatory that presumes that Defendant Ottenbacher already 11 possessed the December 15, 2015, memorandum. Third, Defendant Posson has fully responded 12 to the interrogatory by stating that he didn’t speak to Defendant Ottenbacher, but he did provide 13 the December 15, 2015, memorandum to him. Defendant Posson need not indicate that this was 14 the only communication to Defendant Ottenbacher because this is implicit in his response.

15 Finally, signed discovery responses are certifications that, to the best of the person’s knowledge, 16 information and belief formed after a reasonable inquiry, the responses are correct. See Fed. R. 17 Civ. P. 26(g)(1)(B); Logtale, Ltd. v. IKOR, Inc., 2013 WL 3967750, at *2 (N.D. Cal. 2013). 18 Thus, Defendant Posson does need not further “answer and swear” as his signed discovery 19 responses are made under oath.

Because the Court finds that Defendant Posson has fully 20 responded, no further response to is required and Plaintiff’s Motion 1 as to interrogatory number 21 17 is denied. 22 2. Requests for Admissions 23 Request For Admission No. 7: Do you admit that the use of transition lenses limits a person’s exposure to UV light more than the use of 24 untinted/unpigmented prescription lenses?

ECF No. 71, pgs. 6-7. 25 Defendant Posson’s response: Responding party objects to this request on the grounds that it is an incomplete hypothetical, and calls for 26 speculation. Without waiving these objection, responding party has made a reasonable inquiry but the information known or readily obtained is 27 insufficient to enable him to admit or deny the request.

Id. 28 Court’s Prior ruling: Defendant’s objections are overruled. Plaintiff’s 1 request is not an incomplete hypothetical and does not call for speculation. Further, it appears clear that Defendant Posson would have sufficient 2 information to admit or deny the request.

Therefore, Defendant Posson shall serve a supplemental response to request for admission No. 7. ECF 3 No. 53, pg. 8. 4 Defendant Posson’s further response: Without waiving any objections, the responding party denies the request. ECF No. 71, pg. 7. 5 Plaintiff states that he “will not insult” the Court’s “intelligence by presuming to 6 explain why Defendant Posson’s denial is an outrageous lie and a mockery of the Court’s order.” 7 ECF No. 66, pg.

11. Plaintiff claims Defendant Posson’s response is a “bald-faced lie” because 8 he denies that “tinted lenses limit a person’s exposure to UV light more than clear plastic lenses.” 9 Id., pgs. 11-

12. Defendant argues that Plaintiff's assertions as to the credibility of Defendant Posson's response are inappropriate and that Plaintiff has provided no substantive evidence demonstrating Defendant Posson's response is improper.

See ECF No. 71, pg. 7. Defendant maintains that a motion to compel is not the means in which to challenge the accuracy of a request for admission and that Rule 36 does not authorize the court to make a determination on such matters before trial. See *id.* The Court finds no further response is required. Rule 36 of the Federal Rules of Civil Procedure provides that "[i]f a matter is not admitted, the answer must specifically deny it," which is exactly what Defendant Posson did here.

Requests for admission do not provide a party a vehicle to establish disputed facts. See *Jefferson v. Perez*, 2012 WL 671917 at *1 (E.D. Cal. 20 2012). Rule 36 also does not authorize a court to determine the accuracy of a denial. *Owens v. Degazio*, No. 216CV2750JAMKJNP, 2019 WL 4929812, at *5 (E.D. Cal. Oct. 7, 2019).

Because Defendant Posson has fully satisfied the requirements of Rule 36 by specifically denying such request, no further response is required and Plaintiff's Motion 1 as to request for admission number 7 is denied. 25 / / / 26 / / / 27 / / / 28 1 3. Sanctions 2 Sanctions are unwarranted here because Defendant Posson has complied with the Court's Order and no further responses are required.

Thus, Plaintiff's request for sanctions is 4 denied. 5 B. Motion 2 6 Generally, Plaintiff argues in Motion 2 that based on a response from California 7 Correctional Health Care Services, pursuant to a Public Records Act request ("PRA response"), 8 see ECF No. 69, pgs. 13-15, additional documents exist, which would make discovery responses 9 from Defendants Carrick and Posson incorrect and incomplete.

Some of these requests were the 10 subject of Plaintiff's former motion to compel this Court previously resolved. See ECF No. 53. 11 Plaintiff requests in Motion 2 (1) an order voiding this Court's prior order and requiring further 12 responses from Defendants Carrick and Posson; (2) an order to compel further responses by 13 Defendants Carrick and Posson to certain discovery requests not at issue in the previous motion; 14 (3) an order granting Plaintiff an additional three interrogatories and three requests for production 15 as to Defendants Carrick and Posson; and (4) an order extending discovery deadlines.

For the 16 following reasons, the Court grants in part and denies in part Plaintiff's Motion 2. 17 1. Order Voiding Previous Order and Compelling Further Responses 18 a. Defendant Carrick 19 i. Request for Production No. 1 20 Request for Production No. 1: Plaintiff requests that Defendant Carrick produce any and all documents presented and/or discussed at the 21 California

Correctional Health Care Services (CCHCS) Headquarters Durable Medical Equipment (DME) Committee on October 26, 2015²² pertaining to eyeglass prescription lenses.

ECF No. 72, pg. 4.²³ Defendant Carrick's response: Responding party is not in possession, custody, or control of documents responsive to this request. Id.²⁴ Court's Prior ruling: The Court finds no basis to order any further²⁵ response. ECF No. 53, pg. 10.²⁶ Plaintiff argues that, in his position as Deputy Medical Executive of Utilization²⁷ Management, and author of the December 15, 2015, memorandum, "one can rest assured that²⁸ [Defendant Carrick] is, indeed, in control of said documents." See ECF No. 69, pgs.

3-4. On that¹ premise, he asserts that Defendant Carrick does not deny that such records exist, only that he does² not have possession, custody, or control of such records. See id., pg. 4. Defendant Carrick³ argues that, as Plaintiff concedes, the records of such committee meetings are only kept for three⁴ years, and that since the committee meeting occurred on October 26, 2015, the records of that⁵ meeting would not have been in existence after October 26, 2018—long before Defendant⁶ Carrick's response in 2021.

See ECF Nos. 72, pg. 4 & 69, pg. 4. On reply, Plaintiff argues that⁷ Defendant Carrick's submission of a privilege log designating certain emails regarding draft⁸ Committee position on transition lenses and Committee minutes privileged show that Defendant⁹ is false in his statement that no documents exist after three years. See ECF No. 78, pgs. 1-2.¹⁰ After further consideration, the Court finds a supplemental response is required.

¹¹ Rule 34 requests may be used to inspect documents, tangible things, or land in the possession, ¹² custody, or control of another party. A party is deemed to have control over documents if he or ¹³ she has a legal right to obtain them. *Allen v. Woodford*, No. CVF051104OWWLJO, 2007 WL ¹⁴ 309945, at *6 (E.D. Cal. Jan. 30, 2007), modified on reconsideration, No. 1:05-CV-1104 ¹⁵ OWW NEW, 2007 WL 9747771 (E.D.

Cal. Mar. 16, 2007) (quoting *In re Flag Telecom Holdings, Ltd.* ¹⁶ Sec. Litig., 236 F.R.D. 177, 181 (S.D.N.Y.2006) (rejecting the defendant's argument that ¹⁷ documents belonged to his employer and holding "employees are permitted to utilize the ¹⁸ documents in the course of employment, as they must in order to perform their jobs, and therefore ¹⁹ [defendant] has the practical ability to obtain them"))).

²⁰ A party responding to a document request is under an affirmative duty to seek ²¹ information reasonably available to him from his employees, agents, or others subject to his ²² control, not just that information within his immediate knowledge or possession. *Meeks v.* ²³ *Parsons*, No. 1:03-cv-6700-LJO-GSA, 2009 WL 3003718, *4, (E.D. Cal. Sept. 18, 2009); ²⁴ Courts have assumed that a party has "control of documents in the possession of another and ²⁵ ordered the party to produce relevant documents.

See *Zackery v. Stockton Police Dep't*, No. CIV 26 S-05-2315 MCE DAD P, 2007 WL 1655634, *3-4, (E.D. Cal. June 7, 2007) (“directing” counsel 27 for defendants to obtain and produce records in possession of current employer, the Stockton 28 Police Department). 1 If a defendant has constructive control over the documents requested, then the 2 defendant is in possession, custody, or control of the documents.

See *Hunter v. Ogbuehi*, No. 3 113CV01681DADGSAPC, 2018 WL 1243421, at *10-11 (E.D. Cal. Mar. 9, 2018); *Pulliam v. 4 Lozano*, No. 1:07-cv-964-LJO-MJS, 2011 WL 335866 (E.D. Cal. Jan. 31, 2011); *Mitchell v. 5 Adams*, No. CIV S-06-2321 GEB GGH, 2009 WL 674348, *9 (E.D. Cal. Mar. 6, 2009) (finding 6 even though defendant warden was sued in individual capacity, he had constructive control over 7 requested documents because he had authority to obtain requested documents from CDCR).

8 A party has an obligation to conduct a reasonable inquiry into the factual basis of 9 his responses to discovery. *Perkins v. City of Modesto*, No. 119CV00126LJOEPG, 2020 WL 10 1333109, at *9 (E.D. Cal. Mar. 23, 2020) (finding party has obligation to exercise due diligence 11 and make a reasonable inquiry to determine whether responsive documents exist). Based on that 12 inquiry, a party responding to a request for production is under “‘an affirmative duty to seek that 13 information reasonably available’ to it and make an appropriate production of responsive 14 documents.’” *Hartline v. Nat’l Univ.*, No. 2:14-CV-00635-KJM-AC, 2018 WL 1014611, at *3 15 (E.D.

Cal. Feb. 22, 2018) (quoting *Gray v. Faulkner*, 148 F.R.D. 220, 223 (N.D. Ind. 1992); *Kaur 16 v. Alameida*, 2007 WL 1449723, *2 (E.D. Cal. May 15, 2007) (ordering defendants to conduct 17 additional research for responsive documents and reminding defendants and counsel “of their 18 duty under Rule 34 to conduct a diligent search and reasonable inquiry in effort to obtain 19 responsive documents”).

20 If no responsive documents or tangible things exist, the responding party should so 21 state with sufficient specificity to allow a court to determine whether the party made a reasonable 22 inquiry and exercised due diligence. *Uribe v. McKesson*, No. 08cv1285 DMS (NLS), 2010 WL 23 892093, at *2-3 (E.D. Cal. Mar. 9, 2010); *Rogers v. Giurbino*, 288 F.R.D. 469, 485 (S.D.

Cal. 24 2012) (“A party must make a reasonable inquiry to determine whether responsive documents 25 exist, and if they do not, the party should so state with sufficient specificity to allow the Court to 26 determine whether the party made a reasonable inquiry and exercised due diligence.”). If 27 responsive documents exist but the responsive party claims lack of possession, control, or 28 custody, the party must so state with sufficient specificity to allow the court (1) to conclude that 1 the responses were made after a case-specific evaluation and (2) to evaluate the merit of that 2 response.

Ochotorena v. Adams, No. 1:05-cv-01525-LJO-DLB (PC), 2010 WL 1035774, at *3- 3 4 (E.D. Cal. Mar. 19, 2010). 4 To begin with, Defendant Carrick's response only states that he does not have 5 possession, custody, or control of such documents; however, in his opposition, he argues that, 6 because of CCHCH's policy that records of committee proceedings are only kept for three years, 7 he would not be in the possession of such records.

See ECF N. 72, pg. 4. While this assertion 8 may be true, such was not his response. Furthermore, Defendant Carrick did not respond that he 9 made a diligent and reasonable inquiry into such matters. Defendant Carrick has an affirmative 10 duty to determine whether any documents exist and, from his response, the Court is unable to 11 ascertain whether he performed that inquiry.

Defendant Carrick's response is thus incomplete. 12 Additionally, the documents presented or discussed at the October 26, 2015, 13 meeting pertaining to eyeglass prescription lenses and which form the basis for the CCHCH 14 memorandum would seem to be within the possession, custody or control of Defendant in his 15 employment relationship with CCHCH. Defendant is the Deputy Medical Executive for CCHCH 16 and author of the memorandum.

It is this Court's experience that individual defendants who are 17 employed by CCHCH and who are represented by the Attorney General can generally obtain 18 documents, such as the ones at issue here, by requesting them. Defendant thus has constructive 19 control over the requested documents and the documents must be produced, if they exist. If, after 20 a diligent and reasonable inquiry, the documents no longer exist, Defendant Carrick should so 21 state in his response.

22 Lastly, with respect to Plaintiff's argument that Defendant Carrick is lying that no 23 documents exist because he produced a privilege log identifying an email attachment containing a 24 draft Committee Position and email attachment containing various committee minutes, it is not 25 clear to the Court whether such documents are responsive to Plaintiff's request for "documents 26 presented and/or discussed" at the Committee meeting.

Minutes reveal what was discussed at a 27 meeting, but the minutes themselves are generally not a document that is "presented and/or 28 discussed" at the meetings. Similarly, a draft of the Committee position does not necessarily 1 mean that the draft, itself, was "presented and/or discussed" at the meeting.

The mere fact the 2 email was dated November 19, 2015, almost a month after the Committee meeting, suggests that 3 the draft was a result of the meeting, not a document, itself, presented or discussed at the meeting. 4 To the extent Plaintiff argues on reply that Defendant Carrick's "deliberative process" privilege is 5 also inappropriate, such argument is not properly before the Court.

The Court thus declines to 6 consider that matter here. 7 The Court finds that Defendant Carrick's response that "responding party is not in 8 possession, custody, or control of documents responsive to this request" is not a complete 9 response.

On that basis, the Court grants Plaintiff's Motion 2 as to Plaintiff's Request for 10 Production No. 1. Defendant Carrick is ordered to (1) produce responsive documents to this 11 request, to the extent such documents exist; (2) supplement his response with such information as 12 defendant has, if any, as to who has possession, custody, or control of such documents so that 13 Plaintiff may act accordingly, and if such document exist, or (3) supplement his response to 14 indicate that after a reasonable and diligent inquiry, no such documents exist because they never 15 existed or have been destroyed.

Defendant Carrick shall serve further responses to this request 16 within thirty days of the date of this order. 17 ii. Interrogatory No. 10 18 Interrogatory No. 10: Please identify what clinical case exceptions have been established for transition lenses [and] (a) briefly explain why 19 transition lenses are medical [sic] necessary for each of the identified clinical case exceptions.

ECF No. 72, pg. 5. 20 21 Defendant Carrick's response: There are no clinical case exceptions as the determination to prescribe transition lenses in [sic] made on a case by 22 case basis, and is left to the medical judgment of Plaintiffs treating physicians. Id. 23 Court's Prior ruling: The Court finds no basis to order any further 24 response to this interrogatory.

ECF No. 53, pg. 11. 25 Plaintiff argues that Defendant Posson's further response to interrogatory No. 3 26 contradicts Defendant Carrick's response to this request. See ECF No. 69, pgs. 4-6. Plaintiff 27 asserts that Defendant Posson identifies criteria, established by Defendant Carrick, such that 28 "transition lenses may be clinically indicated for patients with photokeratitis and degenerative 1 retinal diseases who require ultra violet ray exclusion and/or decreased visible light intensity." 2 Id., pg.

5. Plaintiff argues this statement is contrary to Defendant Carrick's response, that no 3 clinical case exceptions exist because the decision of whether or not to prescribe transition lenses 4 is left to individual's treating physicians. Further, Plaintiff claims that the Utilization 5 Management Program, of which Defendant Carrick is the Deputy Medical Executive, shall 6 "implement evidence-based medical necessity criteria statewide" and that Defendant Carrick, in 7 his position, shall "develop and ensure adherence to the UM program policy and procedure and 8 clinical criteria that define medical necessity." ECF No. 69, pgs.

5-6. According to Plaintiff, 9 Defendant Carrick is "responsible for developing said criteria" and that Defendant Posson's 10 further response confirms that such criteria has, in fact, been established by him. Id., pg. 6; see 11 also ECF No. 69, pgs. 28-29. 12 Defendant Carrick argues

that Plaintiff merely disagrees with his response and that 13 it is not inconsistent with Defendant Posson's further discovery responses.

Cf. ECF No. 72, pg. 5 14 with ECF No. 69, pgs. 28-29. Defendant Carrick claims that his response of "no hard and fast 15 exceptions exist because the decision is made on a case-by-case basis according to the judgment 16 of the treating physician" is virtually the same as Defendant Posson's response that "transition 17 lenses may be indicated in some cases but not others." Id. 18 The Court finds no inconsistency between the two responses.

Plaintiff requests 19 from Defendant Carrick the identification of any "clinical case exceptions," while he requests 20 from Defendant Posson, in pertinent part, to "please explain the criteria for transition lenses...." 21 Cf. ECF No. 72, pg. 5 with ECF No. 69, pgs. 28-29. Plaintiff does not request the same 22 information from Defendant Carrick that he does from Defendant Posson.

In this Court's 23 opinion, a "clinical case exception" is not the same as a "criteria." An exception is "something 24 that is excluded from a rule's operation" while a criterion is a "standard, rule, or test on which a 25 judgment or decision can be based or compared; a reference point against which other things can 26 be evaluated." Black's Law Dictionary (11th ed.

2019). In other words, a criteria is a rule and an 27 exception is an acceptable deviation from that rule. Thus, Plaintiff's request for the identification 28 of "any clinical case exceptions" cannot be read to be the same as the "criteria" for prescribing 1 transition lenses.

Because there are no inconsistencies between the responses of Defendants 2 Carrick and Posson, no further response is required by Defendant Carrick. The Court denies 3 Plaintiff's Motion 2 with respect to requiring Defendant Carrick to further respond to 4 Interrogatory number 10. 5 b. Defendant Posson 6 Like those arguments as to Defendant Carrick, Plaintiff argues that based on newly 7 acquired evidence, Defendant Posson's responses and document productions are incorrect and 8 incomplete.

See ECF No. 69, pgs. 6-10. Plaintiff seeks a further response regarding Request for 9 Production numbers 5, 7, and 12. In opposition, Defendant Posson agreed to provide a further 10 response, "as appropriate," after "reviewing the emails referenced by Plaintiff." ECF No. 72, pg. 11 1.

On June 29, 2022, Plaintiff filed a "further reply" arguing that Defendant Posson's further 12 responses, served June 16, 2022, were deficient. See e.g., ECF No. 80, pgs. 1-2. Because 13 Defendant Posson has already served his further responses, Plaintiff's motion to compel further 14 responses to Request for Production numbers 5, 7, and 12 is denied. Any argument by Plaintiff as 15 to the sufficiency of such responses is not properly before the Court and thus, the Court declines 16 to consider that matter here.2 17 2.

Order Compelling Further Responses to Certain Discovery Requests 18 a. Defendant Carrick 19 Interrogatory No. 6: Please describe what efforts, if any, you made to further clarify your expectation with respect to the implementation of the 20 policy referenced in your December 15, 2015 Memorandum, relative to the prescribing of transition lenses. ECF No. 72, pg.

2-3. 21 Defendant Carrick's response: Responding party does not believe that 22 there was a need for clarification. Id. 23 Plaintiff argues that based on new evidence from the PRA response, Defendant 24 Carrick has sent 67 pages of emails concerning "the prescribing of, or criteria for prescribing of, 25 or policy relative to the prescribing of transition lenses." ECF No. 69, pgs.

3, 13-15. It appears 26 27 2 Local Rule 230(m) states, in pertinent part, "[a]fter a reply is filed, no additional memoranda, papers, or other materials may be filed without prior Court approval"; thus, the 28 "further reply" filed by Plaintiff is prohibited as Plaintiff did not seek permission to do so. 1 that Plaintiff is suggesting that because Defendant Carrick has sent emails pertaining to the above, 2 those emails must contain information clarifying his expectations with respect to the policy at 3 issue.

See id. According to Plaintiff, if he had known about these emails, he would have sent out 4 additional discovery and included such request in his previous motion to compel. See id. 5 Defendant Carrick argues that he has "completely responded to the interrogatory" by "stating that 6 he made no efforts to clarify his expectations concerning a December 15, 2015 memorandum 7 because he did not believe that there was a need for clarification." Id., pg.

3. Additionally, he 8 argues that Plaintiff fails to provide facts to support his argument that any such emails exist 9 concerning any clarifications or expectations pertaining to the December 15, 2015 memorandum. 10 See ECF No. 72, pg. 3. 11 Defendant Carrick's response to the discovery request and what he states in his 12 opposition are not the same.

In response to the discovery request, he merely states that he does 13 not believe there was a need for clarification; while his opposition states that "he made no efforts 14 to clarify his expectations" because "he did not believe that there was a need for clarification." 15 The responsive, but missing, answer is what efforts were made—not why no efforts were made.

16 Therefore, Defendant Carrick has not fully responded to Plaintiff's interrogatory as to what 17 efforts were made. 18 Given that Defendant Carrick has stated, albeit in his opposition, that "he made no 19 efforts to clarify his expectations," there is nothing before the Court to indicate that such 20 information exists.

To the extent that Defendant Carrick learns that such information exists, he is 21 under an obligation to supplement his responses. See Fed. R. Civ. P. 26(e)(1) ("A party who has. 22.. responded to an interrogatory, request for production, or request for admission—must 23

supplement or correct its disclosure or response... if the party learns that in some material 24 respect the... response is incomplete or incorrect....”).

Signed discovery responses are 25 certifications that, to the best of the person’s knowledge, information and belief formed after a 26 reasonable inquiry, the responses are correct. See Fed. R. Civ. P. 26(g)(1)(B); *Logtale, Ltd. v. 27 IKOR, Inc.*, 2013 WL 3967750, at *2 (N.D. Cal. 2013) (requiring counsel to be “proactive in 28 ensuring that his clients are conducting thorough and appropriate document searches”).

1 While Plaintiff may be disinclined to trust Defendant Carrick’s discovery 2 response, mere distrust and suspicion regarding discovery responses do not form a legitimate 3 basis to further challenge sufficient responses. See e.g., *Gorrell v. Sneath*, 292 F.R.D. 629, 632 4 (E.D. Cal. 2013); *L.H. v. Schwarzenegger*, No. S-06-2042 LKK GGH, 2007 WL 2781132, at *2 5 (E.D.

Cal. 2007). Discrepancies between facts and evidence is not a basis to compel a further 6 response or to attempt to force a party to change a response; rather, it is fodder for a party to 7 attempt to impeach a witness or to contradict testimony at trial and/or dispositive motion. See 8 *Jacobs*, 2015 WL 3717542, at *8; see *Hoffman*, 2017 WL 5900086, at *8.

Because Defendant 9 Carrick has not completely responded to Plaintiff’s interrogatory, the Court grants Plaintiff’s 10 Motion 2 with respect to Defendant Carrick’s response to Interrogatory Number 6 and orders 11 Defendant Carrick to provide a further response to this request within thirty days of the date of 12 this order. 13 b. Defendant Posson 14 Plaintiff seeks a further response from Defendant Posson regarding Request for 15 Production number 6.

Defendant Posson agreed to provide a further response, “as appropriate,” 16 after “reviewing the emails referenced by Plaintiff” and provided those further responses on June 17 16, 2022. ECF Nos. 72, pg. 3 & 80, pgs. 1-2.

On June 29, 2022, Plaintiff filed a “further reply” 18 arguing that Defendant Posson’s further responses were deficient. See e.g., ECF No. 80, pgs. 1-2. 19 Like above, because Defendant Posson has already served his further responses, Plaintiff’s 20 motion to compel further responses to Request for Production number 6 is moot. Any argument 21 by Plaintiff as to the sufficiency of Defendant Posson’s response is not properly before the Court 22 and thus, the Court declines to consider that matter here.

See footnote 2, above. 23 3. Order Granting Plaintiff Leave to Serve Additional Discovery 24 On February 2, 2023, this Court ordered that discovery shall remain open subject 25 to a later order rescheduling of pre-trial deadlines, including deadlines for completion of 26 discovery and filing of dispositive motions. See ECF No. 103.

Therefore, because currently no 27 discovery deadlines are pending, Plaintiff's request for an order granting him leave to serve three 28 interrogatories and three requests for production as to Defendants Carrick and Posson is denied as 1 unnecessary. Plaintiff may serve additional discovery on Defendants until such time as a 2 discovery deadline is established and Plaintiff complies with all Federal Rules of Civil Procedure.

3 4. Order Extending Discovery Deadlines 4 This Court has already denied as unnecessary Plaintiff's request for an extension 5 of discovery deadlines given there is no operative scheduling order pertaining to deadlines for 6 discovery and dispositive motions. See ECF No. 103.

Thus, the Court denies Plaintiff's request 7 for an extension of discovery deadlines in Motion 2. 8 C. Motion 3 9 Plaintiff seeks an order compelling further discovery responses from Defendant 10 Carrick regarding Plaintiff's Request for Production of Documents, Set Three. At issue is 11 Plaintiff's request for production number 1. 12 Request for production no. 1: Plaintiff requests that Defendant Carrick produce any all e-mails that he sent, from 2012 to present, that discuss the 13 prescribing of, criteria for prescribing of, or policy relative to the prescribing of transition lenses.

ECF No. 89, pgs. 2-3. 14 Defendant Carrick's response: Objection. The request is overly broad 15 as to time, unduly burdensome, and is not proportional to the needs of the case. The request violates the attorney-client privilege as to 16 communications between the Defendant and his counsel, and violates the deliberative process privilege as to drafts of policies concerning 17 prescribing transition lenses.

The request also violates the privacy rights of third-party inmates as to emails concerning transition lenses prescribed to 18 them. A privilege log of documents withheld and/or redacted is attached. Without waiving these objection, all responsive email sent by [Defendant 19 Carrick] between January 1, 2015 and the present are being produced. Defendant [Carrick] notes that he is not producing copies of emails in 20 which he was a recipient, only, as those emails are beyond the scope of this request.

Id. 21 22 Plaintiff addresses each of Defendant Carrick's objections in turn. See ECF No. 23 81, pgs. 3-6. First, as to Defendant Carrick's objection that the request is overly broad as to time, 24 Plaintiff argues that the timeframe is not overly broad because he needs an "accurate portrait of 25 the effects" of Defendant Carrick's policy in order to ascertain how "medical necessity" was 26 previously defined prior to the issuances of the December 15, 2015 memorandum.

Id., pg. 3. 27 Second, Plaintiff argues that the request is not unduly burdensome, as Defendant Carrick claims, 28 because the documents have already been identified and collected by CCHCS Litigation Support 1 in response to his PRA request; the result of such inquiry was 67 pages of emails sent from 2 Defendant Carrick that were responsive to Plaintiff's request and which were deemed not exempt 3 from disclosure.

See *id.*, pgs. 3-4, see also ECF No. 91, pgs. 16-17. Third, Plaintiff maintains that he is not seeking disclosure of emails designated as attorney-client privileged, but claims that emails to and from Litigation Support are not covered under this privilege. See ECF No. 81, pg. 6. Fourth, Plaintiff challenges Defendant Carrick's "deliberative process" privilege designation on the basis that administrative exemptions under FOIA are not the same as discovery privileges.

See *id.*, pg. 5. Plaintiff argues that his need to demonstrate that Defendant Carrick's "underground policy has prevented CDCR doctors from dispensing transition lenses and tinted prescription lenses outweighs any governmental interest in non-disclosure" as "Defendant Carrick has not demonstrated any willingness to provide information in any alternative form." *Id.* Thus, according to Plaintiff, certain emails identified on Defendant Carrick's privilege log should be produced.

See *id.* Alternatively, Plaintiff requests an in camera review of such documents to determine how much of the documents "touch on legality" and "how much of the contents track the December 15, 2015 memorandum so as to constitute a waiver of privilege" as well as what portions of the document can be "segregable from the rest." *Id.*, pg. 6. Fifth, Plaintiff argues that the privacy rights of third party inmates should be protected and that private information can be redacted and the documents produced.

See *id.* Lastly, Plaintiff argues that the documents requested are proportional to the case because some of the emails produced show that CDCR doctors are in a position of denying transition lenses, even when ophthalmologists order or justify them for inmates. See *id.*, pg. 7. Plaintiff asserts that, despite Defendant Carrick's repeated claims that no documents exist that discuss "actual, or potential clinical case exceptions for transition lenses" relative to the December 15, 2015 memorandum, shortly after the issuance of the memorandum, CDCR doctors began sending emails asking which conditions qualify and requesting a list of conditions for which transition lenses would be authorized.

ECF Nos. 81, pgs. 7-8; see e.g., 83, pgs. 8-11, 83-1, 28 pgs. 9-11. As to Defendant Carrick's production of documents, Plaintiff argues that Defendant Carrick produced 14 pages of emails but only 7 were sent from Defendant Carrick; thus, since the PRA response identified 67 pages of responsive emails sent by Defendant Carrick, he failed to produce "at least 60 pages of emails" that are "germane to" Plaintiff's request.

Id., pg. 5. Plaintiff also argues that in Defendant Carrick's prior discovery responses, see Motion 2(1)(1)(i), above, Defendant Carrick responded that records of committee meetings are only kept for three years, and that since the committee meeting occurred on October 26, 2015, the records of that meeting would not have been in existence after October 26, 2018—long before Defendant Carrick's response in 2021.

See ECF Nos. 72, pg. 4 & 69, pg. 4. However, Plaintiff notes that 10 Defendant Carrick produced a privilege log stating he is in possession of meeting minutes from 11 2015; thus Defendant Carrick's response "demonstrates a pattern of lying." ECF No. 81, pg. 10. 12 Plaintiff remarks that conspicuously missing from the list of meeting minutes on 13 the privilege log are the minutes from October 26, 2015.

See *id.* Plaintiff argues that if 14 Defendant Carrick is in possession of all the other meeting minutes leading up to October 26, 15 2015, "there is no reason to suppose that the Committee's minutes [from October 26, 2015] alone 16 were destroyed after 3 years" unless Defendant Carrick "intentionally destroyed" the evidence 17 that led to the creation of the December 15, 2015 memorandum.

Id. 18 Defendant Carrick responds that (1) he has produced all emails sent by him, which 19 mention the criteria for prescribing and the policy relative to prescribing transition lenses; 20 (2) Plaintiff maintains that he is not requesting those emails designated as attorney-client 21 privileged; (3) he has produced redacted records pertaining to a third-party inmate responsive to 22 Plaintiff's request; and (4) a privilege log has been provided identifying those emails withheld 23 based on the attorney-client and deliberative process privileges.

See ECF No. 89, pg. 1. 24 Defendant Carrick maintains that, even though he did not send any emails concerning prior drafts 25 of the December 15, 2015 memorandum concerning the policy for prescribing transition lenses, to 26 the extent any such drafts exist, such drafts would be protected under the deliberative process 27 privilege. See *id.* 28 With respect to Defendant's objections, Defendant Carrick argues that searching 1 for an additional two and one-half years prior to the issuance of the policy is overly broad, and 2 would pose an undue burden on Defendant and counsel, which is not proportional to the needs of 3 the case.

See *id.*, pg. 3. Defendant then continues that despite such objections, counsel has 4 reviewed the 67 emails provided in response to Plaintiff's PRA request and that the PRA response 5 is in error; the inquiry included emails sent or received by Defendant Carrick, which is broader 6 than Plaintiff's request. See *id.* Based on that review, Defendant Carrick asserts no emails were 7 sent by Defendant Carrick between January 1, 2012 and December 31, 2014 so there are no other 8 emails responsive to produce.

See *id.* Additionally, as to Plaintiff's argument regarding the 9 missing meeting minutes of October 26, 2015, Defendant Carrick responds that he did not send an 10 email containing the minutes held on October 26, 2015; as such, no responsive documents exist. 11 See *id.*, pg. 5. 12 As to those documents protected under the attorney-client privilege, Defendant 13 Carrick argues that Plaintiff has acknowledged that he is not requesting this Court to compel 14 production of such emails.

See *id.*, pg. 4. With respect to Defendant Carrick's objection as to 15 third party privacy rights, Plaintiff has requested any private and confidential information be 16 redacted and produced; Defendant Carrick responds that he has produced the responsive records 17 redacted. See *id.*, pg. 4. 18 As to Defendant Carrick's assertion of the deliberative process privilege, he attests 19 that none of the documents sought to be protected under the deliberative process privilege were 20 actually sent by Defendant Carrick.

See *id.*, pg. 4. Defendant Carrick contends that, since the 21 emails at issue here were not sent by Defendant Carrick, they are not responsive to Plaintiff's 22 request. See *id.*, pgs. 4-5. However, to the extent that Plaintiff argues that these documents 23 should be produced, as he does, Defendant Carrick maintains that such documents were objected 24 on the grounds of, and are protected under, the deliberative process privilege.

See *id.* 25 On reply, Plaintiff argues, generally, that the list of emails Defendant Carrick 26 submitted in support of his claim that no emails were sent by him prior to December 31, 2014 is 27 "fabricated"; the Deputy Attorney and CCHCS have colluded and "illegally conspir[ed] to 28 deprive Plaintiff of said documents"; and the emails reviewed by Defendant Carrick are really 67 1 pages, not emails, and there are 113 attachments to the 67 emails—so the list is "fraudulent." 2 ECF No. 91, pgs.

1-4. Plaintiff further argues that, with respect to inmate privacy, he has not 3 received an email dated June 22, 2016, in any form, so Defendant Carrick's claim that such 4 document has been produced is false. See *id.*, pg. 5. 5 Defendant Carrick's objections that Plaintiff's request are overly broad as to time, 6 unduly burdensome, and not proportional to the needs of the case are overruled.

Defendant 7 Carrick has already reviewed the 67 emails identified by the PRA response and determined no 8 emails were sent by him prior to January 1, 2015. Whether the sum of documents is 67 pages or 9 67 emails, neither is unduly burdensome nor out of proportion to the needs of the case. Hence, 10 requiring Defendant Carrick to engage in this exercise would be pointless, as he has already 11 performed the review and produced responsive documents.

Defendant Carrick's objection that 12 communications between Defendant Carrick and Defense Counsel are protected under the 13 attorney-client privilege is sustained. Defendant Carrick did not, however, respond to Plaintiff's 14 contention that documents sent to or from litigation support are considered protected.

In any 15 event, such emails identified on the privilege log do not appear to be responsive to Plaintiff's 16 request at issue here, as neither emails were sent by Defendant Carrick. See ECF No. 3, pg. 6. 17 Defendant Carrick's objection that Plaintiff's request violates third party privacy rights

is 18 sustained but moot as Defendant Carrick has produced such records in redacted form, as Plaintiff 19 requested.

20 Finally, with regard to Defendant Carrick's objection that certain emails are 21 protected under the deliberative process privilege, such objection is denied as unnecessary. The 22 privilege log identifies certain emails designated as protected by the deliberative process 23 privilege, but, as indicated on the privilege log, none was sent by Defendant Carrick; thus, they 24 are not responsive to the request at issue here.

Such objection can be raised again with respect to 25 any future requests where such documents are responsive to Plaintiff's request or are the subject 26 of a motion to compel. 27 As a preliminary matter, Plaintiff's claims that Defense Counsel has "fabricated" 28 evidence before the Court and engaged in a course of conspiracy and collusion are serious 1 accusations, which this Court does not take lightly.

Plaintiff has provided no evidence that would 2 suggest such claims to be true. Plaintiff's speculation is insufficient. Furthermore, any purported 3 discovery abuse based on bad faith is not before the Court. 4 As to the substance of Defendant Carrick's response, he has responded to 5 Plaintiff's request. Regarding Plaintiff's claim that he seeks an email dated June 22, 2016, which 6 Defendant has not yet produced, the Court notes that Plaintiff's own exhibits include a June 22, 7 2016 email regarding a third-party inmate.

See ECF No. 83, pgs. 14-17. As to Plaintiff's claims 8 pertaining to the October 26, 2015 meeting minutes, the Court has determined, above, that 9 meeting minutes are not responsive to the requests for production currently before the Court. If 10 Defendant Carrick states that he did not send an email attaching the October 26, 2015 meeting 11 minutes, then there is nothing for Defendant Carrick to produce in this regard.³ This Court cannot 12 compel Defendant Carrick to produce documents that do not exist.

Baker v. Moore, No. 1:12-cv- 13 00126-LJO-SAB, 2016 WL 796504, at *6 (E.D. Cal. Mar. 1, 2016) ("Defendant cannot be 14 compelled to provide copies of documents that do not exist."); Lopez v. Florez, No. 1:08-CV- 15 01975 - LJO, 2013 WL 1151948, at *3 (E.D. Cal. Mar. 19, 2013) (finding court cannot force a 16 party to produce documents he does not have). 17 As to Plaintiff's speculation that there must be additional documents, given the 18 PRA response, Defendant Carrick has stated that he has produced those documents responsive to 19 this request.

Presumably, Defendant has produced all responsive documents and there is nothing 20 for the Court to compel. See McGinnis v. Atkinson, No. 1:11-cv-01337 LJO JLT (PC), 2012 21 WL 1944801, at *3 (E.D. Cal. May 29, 2012) (denying motion to compel where defendant 22 responded it had provided all responsive documents). Signed discovery responses are 23 3 The Court is concerned, however, as to Defendant Carrick's argument that records 24 of Committee

meetings are only kept for three years, and “since the committee meeting occurred on October 26, 2015, the records of that meeting would not have been in existence after October 25 26, 2018.” See ECF Nos. 72, pg.

4 & 69, pg. 4. Yet, the Declaration of G. Song filed in support of his opposition regarding the deliberative process privilege states “I reviewed the Durable 26 Medical Equipment Committee [draft] minutes [for]... October 26, 2015....” ECF 89, pg. 20. 27 Should these minutes be responsive to any of Plaintiff’s discovery requests, the Court reminds Defendant Carrick of his obligation to supplement his responses, accordingly.

See Fed. R. Civ. P. 28 26(e)(1). 1 certifications that, to the best of the person’s knowledge, information and belief formed after a 2 reasonable inquiry, the responses are correct. See Fed. R. Civ. P. 26(g)(1)(B); Logtale, Ltd., 2013 3 WL 3967750, at *2 (requiring counsel to be “proactive in ensuring that his clients are conducting 4 thorough and appropriate document searches”).

Mere distrust and suspicion regarding discovery 5 responses do not form a legitimate basis to further challenge sufficient responses. See e.g., 6 Gorrell, 292 F.R.D. at 632; L.H. v. Schwarzenegger, 2007 WL 2781132, at *2. Discrepancies 7 between facts and evidence is not a basis to compel a further response or to attempt to force a 8 party to change a response; rather, it is fodder for a party to attempt to impeach a witness or to 9 contradict testimony at trial and/or dispositive motion.

See Jacobs, 2015 WL 3717542, at *8; see 10 Hoffman, 2017 WL 5900086, at *8. 11 Therefore, no further response to this request is required by Defendant Carrick and 12 Plaintiff’s Motion 3 as to request for production of documents, set three, number 1 is denied. 13 To the extent the Parties seek an in-camera review from this Court, such request is 14 denied.

In camera reviews, which are burdensome and intrusive, are not routinely conducted and 15 they are not available to a litigant merely seeking reassurance regarding the sufficiency of the 16 response received. See U.S. v. Zolin, 491 U.S. 554, 569-75 (1989); In re Grand Jury 17 Investigation, 974 F.2d 1068, 1074-75 (9th Cir. 1992); Scott v. Palmer, No. 1:09-CV-01329-LJO, 18 2014 WL 6685810, at *7 (E.D.

Cal. Nov. 26, 2014). Here, Defendant Carrick has certified that 19 all non-privileged documents responsive to Plaintiff’s request have been produced; as such, 20 Plaintiff is required to accept his response. No grounds meriting an in camera review have been 21 identified.

Therefore, to the extent the parties seek an in camera review, such request is denied. 22 23 III. CONCLUSION 24 Accordingly, IT IS HEREBY ORDERED that: 25 1. Plaintiff’s motion to compel discovery and for an award of sanctions, ECF 26 66, is denied. 27 2. Plaintiff’s motion to compel discovery, ECF No. 69, is granted in part and 28 denied in part, as follows: 1 a. The Court grants Plaintiff's motion as to Plaintiff's Request for 2 Production No. 1.

Defendant Carrick is ordered to: (1) produce responsive documents to this request, to the extent such documents exist; (2) supplement his response with information as to who has possession, custody, or control of such documents so that Plaintiff may act accordingly, if such documents exist, or (3) supplement his response to indicate that after a reasonable and diligent inquiry, no such documents exist because they never existed or have been destroyed.

Defendant Carrick shall serve further responses to this request within thirty days of the date of this order. b. The Court denies Plaintiff's motion with respect to requiring Defendant Carrick to further respond to Interrogatory number 10. c. The Court grants Plaintiff's motion with respect to Defendant Carrick's response to Interrogatory Number 6 and orders Defendant Carrick to provide a further response to this request within thirty days of the date of this order.

d. The Court denies Plaintiff's motion to compel further responses from Defendant Posson to Request for Production numbers 5, 6, 7, 12 and 13. e. The Court denies Plaintiff's request for leave to serve three interrogatories and three requests for production as to Defendants Carrick and Posson. f. The Court denies as unnecessary Plaintiff's request for an extension of discovery deadlines.

3. Plaintiff's motion to compel discovery, ECF No. 81, is denied. || So Ordered: >1
| Dated: March 13, 2023 Co 22 DENNIS M. COTA 23 UNITED STATES MAGISTRATE JUDGE
24 25 26 27 28 29