

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

BRYAN E. RANSOM,

CASE NO. 1:05-cv-00086-OWW-GSA PC

Plaintiff,

ORDER GRANTING IN PART AND
DENYING IN PART MOTIONS TO COMPEL,
GRANTING MOTIONS FOR MODIFICATION
OF SCHEDULING ORDER, AND DENYING
MOTION TO SUBSTITUTE PARTIES

v.

M. JOHNSON, et al.,

Defendants.

(Docs. 140, 157, 158, 159, 160, and 169)

ORDER REQUIRING PARTIES TO SUBMIT
STATUS REPORT WITHIN THIRTY DAYS,
AND ORDERING DEFENDANTS TO SERVE
DISCOVERY RESPONSES IDENTIFIED IN
ORDER WITHIN FORTY-FIVE DAYS

Deadline to Amend Pleadings: 06/01/09

Discovery Deadline: 07/01/09

Plaintiff Bryan E. Ransom is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983.¹ This action is proceeding on Plaintiff's amended

¹ This action is proceeding on the following claims against the following defendants: (1) a free exercise claim against Defendant Johnson; (2) an Eighth Amendment failure-to-protect claim against Defendants Canton, Flores, Adams, and Atkinson; (3) a retaliation claim against Defendants Lankford, Diggs, L'Etoile, and Alameda; (4) a retaliation claim against Defendants Burruel, Case, Vance, Cary, Tennyson, and Pliler; (5) an access to the courts claim against Defendants Burruel, Case, Vance, Cary, Tennyson, and Pliler; (6) a retaliation claim against Defendants Rosario, Pliler, Kalvelage, DeGroot, Diggs, and Lankford; (7) a due process claim against Defendants Rosario, Pliler, Kalvelage, DeGroot, Diggs, and Lankford; (8) a retaliation claim against Defendant Arroyo; (9) an Eighth Amendment medical care claim against Defendant Cabral; (8) an Eighth Amendment excessive force claim against Defendants Bremner, Diaz, Jones, Cheema, Duran, Hulsey, Mayo, Garcia, Pina, Madreno, Santos, McDowell, and Meske; (9) a state law assault and battery claim against Defendants Bremner, Diaz, Jones, Cheema, Duran, Hulsey, Mayo, Garcia, Pina, Madreno, Santos, McDowell, and Meske; (10) a right to privacy claim against Defendants Bremner, Diaz, Jones, Cheema, Duran, Hulsey, Mayo, Garcia, Pina, Madreno, Santos, McDowell, and

1 complaint, filed on August 30, 2005. Pending before the Court are Plaintiff's three motions to
2 compel, Plaintiff's motion for an extension of the discovery deadline, Plaintiff's motion for
3 substitution of parties, and Plaintiff's motion for an extension of the amended pleadings deadline.
4 (Docs. 140, 157-160, and 169.) Defendants filed oppositions to Plaintiff's three motions to compel,
5 and Plaintiff filed a reply to the opposition to his second and third motions to compel. (Docs. 150,
6 175, and 177.)

7 **I. First Motion to Compel**

8 On June 12, 2008, Plaintiff filed a motion to compel further responses to select requests for
9 the production of documents and interrogatories. After obtaining an extension of time, Defendants
10 filed their opposition on August 15, 2008, and the motion has been deemed submitted. Local Rule
11 78-230(m).

12 "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any
13 party's claim or defense Relevant information need not be admissible at the trial if the
14 discovery appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R.
15 Civ. P. 26(b)(1). The responding party is obligated to respond to the interrogatories to the fullest
16 extent possible, Fed. R. Civ. P. 33(b)(3), and any objections must be stated with specificity, Fed. R.
17 Civ. P. 33(b)(4). The responding party shall use common sense and reason. E.g., Collins v. Wal-
18 Mart Stores, Inc., No. 06-2466-CM-DJW, 2008 WL 1924935, *8 (D. Kan. Apr. 30, 2008). A
19 responding party is not generally required to conduct extensive research in order to answer an
20 interrogatory, but a reasonable effort to respond must be made. L.H. v. Schwarzenegger, No. S-06-
21 2042 LKK GGH, 2007 WL 2781132, *2 (E.D. Cal. Sep. 21, 2007). Further, the responding party
22 has a duty to supplement any responses if the information sought is later obtained or the response
23 provided needs correction. Fed. R. Civ. P. 26(e)(A).

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25 Meske; (11) a state law IIED claim against Defendants Bremner, Diaz, Jones, Cheema, Duran, Hulsey, Mayo,
26 Garcia, Pina, Madreno, Santos, McDowell, and Meske; (12) an Eighth Amendment medical care claim against
27 Defendants Bremner, Diaz, Jones, Cheema, Duran, Hulsey, Mayo, Garcia, Pina, Madreno, Santos, McDowell,
28 Meske, Bennett, Williams, and MTA Doe; (13) a state law negligence claim against Defendants Bremner, Diaz,
Jones, Cheema, Duran, Hulsey, Mayo, Garcia, Pina, Madreno, Santos, McDowell, Meske, Bennett, Williams, and
MTA Doe; (14) a retaliation claim against Defendants Pear and Scribner; and (15) a First Amendment mail
censorship claim against Defendants Pear and Scribner.

1 For document production requests, responding parties must produce documents which are
2 in their “possession, custody or control.” Fed. R. Civ. P. 34(a)(1). “Property is deemed within a
3 party’s ‘possession, custody, or control’ if the party has actual possession, custody, or control thereof
4 or the legal right to obtain the property on demand.” Allen v. Woodford, No. CV-F-05-1104 OWW
5 LJO, 2007 WL 309945, *2 (E.D.Cal. Jan. 30, 2007) (citing In re Bankers Trust Co., 61 F.3d 465, 469
6 (6th Cir. 1995)).

7 If Defendants object to one of Plaintiff’s discovery requests, it is Plaintiff’s burden on his
8 motion to compel to demonstrate why the objection is not justified. In general, Plaintiff must inform
9 the Court which discovery requests are the subject of his motion to compel, and, for each disputed
10 response, inform the Court why the information sought is relevant and why Defendants’ objections
11 are not justified.

12 In this instance, however, there are deficiencies with respect to Plaintiff’s motion to compel
13 *and* with Defendants’ objections. Given these deficiencies and the extent of discovery conducting
14 by the parties, and in the interest of conservation of the Court’s resources, the Court opts to reach
15 the merits of Plaintiff’s motion to compel, to the extent it is able to do so, rather than deny the
16 motion without prejudice to refiling. Because the discovery deadline shall be extended by this
17 order, Plaintiff is not precluded from redrafting and serving amended discovery requests, as guided
18 by this order.

19 **A. Discovery Request Served on Defendant Arroyo**

20 Plaintiff seeks to compel a further response to one of his requests for the production of
21 documents, set one, served on Defendant Arroyo.

22 **POD 4:** “Please produce all other documents, items of evidence or sworn or unsworn
23 statements or affidavits that relate to the allegations made in Plaintiff’s complaint against you.”

24 **Ruling:** Defendants object that the request seeks documents protected by attorney-client
25 privilege and attorney work product, and that the only responsive non-privileged documents are in
26 Plaintiff’s central file and equally available to him. Defendants’ bare objection on attorney-client
27 privilege and attorney work product grounds falls well short of what is required to assert those
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1 privileges, and is overruled. Burlington N. & Santa Fe Ry. Co. v. United States Dist. Court for the
2 Dist. of Montana, 408 F.3d 1142, 1149 (9th Cir. 2005).

3 Plaintiff's request is overly broad and vague, however, and needs to be narrowed. For
4 example, Plaintiff would be better served to seek any sworn statements separately from other
5 documents, etc. Further, Plaintiff must limit his discovery requests to information relevant to his
6 claims and within a reasonable time frame.

7 Plaintiff's motion is denied, without prejudice, subject to the following orders. Regarding
8 photocopying costs, which Plaintiff asserts he is unable to afford, Plaintiff would ordinarily bear the
9 burden of these costs. However, the Court has discretion to shift the costs to Defendants and will
10 do so if the alternative would leave Plaintiff unable to obtain any documents from his file. It is not
11 clear from Plaintiff's motion whether he is able to make copies and the prison will simply assess the
12 costs against his trust account, *regardless of the existence of available funds*, or whether he must in
13 fact have funds available to pay the costs in order to obtain the copies. If Plaintiff is allowed to make
14 copies even if he has no available funds, and the costs are simply charged against his trust account,
15 leading to or adding to a negative balance, the Court will not shift costs. The parties are required to
16 clarify this issue via status report within thirty days.

17 Further, assuming the Court finds costs must be shifted to Defendants, the Court will not
18 order them to produce an entire copy of Plaintiff's central file. Plaintiff's request is overly broad,
19 as previously stated. Plaintiff is entitled to review his central file, and he must narrow his document
20 production request to documents relevant to his First Amendment claim against Defendant Arroyo
21 arising out of the alleged destruction of his personal property in retaliation for his obtainment of a
22 restraining order relating to the property.

23 Accordingly, Plaintiff may review his central file, re-draft narrower and more specific
24 requests, and re-serve the requests on Defendant Arroyo. Defendants' counsel is requested to contact
25 the Litigation Office in order to facilitate Plaintiff's review of his file in the very near future.

26 **B. Discovery Requests Served on Defendant Atkinson**

27 Plaintiff seeks to compel further responses to his interrogatories, set one, and requests for the
28 production of documents, set one, served on Defendant Atkinson.

1 **ROG 18:** “Referring your attention to Plaintiff’s SATF-IV Endorsement Attached as Exhibit
2 D; and the October 24, 2000 Memorandum: Appeal Response, Attached as Exhibit E, Please explain
3 in as much detail as possible how it was determined that Plaintiff’s placement and endorsement to
4 a SNY was incorrect and why.”

5 **Ruling:** Plaintiff’s motion to compel is denied. Plaintiff is required to accept Defendant’s
6 response that he has no knowledge with which to answer the question, absent a showing to the
7 contrary, which was not made in the motion to compel.

8 **POD 4:** “The complete indexed and compartmentalized contents of Plaintiff’s C-file,
9 including but not limited to disciplinary reports, incident report, evaluations, criminal justice
10 information, and medical and mental health records.”

11 **Ruling:** This request is overly broad in that it lacks limitation to documents relevant to
12 Plaintiff’s claim that Defendant endangered his safety by failing to include certain information in the
13 written Departmental Review Board recommendation, and lacks any time period limitation.
14 However, as with Arroyo POD 4, Defendant’s bare assertion of official information privilege is
15 insufficient, Johnson v. Runnels, No. CIV S-04-0776 LKK EFB P, 2009 WL 900755, *3 (E.D.Cal.
16 Mar. 31, 2009), and the issue of whether Plaintiff has equal access to obtain copies of the documents
17 requires further briefing by the parties, as addressed in the previous subsection.

18 Plaintiff’s compel is denied, without prejudice. As with Arroyo POD 4, Plaintiff may review
19 his central file, re-draft a narrow and more specific request(s), and re-serve it (them) on Defendant.

20 **POD 5:** “All instructions, training manuals, directives and example sheets on how to prepare
21 a CSU/DRB referral.”

22 **Ruling:** In their opposition, Defendants agreed to supplement their response and provide
23 further documents in light of Plaintiff’s clarification of what he seeks, set forth in his motion to
24 compel. Accordingly, Plaintiff’s motion to compel a further response to this request is denied as
25 moot, without prejudice.

26 **POD 6:** “The complete contents of Plaintiff’s CDC 114 and 114A while housed at SATF.”

27 **Ruling:** Defendant objects on the ground that the only documents responsive to this request
28 are in Plaintiff’s central file, and are equally available to Plaintiff. The Court will reserve its ruling

1 on this request pending the parties' status reports on how the assessment of photocopying costs is
2 handled for indigent prisoners.

3 **POD 7:** "Any and all administrative bulletins and memorandums generated throughout CDC
4 by Director Cal Terhune or his successors regarding any special interests in the activities of the
5 Islamic group/organization called the Five Percenters (5%)."

6 **Ruling:** Plaintiff's motion to compel is denied. Absent a showing by Plaintiff in his motion
7 to compel that Defendant does in fact have the documents in his possession, custody, or control,
8 which was not made, Plaintiff is required to accept Defendant's answer.

9 **C. Discovery Requests Served on Defendant Case**

10 Plaintiff seeks to compel further responses to his interrogatories, set one, and requests for
11 the production of documents, set one, served on Defendant Case.

12 **ROG 5:** "Please describe in as much detail as possible whether Plaintiff had been endorsed
13 by CSR or DRB for transfer at the time of the 2001 transpacking/transfer of his personal property."

14 **ROG 6:** "If not, please explain in as much detail as possible the complete circumstances as
15 to why."

16 **ROG 7:** "Please state the name, affiliation, title, last known address, and last known
17 telephone number of each person who has knowledge of any facts stated in your response to
18 Interrogatories No. 5 and No. 6."

19 **ROG 8:** "Please identify each document as the term is defined in FRCP, Rule 34(a)(1), that
20 evidence, mentions, or refers to any of the facts stated in your response to Interrogatories No. 5 and
21 No. 6."

22 **Ruling:** Plaintiff's motion to compel is granted. Defendant's response that he "does not have
23 knowledge sufficient to provide a meaningful response" suggests that he possesses the ability to
24 answer this question to some extent. Defendant has forty-five days to respond to ROGs 5 through
25 8.

26 **ROG 9:** "Please describe in as much detail as possible the complete circumstances
27 surrounding Plaintiff's person [sic] property being removed from his cell, transpacked/ transferred,
28 where it went and when it was returned to Plaintiff in 2001."

1 **ROG 10:** "Please state the name, affiliation, title, last known address, and last known
2 telephone number of each person who has knowledge of any of the facts stated in your response to
3 Interrogatory No. 9."

4 **ROG 11:** "Please identify each document as the term is defined in FRCP, 34(a)(1), that
5 evidence mentions, or refers to any of the facts stated in your response to Interrogatory No. 9."

6 **Ruling:** Plaintiff's motion to compel is granted on the same grounds as with ROGs 5 through
7 8. Defendant has forty-five days to serve a response to ROGs 9 through 11.

8 **ROG 17:** "Please identify each person who has made sworn or unsworn statements or
9 provided information for affidavits or statements that relate to the allegations made in Plaintiff's
10 complaint and state the information provided."

11 **Ruling:** Plaintiff's motion to compel is denied. This request is vague, ambiguous, and overly
12 broad. However, Defendant's bare objection on attorney-client privilege grounds is overruled.
13 Burlington N. & Santa Fe Ry. Co., 408 F.3d at 1149.

14 **POD 1:** "Please produce all documents that contain, mention, construe or refer to Plaintiff's
15 grievances, petitions, letters, and complaints against CSP-SAC officials."

16 **Ruling:** Plaintiff's motion to compel is denied. This request is vague, ambiguous, and overly
17 broad, and Plaintiff's motion to compel provides no clarification of the issues.

18 **POD 2:** "Please produce all documents that contain, mention, construe or refer to information
19 concerning the 2001 transpacking and transferring of Plaintiff's personal property including where
20 all it was transferred to and when it was returned to Plaintiff."

21 **POD 3:** "Please produce all documents that contain, mention, construe or refer to the policy,
22 procedure, and practice that governs the initial scheduling of a prisoner's personal property being
23 'transpacked' for transfer to another prison."

24 **POD 4:** "Please produce all documents that contain, mention, construe or refer to the policy,
25 procedure, and practice that governs the initial scheduling of a prisoner's personal property being
26 'transferred' to another prison."

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1 **Ruling:** Plaintiff's motion to compel further responses to PODs 2, 3 and 4 is denied. Absent
2 a showing to the contrary, which was not made, Defendant's response that he has produced all the
3 responsive documents in his possession, custody, or control must be accepted.

4 **POD 5:** "Please produce all other documents, items of evidence, or sworn or unsworn
5 statements or affidavits that relate to the allegations made in Plaintiff's complaint."

6 **Ruling:** Plaintiff's motion to compel is denied. This request is overly broad. However,
7 Defendant's bare objection on attorney-client privilege and attorney work product grounds is
8 overruled. Burlington N. & Santa Fe Ry. Co. at 1149.

9 **D. Discovery Requests Served on Defendant Diggs**

10 Plaintiff seeks to compel further responses to his interrogatories, set one, and requests for
11 the production of documents, set one, served on Defendant Diggs.

12 **ROG 6:** "Referring to the June 8, 2001 CDC-128-G Classification DRB Action, attached as
13 Exhibit A, please explain in as much detail as possible why you ordered Plaintiff who is a 270 design
14 prisoner to be transferred to CSP-SAC IV which is a 180 design prison."

15 **Ruling:** Plaintiff's motion to compel a further response is denied. Defendant responded to
16 this interrogatory. Plaintiff argues that Defendant is required to provide the information sought, such
17 as telephone interviews, letters, hearings, and grievances. Plaintiff may not compel the production
18 of documents via an interrogatory. Defendant's response to this interrogatory is not obviously
19 deficient to the Court, and Plaintiff has provided no further illumination of the issue in his motion.

20 **POD 4:** "Please produce all documents including studies, memos, bulletins and case law
21 citings explicitly addressing the potential threat of a substantial risk of harm arising from prison
22 officials disseminating critical case factors of a prisoner to the Gen. prison population and then
23 releasing the prisoner to that general population."

24 **Ruling:** Plaintiff's motion to compel is denied. Absent a showing to the contrary, which was
25 not made in the motion, Defendant's response that he has no such documents in his possession,
26 custody, or control must be accepted.

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1 **E. Discovery Requests Served on Defendant Flores**

2 Plaintiff seeks to compel further responses to his requests for the production of documents,
3 set one, served on Defendant Flores.

4 **POD 1:** “All documents that contain, mention, construe or refer to CDC 602 Log No. SATF-
5 00-04787; IAB Case No. 00090-65.”

6 **Ruling:** Defendant’s bare objection on attorney-client privilege and attorney work product
7 grounds is overruled. Burlington N. & Santa Fe Ry. Co. at 1149. The Court will reserve its ruling
8 on this request pending the parties’ status reports on how the assessment of photocopying costs is
9 handled for indigent prisoners.

10 **POD 2:** “All documents that contain, mention, construe or refer to this prohabition [sic] of
11 staff exposing a Prisoners [sic] critical case information to other Prisoners.”

12 **Ruling:** The Court will reserve its ruling on this request pending the parties’ status reports
13 on how the assessment of photocopying costs is handled for indigent prisoners.

14 **POD 3:** “All documents written or created that contain, mention, construe, or refer to an
15 inspection, inquiry or complaint about the issues of CDC 602 Log No. SATF-00-4787; IAB Case
16 No. 0009065, whether formal or informal, official or unofficial including inmates, staff, and civilian
17 grievances, complaints, reports and appeals, and including responses to such documents prepared
18 by CDC or their agents.”

19 **Ruling:** The Court will reserve its ruling on this request pending the parties’ status reports
20 on how the assessment of photocopying costs is handled for indigent prisoners.

21 **POD 5:** “All documents written or created that contain, mention, construe, or refer to any
22 insurance agreement or arrangement according to which an insurance company or other entity or
23 person will guaranty, act as a surety for, or otherwise bear any responsibility for litigating this action,
24 including but not limited to paying for the Defendants attorney fees, paying for any monetary or
25 injunctive relief ordered as part of a court or consent judgment.”

26 **Ruling:** Plaintiff’s motion to compel is denied. Plaintiff is required to accept that Defendant
27 has no responsive documents in his possession, custody, or control.

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1 **F. Discovery Requests Served on Defendant Johnson**

2 Plaintiff seeks to compel further responses to his interrogatories, set one, and requests for
3 the production of documents, set one, served on Defendant Johnson.

4 **ROG 7:** “Please explain in as much detail as possible how these procedures [as described
5 in ROG 6] were taken with Plaintiff.”

6 **Ruling:** Plaintiff’s motion to compel is denied. Defendant answered the interrogatory, and
7 Plaintiff may not move to compel information not originally sought in the interrogatory.

8 **ROG 9:** “Please identify each person who has made to you sworn or unsworn statements or
9 provided information for affidavits or statements that relate to this allegations made in Plaintiff’s
10 complaint and state this information provided.”

11 **Ruling:** Plaintiff’s motion to compel is denied. This interrogatory is vague, ambiguous, and
12 overly broad. Defendant’s bare objection on attorney-client privilege and attorney work product
13 grounds is overruled, however. Burlington N. & Santa Fe Ry. Co. at 1149.

14 **POD 1:** “All documents that contain, mention, construe or refer to the April 17, 2000
15 Grooming Standard Memorandum.”

16 **Ruling:** The Court will reserve its ruling on this request pending the parties’ status reports
17 on how the assessment of photocopying costs is handled for indigent prisoners.

18 **POD 3:** “All other documents, items of evidence, or sworn or unsworn statements or
19 affidavits that relate to the allegations made against you in Plaintiff’s complaint.”

20 **Ruling:** Plaintiff’s motion to compel is denied. This request is vague, ambiguous, and overly
21 broad, but Defendant’s bare objection on attorney-client privilege and attorney work product grounds
22 is overruled. Burlington N. & Santa Fe Ry. Co. at 1149.

23 **POD 4:** “All documents that contain, mention, construe, or refer to any insurance agreement
24 or arrangement according to which an insurance company or other entity or person will guaranty, act
25 as a surety for or otherwise bear any responsibility for litigating this action, including, but not limited
26 to paying for the Defendants attorney fees, costs, or out-of-pocket expenses, or paying for any
27 monetary or injunctive relief ordered as part of a court or consent judgment.”

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1 **Ruling:** Plaintiff's motion to compel is denied. Plaintiff is required to accept that Defendant
2 has no responsive documents in his possession, custody, or control

3 **G. Discovery Requests Served on Defendant Pina**

4 Plaintiff seeks to compel further responses to his requests for the production of documents,
5 set one, served on Defendant Pina.

6 **POD 1:** Plaintiff did not provide a copy of this request with his motion to compel, but in light
7 of Defendant's response to the motion to compel, it appears to involve the production of a videotape.
8 (Doc. 150, Def. Opp., 10:7-22.)

9 **Ruling:** Plaintiff's motion to compel is denied. Plaintiff has not met his burden as the
10 moving party, and in this instance, the Court cannot discern on its own exactly what Plaintiff wants
11 or whether the request has been rendered moot or not.

12 **POD 7:** "Please produce a complete copy of the CDC 837 Crime/Incident Report in its
13 entirety."

14 **Ruling:** Plaintiff's motion to compel is denied as moot in light of Defendant's agreement to
15 review the documents produced and provide any missing pages.

16 **II. Second Motion to Compel**

17 On September 4, 2008, Plaintiff filed a second motion to compel, seeking to compel
18 responses to his first set of interrogatories to Bennett, Bremner, Garcia, and Medrano; his first
19 requests for the production of documents to Bennett, Bremner, Garcia, and Medrano; his second set
20 of interrogatories to Arroyo, Atkinson, and Johnson; and his second requests for the production of
21 documents to Arroyo and Atkinson.

22 Defendants contend they were never served with the first set of interrogatories and requests
23 for the production of documents to Medrano; the second set of interrogatories to Arroyo, Atkinson,
24 and Johnson; and the second requests for the production of documents to Arroyo and Atkinson.
25 Further, Defendants represent that Garcia will respond to Plaintiff's discovery requests, and attach
26 to their opposition Bennett and Bremner's responses, dated September 17, 2008.

27 Absent evidence to the contrary, which was produced, the Court accepts Defendants'
28 representation that they did not receive some of Plaintiff's discovery requests. Plaintiff's motion to

1 compel is granted to the extent that Defendants shall now serve responses to those requests, which
2 are attached as exhibits to Plaintiff's motion to compel. Accordingly, Defendants have forty-five
3 days from the date of service of this order to serve their responses to the second set of interrogatories
4 to Arroyo, Atkinson, and Johnson; and the second requests for the production of documents to
5 Arroyo and Atkinson.

6 As far as the Court is aware, Defendants Medrano and Garcia have not waived service or
7 been personally served, and have not voluntarily appeared in this action. (Docs. 128, 137.)
8 Defendants' counsel is directed to clarify whether or not he represents Medrano and Garcia. If he
9 does not, neither counsel nor those defendants have any legal obligation to respond to Plaintiff's
10 discovery requests. The Court will reserve its ruling on Plaintiff's motion to compel their responses
11 pending counsel's status report, due within thirty days. In the event Defendants Garcia and Medrano
12 waived service or were served, and are now represented, they must file a response to Plaintiff's
13 amended complaint within thirty days.

14 Plaintiff's motion to compel responses by Bennett and Bremner is denied as moot given that
15 they served responses.

16 **III. Third Motion to Compel**

17 On September 4, 2008, Plaintiff filed a third motion to compel, seeking an order compelling
18 Defendant Diaz to respond to select requests for the production of documents and Defendant Diggs
19 to respond to one interrogatory.

20 **A. Discovery Requests Served on Defendant Diaz**

21 **PODs 3 and 4:** Plaintiff seeks the production of five MK-46 pepper spray canisters, and an
22 X-10 Barricade remover complete with canister.

23 **Ruling:** Plaintiff's motion to compel is denied. Although the alleged use of the items by
24 Defendants is relevant to Plaintiff's claim that excessive force was used against him, the Court
25 declines to compel Defendant to produce these tangible items directly to Plaintiff. The safety and
26 security issues that would result from such a directive cannot be overstated. Plaintiff may describe
27 them himself or elicit descriptive testimony from others, and Plaintiff may also draw his own
28 diagram, subject to review by Defendants and the Court, and subject to the rules of evidence.

1 **PODs 10-16:** Plaintiff seeks the production of various photographs and an ariel diagram
2 relating to the locations where the events at issue in this action occurred.

3 **Ruling:** Plaintiff's motion to compel is denied. Defendant's bare assertion of attorney work
4 production is overruled. Burlington N. & Santa Fe Ry. Co. at 1149. However, Plaintiff is required
5 to accept Defendant's response that he has no such documents in his possession, custody, or control.
6 Plaintiff's argument in his reply that Defendant has access to a camera and can take photographs is
7 without merit. Defendant is not obligated to create evidence for Plaintiff. His obligation extends
8 only as far as producing existing documents within his possession, custody, or control. Plaintiff's
9 motion to compel production of photographs and a diagram is denied. Defendant are reminded of
10 their obligation to supplement their responses, should such evidence later come into their possession.
11 Fed. R. Civ. P. 26(e).

12 **B. Discovery Request Served on Defendant Diggs**

13 **ROG 15:** "Referring to the June 8, 2001, CDC-128-G, Classification DRB Action, attached
14 as Exhibit A, please explain your position in as much detail as possible as to how the prospect of
15 transferring Plaintiff back to a SNY/PHU setting was a realistic option when it had already been pre-
16 determined by the CSATF/SP ICC and Associate Warden and Captain that Plaintiff did not meet
17 SNY criteria and that his previous endorsement to and placement in SNY was in error. (See CDC
18 114-D dated October 6, 2000, attached as Exhibit C; and Memorandum, dated October 24, 2000,
19 attached as Exhibit D)."

20 **Response:** "The DRB action of June 8, 2001 did not place plaintiff in SNY or PHU. The
21 DRB endorsed plaintiff's transfer to CSP-SAC and directed SAC ICC to determine the appropriate
22 facility placement with Ransom's input and agreement at CSP-SAC."

23 **Ruling:** Plaintiff argues that Defendant's response is evasive while Defendant argues that
24 Plaintiff is seeking an explanation from him regarding a decision that he did not make. In his reply,
25 Plaintiff contends that the DRB Action contains information that he refused placement in an SNY
26 or PHU setting, and that every viable placement option was considered, and he is asking Defendant
27 to explain how it was determined that SNY or PHU placement was a viable option when it had
28 previously been found that he did not meet the criteria for such placement.

1 Plaintiff's motion to compel is denied. Plaintiff's interrogatory was not drafted to net the
2 information he apparently seeks. The DRB Action at issue recommended Plaintiff's transfer to CSP-
3 SAC-IV. As drafted, the interrogatory seeks to know why it was a viable option to transfer Plaintiff
4 back to an SNY or PHU setting. Since the DRB Action did not involve ordering or recommending
5 SNY or PHU placement, Defendant's answer is acceptable.

6 To the extent that Plaintiff wants different information, he must draft another interrogatory.
7 The Court notes that the information Plaintiff is interested in addressing is set forth in a section
8 entitled "Classification Services Recommendation," and appears to be a summary of information
9 provided by CSU rather than a recommendation or finding by the DRB. Thus, it is not clear that
10 Defendant possesses the information sought by Plaintiff, even with the benefit of a new
11 interrogatory.

12 **IV. Other Motions**

13 **A. Motions for Extension of Discovery and Amended Pleadings Deadlines**

14 On September 4, 2008, Plaintiff filed a motion seeking an extension of the discovery
15 deadline, and on October 14, 2008, Plaintiff filed a motion seeking an extension of the amended
16 pleadings deadline. Defendants did not file responses.

17 In light of the existence of substantial discovery disputes between the parties, now largely
18 resolved, the Court finds good cause to modify the scheduling order. Fed. R. Civ. P. 16(b). The
19 deadline to amend the pleadings is extended to June 1, 2009, and the discovery deadline is extended
20 to July 1, 2009, applicable to all parties.

21 **B. Motion to Substitution of Parties**

22 On September 5, 2008, Plaintiff filed a motion seeking to substitute parties. Fed. R. Civ. P.
23 25(d). Defendants did not respond.

24 Defendants Alameida, Diggs, Lankford, and L'Etoille are retired from the California
25 Department of Corrections and Rehabilitation, and in response to Plaintiff's requests for the
26 production of documents, they stated that they do not have possession, custody, or control of the
27 documents sought. Plaintiff contends that he is suing these defendants in their official and individual
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1 capacities, and for his official capacity claims, he seeks to substitute their successors in office under
2 Rule 25(d) so that he may obtain discoverable documents.

3 These defendants were members of the Departmental Review Board, and recommended
4 Plaintiff's transfer to CSP-SAC-IV on June 8, 2001, allegedly in retaliation for filing grievances and
5 a petition for writ of habeas corpus. Plaintiff's claims against them are necessarily individual
6 capacity claims because the Eleventh Amendment bars officials capacity claims for damages against
7 state officials.² Hydrick v. Hunter, 500 F.3d 978, 986-87 (9th Cir. 2007). Therefore, Plaintiff's
8 motion to substitute parties under Rule 25(d) for his official capacity claims is without merit.

9 Plaintiff is not without recourse, however. Plaintiff may move to compel a response if he
10 believes the documents are in fact in the possession, custody, or control of a defendant, and his
11 motion contains support for his position.

12 Further, subject to the following requirements, Plaintiff is entitled to the issuance of a
13 subpoena commanding the production of documents from non-parties, and to service of the subpoena
14 by the United States Marshal. Fed. R. Civ. P. 45; 28 U.S.C. 1915(d). However, the Court will
15 consider granting such a request *only if* the documents sought from the non-party are not equally
16 available to Plaintiff and are not obtainable from Defendants through a request for production of
17 documents. Fed. R. Civ. P. 34. If Plaintiff wishes to make a request for the issuance of a records
18 subpoena, he may file a motion requesting the issuance of a subpoena duces tecum that (1) identifies
19 *with specificity* the documents sought and from whom, and (2) makes a showing in the motion that
20 the records are only obtainable through that third party.

21 **V. Order**

22 As set forth herein, it is HEREBY ORDERED that:

23 1. Plaintiff's first motion to compel, filed June 12, 2008, is GRANTED IN PART and
24 DENIED IN PART, and the Court reserves its ruling IN PART;

25
26 _____
27 ² The Eleventh Amendment does not bar claims for declaratory and injunctive relief against state officials in
28 their official capacities, Hydrick v. Hunter, 500 F.3d 978, 986-87 (9th Cir. 2007), but the nature of Plaintiff's claims
precludes any viable claims for equitable relief, 18 U.S.C. § 3626(a)(1)(A); City of Los Angeles v. Lyons, 461 U.S.
95, 101, 103 S.Ct. 1660, 1665 (1983); Jones v. City of Los Angeles, 444 F.3d 1118, 1126 (9th Cir. 2006);
Headwaters, Inc. v. Bureau of Land Management, Medford Dist., 893 F.2d 1012, 1015 (9th Cir. 1989).

1 2. Plaintiff's second motion to compel, filed September 4, 2008, is GRANTED IN
2 PART and DENIED IN PART;
3 3. Plaintiff's third motion to compel, filed September 4, 2008, is DENIED;
4 4. Plaintiff's motions for modification of the scheduling order, filed September 4, 2008,
5 and October 14, 2008, are GRANTED;
6 5. Plaintiff's motion for the substitution of parties, filed September 5, 2008, is
7 DENIED;
8 6. The deadline to amend the pleadings is extended to June 1, 2009;
9 7. The discovery deadline is extended to July 1, 2009;
10 8. Within **thirty (30) days** from the date of service of this order, Plaintiff and
11 Defendants shall file status reports explaining how photocopy costs are handled for
12 indigent prisoners, and Defendants' counsel shall clarify in his report whether or not
13 he now represents Defendants Garcia and Medrano;
14 9. Within **forty-five (45) days** from the date of service of this order, Defendants shall
15 serve supplemental responses to the Case ROGs 5-11;
16 10. Within **forty-five (45) days** from the date of service of this order, Defendants shall
17 serve responses to the first set of interrogatories and requests for the production of
18 documents to Medrano; the second set of interrogatories to Arroyo, Atkinson, and
19 Johnson; and the second requests for the production of documents to Arroyo and
20 Atkinson; and
21 11. If Defendants Garcia and Medrano waived service or were served, and are now
22 represented, they must file a response to Plaintiff's amended complaint within **thirty**
23 **(30) days.**

24
25
26

IT IS SO ORDERED.

Dated: April 13, 2009

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE