

1 Recreations, Inc., 975 F.2d 604, 609 (9th Cir. 1992). The pretrial schedule may be modified
2 “if it cannot reasonably be met despite the diligence of the party seeking the extension.” Id.
3 at 609. However, if the party seeking the modification “was not diligent, the inquiry should
4 end” and the motion to modify should not be granted. Id.

5 Plaintiff asserts that the Court should extend the dispositive motion deadline because
6 he has not been able to obtain records from the California Department of Corrections
7 (“CDCR Records”) which document the internal affairs investigation into his alleged assault.
8 Plaintiff has been reasonably diligent in seeking to obtain the CDCR Records. During the
9 September 22, 2010 telephonic conference, the Court asked Defense Counsel Marta Barlow
10 to disclose how Plaintiff could obtain the Records. (Doc. 74). In a subsequently filed
11 Declaration, Barlow explained that the CDCR viewed the Records as confidential and would
12 only release them pursuant to subpoena. (Doc. 78). On January 21, 2011, Plaintiff moved
13 the Court to subpoena the CDCR records. (Doc. 96). The Court granted Plaintiff’s motion
14 and directed that a subpoena be issued and served by the United States Marshall Service on
15 January 24, 2011. (Doc. 108). However, the CDCR has not produced any documents and has
16 now moved to quash Plaintiff’s subpoena on grounds of official immunity and
17 confidentiality. (Doc. 115).

18 The fact that Plaintiff has diligently pursued the CDCR Records supports a finding
19 of good cause to grant his request for a modification. Furthermore, an extension will allow
20 the Court to resolve CDCR’s Motion to Quash and determine which documents will be
21 available to Plaintiff. Although some or even all of the documents may be protected by
22 privilege or confidentiality, fairness dictates that Plaintiff receive any unprotected documents
23 before the dispositive motion deadline passes.

24 **II. Motion for a 90-Day Extension to Respond**

25 On November 29, 2010, Defendants moved for Summary Judgment. (Doc. 90). On
26 December 2, 2010, the Court informed Plaintiff of Defendants’ Motion and his responsibility
27 to respond by January 1, 2011. (Doc. 93). Plaintiff later moved the Court to extend the
28 deadline because he had not received the CDCR documents’s request and the Court extended

1 that deadline to March 3, 2011. (Doc. 98). Plaintiff now requests another 90-day extension
2 to allow him to receive the CDCR Records before filing his opposition.

3 Under Rule 56(d) of the Federal Rules of Civil Procedure, the Court has discretion to
4 extend a response deadline where “the nonmovant shows by affidavit or declaration that, for
5 specified reasons, it cannot present facts essential to justify its opposition.”¹ Therefore
6 Plaintiff must show: “(1) it has set forth in affidavit form the specific facts it hopes to elicit
7 from further discovery; (2) that the facts sought exist; and (3) that the sought-after facts are
8 essential to oppose summary judgment.” Family Home & Fin. Ctr., Inc. v. Fed. Home Loan
9 Mortg. Corp., 525 F.3d 822, 827 (9th Cir. 2008). An extension is not justified merely because
10 discovery is incomplete or desired facts are unavailable, “rather the party filing the affidavit
11 must show how additional time will enable him to rebut the movant’s allegations of no
12 genuine issue of fact.” Jensen v. Redev. Agency of Sandy City, 998 F.2d 1550, 1554 (10th
13 Cir. 1993).

14 Defendants’ Motion for Summary Judgment seeks to dispose of Plaintiff’s Eighth
15 Amendment claims of deliberate indifference. Therefore, only facts from the report that
16 would be essential to opposing summary judgment on those claims are relevant. To show a
17 genuine issue of material fact on the deliberate indifference claims, Plaintiff, when all facts
18 and inferences are viewed in his favor, must show that Defendants acted with “deliberate
19 indifference to serious medical needs.” Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006).
20 A plaintiff must show (1) “‘serious medical need’ by demonstrating that ‘failure to treat a
21 prisoner’s condition could result in further significant injury or the ‘unnecessary and wanton
22 infliction of pain’” and (2) that the defendant’s response “was deliberately indifferent.” Jett,
23 439 F.3d at 1096 (quoting McGuckin v. Smith, 974 F.2d 1050, 1059-60 (9th Cir. 1991)).

24 Consequently, Plaintiff must show that facts in the CDCR Records address these
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26 ¹Defendants refer throughout their motion to Rule 56(f). That rules content is now
27 contained in Rule 56(d). Practice under the rule remains essentially the same and the Court
28 will continue to cite cases interpreting Rule 56(f). See Rule 56 Advisory Committee Note to
the 2010 amendments.

1 elements. Plaintiff has failed to comply with Rule 56(d) by setting forth in “affidavit or
2 declaration” the facts required to justify his opposition that would be found in the CDCR
3 Records. This alone is grounds to deny the additional time for discovery and proceed to rule
4 on the motion for summary judgment. Brae Transp., Inc. v. Coopers & Lybrand, 790 F.2d
5 1439, 1443 (9th Cir. 1986). Furthermore, even considering the assertions presented in
6 Plaintiff’s Motion for a 90-day Extension, Plaintiff has failed to show which specific facts
7 will be found that are essential to his opposition.² See Family Home & Fin. Ctr., Inc., 525
8 F.3d at 827.

9 Although the Court has discretion to deny Plaintiff’s Motion, because of the
10 circumstances of the case, and the fact that the Court will simultaneously extend the
11 dispositive motion deadline to provide time to resolve CDCR’s Motion to Quash, the Court
12 will reserve ruling on Plaintiff’s Motion and allow Plaintiff time to file a Reply with an
13 affidavit complying with Rule 56(d). To provide time for that filing the Court will provide
14 Plaintiff with a 30-day extension to his response deadline.

15 **III. Conclusion**

16 Plaintiff’s Motions have been evaluated under the differing standards of Rules 16(b)
17 and Rule 56(d). Plaintiff has shown good cause for an extension of the dispositive motion
18 deadline to allow the Court to resolve the subpoena dispute so that Plaintiff has all available
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20 ²Plaintiff’s Motion argues that the facts will show that (1) Defendant Carter conspired
21 to murder defendant; (2) Defendant Carter intentionally opened Plaintiff’s cell door and let
22 the assailant in; (3) Defendant Carter stood for 3-6 minutes watching the assailant violently
23 stab plaintiff; (4) Defendant Carter did not call for any assistance and allowed the suspect to
24 flee the scene; (5) the suspect testifies to this entire sequence of events; (6) Plaintiff was
25 placed back into his cell without medical care after the stabbing; (7) Defendants knew of the
26 stabbing and allowed plaintiff to lie in his cell for 40-50 minutes without receiving medical
27 care, (8) an inmate informed Defendant Carter that Plaintiff was dying but Defendant Carter
28 and Defendants did nothing to assist him; and (9) the interview transcripts will show that
none of the Defendants gave Plaintiff medical care when they allege they did. (Doc.114 at
12-14). These arguments assert facts that may be necessary to oppose a motion for summary
judgment by Defendant Carter, but no such motion is at issue. Plaintiff must show that these
facts are essential to oppose this Motion.

1 information about Defendant Carter's actions prior to the deadline. However, Plaintiff has
2 failed to comply with Rule 56(d)'s requirements that he show by affidavit or declaration that
3 the information in the CDCR Records is essential to justify his opposition. Therefore, before
4 the Court will rule on the extension he must comply.

5 Accordingly,

6 **IT IS HEREBY ORDERED GRANTING** Plaintiff's Motion to Extend the
7 Dispositive Motion Deadline to June 18, 2011. (Doc. 110).

8 **IT IS FURTHER ORDERED** that Plaintiff file an affidavit or declaration pursuant
9 to Rule 56(d) by March 11, 2011.

10 **IT IS FURTHER ORDERED** that the deadline to file Plaintiff's Response is
11 extended from March 3, 2011 to April 2, 2011.

12 DATED this 3rd day of March, 2011.

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16 Stephen M. McNamee
17 United States District Judge
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