

1 including a request to submit supporting evidence under seal.¹ On April 3, 2014,
2 Plaintiff filed opposition to the summary judgment motion. Defendants replied to the
3 opposition on April 10, 2014.

4 The motion to file documents under seal was denied without prejudice on
5 September 10, 2014. Defendants renewed the motion on September 26, 2014. Plaintiff
6 has not opposed the renewed motion to seal and the time for doing so has passed.
7 Local Rule 230(f).

8 **II. FACTUAL BACKGROUND**

9 The action arose while Plaintiff was incarcerated at the California Correctional
10 Institution at Tehachapi, California (“CCI”).

11 On December 5, 2006, Plaintiff was assaulted in the yard by two Hispanic
12 inmates armed with inmate-made weapons. Plaintiff refused to provide information
13 about the assault to staff. He also refused to accept Sensitive Needs Yard (“SNY”)
14 housing. The CCI Institutional Classification Committee (“ICC”) suspected the attack
15 was carried out by Southern Hispanic (Sureños) gang associates and referred Plaintiff’s
16 housing determination to Defendants, Dispute Resolution Board (“DRB”) members, with
17 the recommendation that Plaintiff be placed in the Security Housing Unit (“SHU”) for an
18 indeterminate term due to safety concerns. On July 25, 2007, Defendants approved an
19 indeterminate SHU term for Plaintiff.

20 Plaintiff disagreed with SHU housing, arguing he had no documented gang
21 activity or safety concerns, and that he could safely transfer to another facility’s general
22 population. He claims Defendants sent him to the SHU because they believed his
23 Hispanic race and culture would require him to carry out an act of violence to regain the
24 favor of other Hispanic inmates, and not because of his behavior or any security risk.
25 Plaintiff also claims this treatment differed from that accorded non-Hispanics.

26 Plaintiff maintains SHU housing denied him inmate privileges and opportunities

27 ¹ Pursuant to *Woods v. Carey*, 684 F.3d 934 (9th Cir. 2012) and *Rand v. Rowland*, 154 F.3d 952 (9th Cir.
28 1998), the Defendants notified Plaintiff of his rights, obligations and methods for opposing Defendants’
motion. (ECF No. 42-2.)

1 available to the general population.

2 **III. DISCUSSION**

3 **A. Legal Standard**

4 Any party may move for summary judgment, and the Court shall grant summary
5 judgment if the movant shows that there is no genuine dispute as to any material fact
6 and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a);
7 *Washington Mutual Inc. v. U.S.*, 636 F.3d 1207, 1216 (9th Cir. 2011). Each party's
8 position, whether it be that a fact is disputed or undisputed, must be supported by (1)
9 citing to particular parts of materials in the record, including but not limited to
10 depositions, documents, declarations, or discovery; or (2) showing that the materials
11 cited do not establish the presence or absence of a genuine dispute or that the
12 opposing party cannot produce admissible evidence to support the fact. Fed. R. Civ. P.
13 56(c)(1). While the Court may consider other materials in the record not cited to by the
14 parties, it is not required to do so. Fed. R. Civ. P. 56(c)(3); *Carmen v. San Francisco*
15 *Unified School Dist.*, 237 F.3d 1026, 1031 (9th Cir. 2001).

16 If the moving party meets its initial responsibility, the burden then shifts to the
17 opposing party to establish that a genuine issue as to any material fact actually does
18 exist. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

19 In attempting to establish the existence of this factual dispute, the opposing party
20 may not rely upon the denials of its pleadings, but is required to tender evidence of
21 specific facts in the form of affidavits, and/or admissible discovery material, in support of
22 its contention that the dispute exists. Fed. R. Civ. P. 56(c); *Matsushita*, 475 U.S. at 586
23 n.11. The opposing party must demonstrate that the fact in contention is material, i.e., a
24 fact that might affect the outcome of the suit under the governing law, *Thrifty Oil Co. v.*
25 *Bank of Am. Nat'l Trust & Sav. Ass'n*, 322 F.3d 1039, 1046 (9th Cir. 2002), and that the
26 dispute is genuine, i.e., the evidence is such that a reasonable jury could return a
27 verdict for the nonmoving party. *Long v. County of Los Angeles*, 442 F.3d 1178, 1185
28 (9th Cir. 2006). Summary judgment must be entered, "after adequate time for discovery

1 and upon motion, against a party who fails to make a showing sufficient to establish the
2 existence of an element essential to that party's case, and on which that party will bear
3 the burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

4 **B. Arguments**

5 1. Defendants’ Arguments Are Summarized As Follows²

6 Plaintiff was placed in the SHU not because he is Hispanic, but rather because of
7 past gang connections and concerns for institutional safety and security. The attack on
8 Plaintiff, a street gang member before incarceration, was by inmates associated with the
9 Southern Hispanics, a street gang controlled by the Mexican Mafia.

10 Inmates in bad standing with a gang, any gang, are known to engage in illegal
11 activities to regain good standing. Plaintiff was on the “roll call” of the Southern
12 Hispanics. He had a history of violence. In making the housing decision, the ICC and
13 DRB relied on information in Plaintiff’s central files, his refusal of SNY housing and his
14 failure to cooperate with investigators. Prison regulations provide that an inmate who
15 could endanger the safety of others or the security of the institution be placed in the
16 SHU for an indeterminate term.³

17 The Defendants had not previously served together on a DRB and so had not
18 placed any inmate under comparable circumstances. They made the placement
19 decision of Plaintiff without regard to race and based solely on their belief as to
20 Plaintiff’s gang-related history and on established prison policy for dealing with
21 individuals, regardless of race, with such a history.

22 Conditions in the SHU, other than lack of physical contact with other inmates, are
23 equal to those in the general population. The lack of physical contact is necessitated by
24 safety and security concerns.

25 Defendants are entitled to qualified immunity because they reasonably believed

26 _____
27 ² For the reasons discussed below, this summary does not include any argument based on evidence in
documents Defendants sought to file under seal or any reference to such documents. None were
considered by the Court.

28 ³ Cal. Code Regs. tit. 15 § 3341.5(c).

1 Plaintiff was a safety and security risk when, acting as the DRB, they approved his
2 indeterminate SHU term.

3 2. Plaintiff's Arguments Are Summarized As Follows

4 In approving the indeterminate SHU term, Defendants were motivated by racial
5 stereotype, believing Hispanic prison culture and ideology would drive Plaintiff to
6 violence. Plaintiff supports this contention by arguing that his disciplinary history
7 showed no documented gang activity and should not have been considered; the 2006
8 assault was not gang related; the gang activity allegations against Plaintiff were
9 exaggerations; and there are a disproportionate number of Hispanics housed in the
10 SHU.

11 Defendants also treated Plaintiff differently from other inmates who, in similar
12 circumstances, were transferred to other facilities away from their enemies.

13 Defendants are not entitled to qualified immunity because they denied Plaintiff
14 equal protection.

15 Plaintiff's incarceration in the SHU has deprived him of vocational opportunities
16 and contact visitation and stigmatized him before the parole board.

17 **C. Discussion**

18 1. Defendants' Motion To Seal

19 Defendants seek to file under seal their supporting Exhibits B through E. They
20 claim these Exhibits, taken from Plaintiff's confidential file, include detailed information
21 about a prison gang and Plaintiff's alleged connection to it which, if disclosed, would
22 create a severe risk to the safety of other prisoners and to institutional security. (Tyree
23 Decl., ECF No. 52-1 at ¶¶ 4-7.) They are protected from disclosure by prison policy.
24 (Id., at ¶ 3.)

25 Plaintiff has not responded to Defendants' requests to seal. He filed opposition
26 to Defendants' summary judgment motion without having had the benefit of reviewing
27 Defendants' confidential Exhibits.

28 The undersigned has not considered, and will not consider, evidence the

1 contents of which are concealed from Plaintiff. *U.S. v. International Business Machines*
2 *Corp.*, 163 F.3d 737, 739 (2d Cir. 1998) (court is hesitant to rely on sealed evidence
3 whose contents are concealed). To allow the documents to be filed under seal and
4 considered by the Court would deprive Plaintiff of the ability to confront and dispute
5 evidence used to defeat his claim.

6 This Court's prior order denying the seal request gave Defendants an opportunity
7 to provide compelling reasons for sealing the documents and authority for withholding
8 them from a Plaintiff facing a dispositive motion. (See ECF No. 51 at 4:10-5:4.)
9 Defendants have provided neither.

10 Accordingly, Defendants' request to file under seal Exhibits B through E in
11 support of their instant motion for summary judgment should be denied.

12 2. Plaintiff's Opposition Procedurally Deficient

13 Plaintiff's opposition is untimely. It was due March 17, 2014, but not filed until
14 April 3, 2014. Local Rule 230(j).

15 Plaintiff also failed to include with his opposition the required separate statement
16 of facts admitting or denying each of Defendants' asserted facts and citing to competent
17 evidence supporting each denial. Fed. R. Civ. P. 56(c); Local Rule 260(b).

18 It is appropriate to grant Defendants' motion on those grounds alone. As noted
19 below, full consideration of Plaintiff's substantive arguments and evidence would not
20 produce a different result.

21 3. Defendants' Evidentiary Objections

22 Defendants' object that Plaintiff's opposition declaration at paragraphs 5-9,
23 relating alleged conversations with other similarly situated inmates, lacks foundation
24 and contains hearsay and unsupported conclusions.⁴ (ECF No. 49 at 4:20-25). There
25 is validity to these objections. But, again, consideration of their content does not
26 change the outcome of this motion.

27
28 ⁴ Defendants cite to Federal Rules of Evidence 601-602, 802, 1002.

1 4. No Equal Protection Violation

2 The Equal Protection Clause requires that persons who are similarly situated be
3 treated alike. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439
4 (1985). A plaintiff can establish an equal protection claim by showing that the defendant
5 has intentionally discriminated against him on the basis of the plaintiff's membership in
6 a protected class, see, e.g., *Lee v. City of Los Angeles*, 250 F.3d 668, 686 (9th Cir.
7 2001); *Thornton v. City of St. Helens*, 425 F.3d 1158, 1167 (9th Cir. 2005), or that
8 similarly situated individuals were intentionally treated differently without a rational
9 relationship to a legitimate state purpose, *Village of Willowbrook v. Olech*, 528 U.S. 562,
10 564 (2000); see also *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 592 (9th Cir. 2008);
11 *North Pacifica LLC v. City of Pacifica*, 526 F.3d 478, 486 (9th Cir. 2008)..

12 Equal protection claims are subject to a heightened standard of scrutiny when
13 they involve a "suspect" or "quasi-suspect" class, such as race or national origin, or
14 when they involve a burden on the exercise of fundamental personal rights protected by
15 the Constitution. *Cleburne*, 473 U.S. at 440. The heightened standard of strict scrutiny
16 requires the state to show that the classification is narrowly tailored to serve a
17 compelling government interest. *Schuetz v. Coalition to Defend Affirmative Action,*
18 *Integration and Immigrant Rights*, 134 S.Ct. 1623, 1649 (2014).

19 Prison regulations provide that a referral to the DRB shall be made when:

20 An institution head believes a DRB level decision for placement of an
21 inmate is required because of an unusual threat to the safety of persons or
22 public interest in the case; e.g., commuted or modified death sentence or
classification of an inactive gang member or associate.

23 Cal. Code Regs. tit. 15 § 3376.1(d)(3).

24 Defendants have presented competent evidence that their approval of Plaintiff's
25 indeterminate SHU term was based on safety and security concerns. (Undisputed
26 Material Fact ("UFM") Nos. 18, 19, 30.) Plaintiff was convicted of two murders. (UFM
27 No. 1.) He had been found guilty of rules violations, including possession of a weapon,
28 fighting and battery on a peace officer. (UMF No. 28.)

1 Defendants believed that Plaintiff's central file (UMF Nos. 22, 25) and disciplinary
2 history (UMF No. 28) reflect an association with the Southern Hispanics. (UMF Nos. 11,
3 25.) The assault upon him involved the Southern Hispanics. (UMF Nos. 2, 4-8, 10, 18,
4 22, 25.) He was attacked shortly after prison staff received a warning that a gang
5 leader had authorized a stabbing in Plaintiff's housing unit. (Kalvelage Decl. at ¶ 8.)
6 The attack appeared to be gang related because it involved inmate made weapons and
7 was coordinated to take place simultaneously with another attack in the yard. (UMF
8 Nos. 2, 4-8, 10.) Plaintiff and the others involved in the incident refused to provide
9 statements to investigators, consistent with fear of gang reprisal. (UMF Nos. 9, 16.)

10 Plaintiff provides no competent evidence contradicting the forgoing or the validity
11 of Defendants' reasoning arising from it. Instead Plaintiff relies upon an inference of
12 race based discrimination and disparate treatment unsupported in the record before us.
13 See *E.E.O.C., v. Boeing Co.*, 577 F.3d 1044, 1050 (9th Cir. 2009) (inferences arising
14 from direct evidence may constitute proof for purposes of summary judgment provided
15 they are "specific and substantial", not merely speculative).

16 Plaintiff does not dispute his association with the Southern Hispanics prior to the
17 assault. Indeed, his opposition suggests he continued to associate with them even after
18 Defendants issued their DRB decision. (ECF No. 48 at 23-24.) Plaintiff makes no
19 showing that Defendants considered the Southern Hispanics to be a racial or ethnic
20 group rather than a street gang. (UMF Nos. 11, 12.) Gang membership alone is not a
21 suspect class. *Allen v. Hubbard*, 2011 WL 6202910 at *4 (C.D. Cal. October 12, 2011).
22 Placement of an inmate in the SHU on grounds of an unusual threat to institutional
23 safety is appropriate. (See Kalvelage Decl., ECF No. 42-6 at ¶ 12; Cal. Code Regs. tit.
24 15 § 3341.5(c)). Plaintiff's declaration and attached central file documents (see ECF
25 No. 48 and Ex.'s A-D thereto) do not suggest Defendants were motivated by race, but
26 rather that they applied case factors in a manner consistent with prison regulations.
27 See Cal. Code Regs. tit. 15 §§ 3341.5, 3375.2, 3376.1.

28 Even if, as Plaintiff attests, inmate assault victims of various races were

1 transferred to other facilities, there is no basis to find Defendants were involved in these
2 unspecified transfer decisions or that the failure to transfer Plaintiff shows a racial
3 animus. (Pl.'s Dep. 97:13-20; ECF No. 48 at ¶¶ 5-9.) Plaintiff, in his opposition, states
4 that he requested evidence of these alleged third party transfer incidents be forwarded
5 for review by the Presiding Judge. (Id. at ¶ 9.) They were not, and they are not before
6 the Court. Plaintiff does not request a Rule 56(d) continuance.

7 Plaintiff casts as racial stereotyping Defendants' expressed concern that prison
8 gang culture might lead him to commit illegal acts were he not housed in the SHU. (See
9 UMF Nos. 17, 34-35.) He states Defendants were motivated by "Hispanic ideologies
10 [and] prison culture" or "inclinations of race based consensus." (ECF No. 48 at 49:8.)
11 However, Plaintiff conceded in his deposition that there is a "good possibility" that gang
12 members of any race who are "on the outs" and housed in the general population may
13 try to help the gang to regain their good standing. (Pl.'s Dep. 95:21-96:22.) Thus,
14 Plaintiff essentially conceded that Defendants' concerns would be equally applicable to
15 non-Hispanic gang members.

16 Where, as here, the common name of a group or gang incorporates the
17 perceived nationality of its members, one of course may question whether an action,
18 such as that here, was motivated by discriminatory animus against that nationality or
19 instead by other factors peculiar to the gang or the individual being acted upon.
20 However, such questions are insufficient to withstand a motion for summary judgment.
21 See *Escalante v. Hubbard*, No. C-10-1583 RS (PR), 2010 WL 4916404, at *5 (N.D. Cal.
22 2010) ("[T]he discussion of 'Northern Hispanics' at the disciplinary hearing had to do
23 with the name of [the] gang, not with a broad racial category."), *cited with approval in*
24 *Baker v. Kernan*, 795 F. Supp. 2d 992, 994 (E.D. Cal. 2011). Here, Defendants' submit
25 sworn declarations to the effect that their actions were taken because of facts peculiar
26 to Plaintiff and the group to which he belonged. Plaintiff was required to respond with
27 "evidence sufficient to permit a reasonable trier of fact to find by a preponderance of the
28 evidence that [Defendants'] decision was racially motivated." *Serrano v. Francis*, 345

1 F.3d 1071, 1082 (9th Cir. 2003) (quoting *Bingham v. City of Manhattan Beach*, 329 F.3d
2 723, 732 (9th Cir. 2003)). He did not. Instead, his argument appears based upon
3 speculation unsupported by evidence in the record. Plaintiff did not attend the DRB
4 proceedings. (UMF No. 20.) He has never communicated with Defendants. (Id.) He
5 does not know what the Defendants discussed in reaching their decision. (UMF No.
6 21.) Further, he acknowledges that Defendants acted upon consideration of institutional
7 safety and security. (UMF No. 31.) He also concedes that inmates in bad standing with
8 a gang, regardless of race, may engage in illegal activities to regain good standing.
9 Pl.'s Dep. 95:23-96:22.

10 Plaintiff's opposition declaration suggests that Defendants exaggerated his
11 disciplinary history and gang association, but he identifies no evidence to support that
12 claim. (See ECF No. 48 at ¶¶ 11-12.) A party cannot create a genuine issue of material
13 fact merely by making assertions in unverified points and authorities. Fed. R. Civ. P.
14 56(c)(4); *Helmich v. Kennedy*, 796 F.2d 1441, 1443 (11th Cir. 1986) (statements in
15 unverified brief not competent evidence); cf., *Johnson v. Meltzer*, 134 F.3d 1393, 1399
16 (9th Cir. 1998) (statements in verified opposition to summary judgment found to be
17 competent evidence).

18 Finally, Plaintiff claims that similarly situated, non-Hispanic inmates were
19 transferred to a different institution rather than given the SHU. (See ECF No. 48 at ¶¶
20 5-8.) However, this alleged disparate treatment of Hispanic inmates is insufficient to
21 meet Plaintiff's burden on a motion for summary judgment. Even accepting this
22 allegation as true, official action is not unconstitutional solely because it results in a
23 racially disproportionate impact. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*,
24 429 U.S. 252, 264 (1977). Proof of racially discriminatory intent is required, and
25 disparate treatment will suffice to establish intent only where there is a "clear pattern,
26 unexplainable on grounds other than race." *Id.* at 266. Such is not the case here.

27 In sum, Plaintiff does not provide any competent evidence Defendants were
28 motivated by his Hispanic race and characteristics, rather than the factors cited by

1 Defendants in their July 25, 2007 decision approving the indeterminate SHU term.
2 (UMF No. 33.)

3 5. Qualified Immunity

4 Government officials enjoy qualified immunity from civil damages unless their
5 conduct violates “clearly established statutory or constitutional rights of which a
6 reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

7 Plaintiff argues that Defendants, by virtue of their high stature within the CDCR,
8 should have known of a possible violation of Plaintiff’s rights. However, for the reasons
9 stated, Defendants have demonstrated the absence of any constitutional violation.

10 Accordingly, Defendants are entitled to qualified immunity from damages.

11 **IV. CONCLUSIONS AND RECOMMENDATIONS**

12 The undersigned concludes that: Defendants did not comply with the Court’s
13 order to provide authority for withholding from Plaintiff supporting evidence covered by
14 their sealing request; Plaintiff’s opposition was not timely filed and does not include an
15 opposing separate statement of fact; Defendants’ objections to Plaintiff’s opposing
16 declaration were not reached given Plaintiff’s pro se status; Plaintiff’s evidentiary
17 showing is insufficient to establish a factual dispute as to discrimination and qualified
18 immunity; and Defendants have shown entitlement to judgment on the equal protection
19 claim and qualified immunity defense.

20 Based on the foregoing, it is HEREBY RECOMMENDED that (1) Defendants’
21 September 26, 2014 request to seal documents (ECF No. 52) should be DENIED, and
22 (2) Defendants’ February 20, 2014 motion for motion for summary judgment (ECF No.
23 42) should be GRANTED.

24 These Findings and Recommendations will be submitted to the United States
25 District Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. §
26 636(b)(l). Within fourteen (14) days after being served with these Findings and
27 Recommendations, the parties may file written objections with the Court. The document
28 should be captioned “Objections to Magistrate Judge’s Findings and

1 Recommendations.”

2 A party may respond to another party’s objections by filing a response within
3 fourteen (14) days after being served with a copy of that party’s objections.

4 The parties are advised that failure to file objections within the specified time
5 may result in the waiver of rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 839
6 (9th Cir. 2014), citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991).

7
8 IT IS SO ORDERED.

9 Dated: January 16, 2015

/s/ Michael J. Seng
UNITED STATES MAGISTRATE JUDGE

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