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7 UNITED STATES DISTRICT COURT
8 EASTERN DISTRICT OF CALIFORNIA
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10 GUILLERMO CRUZ TRUJILLO,

11 Plaintiff,

12 v.

13 MUNOZ and ALVAREZ,

14 Defendants.
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Case No. 1:14-cv-00976-NONE-EPG (PC)

FINDINGS AND RECOMMENDATIONS,
RECOMMENDING THAT THIS CASE BE
DISMISSED

(ECF NO. 123)

OBJECTIONS, IF ANY, DUE WITHIN
THIRTY (30) DAYS

ORDER DENYING PLAINTIFF'S
APPLICATION TO PROCEED IN FORMA
PAUPERIS AS MOOT

(ECF NO. 128)

19 Guillermo Cruz Trujillo ("Plaintiff") is a state prisoner proceeding *pro se* and *in forma*
20 *pauperis*¹ in this civil rights action filed pursuant to 42 U.S.C. § 1983. On May 21, 2020, the
21 Court issued an order sanctioning Plaintiff and warning Plaintiff that if he failed to pay the
22 sanction the Court would recommend dismissal of the case. (ECF No. 123). On June 12, 2020,
23 Plaintiff filed a response to the Court's order, indicating that he cannot pay the sanction as
24 required and arguing that he should not be required to pay it. (ECF Nos. 126 & 127). For the
25 reasons that follow, the Court will recommend that this case be dismissed.

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28 ¹ Plaintiff now has "three-strikes," (*see, e.g., Cruz v. Chappuis*, E.D. Cal Case No. 2:18-cv-00193, ECF No. 54), but Plaintiff did not have three-strikes at the time he filed this action.

1 **I. BACKGROUND**

2 **a. Plaintiff’s Discovery Motions**

3 This action is proceeding “on Plaintiff’s claim against defendant Alvarez for
4 unreasonable searches in violation of the Fourth Amendment, and on Plaintiff’s claims against
5 defendants Munoz and Alvarez for cruel and unusual punishment in violation of the Eighth
6 Amendment and retaliation in violation of the First Amendment.” (ECF No. 65, at p. 3). The
7 underlying incidents allegedly took place in 2013 and 2014.

8 Plaintiff filed the first complaint in this action on June 23, 2014. (ECF No. 1). After
9 initial dismissals and remand from the Ninth Circuit based on Magistrate Judge jurisdiction in
10 light of Williams v. King, 875 F.3d 500, 503-04 (9th Cir. 2017), this Court set an initial
11 scheduling conference. In preparation for that conference, the Court ordered that both parties
12 send initial disclosures and file scheduling conference statements. (ECF No. 47). However,
13 Plaintiff failed to send initial disclosures or file a scheduling conference statement before the
14 initial scheduling conference. (ECF No. 53). Thus, the conference was not held. (Id.).
15 Plaintiff was sent the Court’s order again and given another opportunity to comply. (Id.).

16 After additional motion practice, the Court held a scheduling conference on July 29,
17 2019. (ECF No. 85). The Court verbally explained discovery procedures, including third party
18 subpoenas. The Court issued a scheduling order on August 9, 2019. (ECF No. 86). Regarding
19 third party subpoenas, the Scheduling Order stated “However, the Court will consider granting
20 such a request *only if* the documents sought from the non-party are not equally available to
21 Plaintiff and are not obtainable from Defendant(s) through a Rule 34 request for production of
22 documents. In any request for a subpoena, Plaintiff must: (1) identify with specificity the
23 documents sought and from whom; and (2) make a showing in the request that the records are
24 only obtainable through a third party. The documents requested must also fall within the scope
25 of discovery allowed in this action. *See Fed. R. Civ. P. 26(b)(1).*” (ECF No. 86, at p. 4). It
26 also included procedures for seeking attendance of incarcerated witnesses at trial. (ECF No.
27 86, at pgs. 6-7). For incarcerated witnesses who have agreed to testify, the Court required: “A
28 party intending to introduce the testimony of incarcerated witnesses who have agreed to

1 voluntarily attend the trial must serve and file a written motion for a court order requiring that
2 such witnesses be brought to court at the time of trial. The motion must: (1) state the name,
3 address, and prison identification number of each such witness; and (2) be accompanied by
4 declarations showing that each witness is willing to testify and that each witness has actual
5 knowledge of relevant facts. The motion should be entitled ‘Motion for Attendance of
6 Incarcerated Witnesses.’” (Id. at 6). Regarding the showing of actual knowledge, the Court
7 required a declaration from either the party or the witness that is “specific about the incident,
8 when and where it occurred, who was present, and how the prospective witness happened to be
9 in a position to see or to hear what occurred at the time it occurred.” (Id. at 7). The deadline to
10 file such motions was November 6, 2020. (Id. at 6).

11 About one month later, on September 9, 2019, Plaintiff filed four motions. (ECF Nos.
12 87, 88, 89, & 90). In a motion for attendance of incarcerated witnesses, Plaintiff claimed that
13 two witnesses are willing to testify at trial. (ECF No. 87). However, there was no information
14 regarding their knowledge of the incidents. The Court denied this motion on September 11,
15 2019, on the ground that it provided no information regarding the subject of each witnesses’
16 testimony. (ECF No. 92). The Court also stated that “If Plaintiff chooses to refile the motion,
17 the earliest he should file it is ninety days before the Telephonic Trial Confirmation Hearing,
18 which is currently scheduled for January 7, 2021.” (ECF No. 92, at p. 2).

19 In a motion for discovery requests, Plaintiff asked the Court to expunge an appeal from
20 the Inmate Appeals Office and to send it to Plaintiff. (ECF No. 90). The Court denied the
21 motion on September 11, 2019, setting forth the relevant legal standards and stating: “Plaintiff
22 provided no explanation as to why the appeal should be expunged and cited to no legal
23 authority.” (ECF No. 93, at p. 2). The Court also denied what it construed as a request for
24 issuance of a subpoena because Plaintiff did not show that the documents are only available
25 through a third party and did not describe why the information is relevant. (Id.).

26 In motions for an order compelling discovery, Plaintiff requested an order compelling
27 Defendants to answer interrogatories and produce certain documents. (ECF. No. 89).
28 Additionally, Plaintiff attached a third party subpoena to a deputy probation officer for

1 sentencing transcripts and photos. Defendants filed an opposition on September 12, 2019,
2 (ECF No. 96), explaining that “Defendants were unaware of these discovery requests before
3 Plaintiff filed his motion, but in a showing of good faith, they will respond to them within 45
4 days of their service as part of the motion, as required by this Court’s discovery order.” (Id. at
5 2).

6 The Court denied the motions to compel on October 29, 2019, explaining that the
7 motions were premature under the scheduling order, and also noting that there was no evidence
8 that Plaintiff had served his discovery responses on Defendants. (ECF No. 102). The Court
9 also “warn[ed] Plaintiff that meritless motions may result in sanctions or an award of costs.
10 See, e.g., Fed. R. Civ. P. 11(c), 16(f), 26(g), & 37.” (Id. at 2).

11 On October 2, 2019, Plaintiff filed two third party subpoenas. (ECF No. 98). One was
12 a subpoena to the two incarcerated witnesses to testify, and asking them to bring Sentencing
13 Transcripts from another case. (ECF No. 98, at p. 1). The second was a subpoena to the
14 Substance Abuse Treatment Facility/Corcoran State Prison Inmate Appeals Office for various
15 documents. (ECF No. 98, at p. 3).

16 On October 7, 2019, the Court ruled regarding the subpoenas, stating that Plaintiff had
17 not filed any motion, and “failed to make a showing that the documents he is seeking are only
18 available through third parties, rather than through a request on defendants. Additionally,
19 Plaintiff failed to provide any explanation regarding the relevance to this case of the documents
20 he is requesting.” (ECF No. 99, at p. 2). The Court copied the instructions for third party
21 subpoenas from its scheduling order and stated that Plaintiff could request subpoenas if he
22 followed those instructions. (Id. at 1-2).

23 On November 1, 2019, Plaintiff filed a motion for subpoena duces tecum for certain
24 sentencing transcripts as well as photos and written reports regarding a November 1, 2013
25 incident. (ECF No. 103). Plaintiff stated that “Neither the California Department of
26 Corrections and Rehabilitation and/or the Office of Inspector General” has access to the
27 documents. (Id. at 1). On November 6, 2019, the Court ordered Defendants to respond to
28 Plaintiff’s motion in light of his representation that the documents were not available without a

1 subpoena. (ECF No. 104, at p. 2 (“While it appears that Plaintiff has stated that the documents
2 he is requesting are only available through a third party, Plaintiff has not submitted any
3 evidence that he attempted to get these documents from Defendants prior to filing this motion.
4 Moreover, it appears that at least some of the documents requested may be available through
5 Defendants. Therefore, the Court will require Defendants to file a response within 14 days,
6 indicating whether any of the documents Plaintiff is requesting are available through a
7 discovery request to Defendants.”)).

8 On November 12, 2019, Defendants filed their response. (ECF No. 107). Defendants
9 stated that they had already sent Plaintiff the incident report and photos before Plaintiff filed his
10 motion. (Id. at 1). Regarding the sentencing transcripts, Defendants stated that Plaintiff had
11 not requested them in discovery, but Defendants do not have them in their possession, custody,
12 or control and that they are not relevant to this case in any event. (Id. at 2).

13 In the meantime, Plaintiff filed additional motions. On November 7, 2019, Plaintiff
14 filed a Motion requesting a subpoena form to have incarcerated witnesses attend all future court
15 hearings in this case. (ECF No. 105). The Court denied the motion on November 13, 2019,
16 because Plaintiff did not provide any names of the witnesses or reasons why they should attend
17 all hearings. (ECF No. 108).

18 On November 7, 2019, Plaintiff filed a motion requesting the Court to provide *duces*
19 *tecum* subpoena. (ECF No. 106). Plaintiff requested a subpoena form “to subpoena and serve
20 third party to produce documents electronically stored information because the documents and
21 information requested can not be obtain [sic] by the Department of Corrections and/or Office of
22 the Inspector General.” (ECF No. 106). The Court denied the motion, stating “Despite being
23 informed by the Court of the showing he must make for the Court to grant a motion for the
24 issuance of a subpoena *duces tecum*, Plaintiff’s motion does not specify the person or entity he
25 is seeking documents and electronically stored information from, or the documents and
26 electronically stored information he is seeking.” (ECF No. 109, at p. 1).

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1 **b. The Court’s Order to Show Cause**

2 On December 9, 2019, the Court issued an order for Plaintiff to show cause why he
3 should not be sanctioned for filing frivolous motions and misrepresenting facts to the court.
4 (ECF No. 110). The Court reviewed the history of motions and filings and explained how
5 Plaintiff repeatedly ignored the Court’s instructions. The Court concluded: “IT IS HEREBY
6 ORDERED that Plaintiff has twenty-one days from the date of service of this order to show
7 cause why he should not be sanctioned for filing frivolous motions, and for misrepresenting
8 facts to the Court. Failure to respond to this order may result in dismissal of this case.” (ECF.
9 No. 110, at p. 3).

10 Plaintiff asked for an extension of thirty-five days to respond in order to obtain all facts
11 necessary to respond to the Court’s order. (ECF No. 114). The Court granted Plaintiff’s
12 request. (ECF No. 116)

13 Plaintiff responded to the order to show cause on December 23, 2019. (ECF No. 117).
14 Plaintiff stated that he had requested the sentencing transcripts through a CDCR Form 22 form
15 and written to the Office of the Inspector General, and that was why he said those documents
16 were not available without a subpoena. (Id. at 1). Thus, Plaintiff claims he should not be
17 sanctioned. (Id. at 2).

18 Plaintiff’s response did not address the other repeated requests for a third party
19 subpoena, nor the motions for attendance of incarcerated witnesses.

20 **c. Plaintiff’s Additional Motions Following Order to Show Cause**

21 On December 16, 2019, Plaintiff filed a motion to produce documents for inspection.
22 (ECF No. 112). Plaintiff moved to compel the Department of Corrections and the Attorney
23 General to make available “the entire unedited personnel files of Correctional Officers Munoz
24 and Lt. Alvarez,” including psychiatric and psychological records; the names, addresses and
25 telephone numbers of all persons who made certain types of complaints against the officers or
26 were interviewed for any investigation of the officer; and the name and assignments of all
27 investigators. (ECF No. 112).

28 The Court ordered Defendants to respond. (ECF No. 113).

1 Defendants filed their response on December 20, 2019. (ECF No. 115). Defendants
2 stated: “Plaintiff’s instant motion to compel is no more meritorious than his previous motion.
3 As with Plaintiff’s previous motion to compel, he provides no evidence that he ever served
4 Defendants with the purported discovery requests. (*Id.*) In fact, Defendants have not received
5 any written discovery requests from Plaintiff in this case.” (ECF No. 115, at pgs. 1-2).

6 Plaintiff did not file a reply.

7 On January 6, 2020, Plaintiff filed a “Motion to Show Cause.” (ECF No. 118).
8 Attached is a Form 22 in which Plaintiff requested sentencing transcripts from a probation
9 officer.

10 **d. The Court’s Sanction Order**

11 On May 21, 2020, the Court issued an order sanctioning Plaintiff and denying several
12 motions. (ECF No. 123). The analysis from that order follows.

13 i. Legal Standards

14 1. *Federal Rule of Civil Procedure 37*

15 If a motion to compel discovery is denied, the Federal Rules of Civil Procedure require
16 payment of expenses, including attorney’s fees, by the moving party to the opposing party:

17 *If the Motion Is Denied.* If the motion is denied, the court . . . must, after giving an
18 opportunity to be heard, require the movant, the attorney filing the motion, or both
19 to pay the party or deponent who opposed the motion its reasonable expenses
20 incurred in opposing the motion, including attorney’s fees. But the court must not
21 order this payment if the motion was substantially justified or other circumstances
22 make an award of expenses unjust.

23 Fed. R. Civ. P. 37(a)(5)(B).

24 2. *Federal Rule of Civil Procedure 11*

25 Federal “Rule [of Civil Procedure] 11 provides for the imposition of sanctions when a
26 filing is frivolous, legally unreasonable, or without factual foundation, or is brought for an
27 improper purpose.” *Simpson v. Lear Astronics Corp.*, 77 F.3d 1170, 1177 (9th Cir. 1996)
28 (footnote omitted). “Although Rule 11 applies to *pro se* plaintiffs, the court must take into
account a plaintiff’s *pro se* status when it determines whether the filing was reasonable.”
Warren v. Guelker, 29 F.3d 1386, 1390 (9th Cir. 1994) (quoting *Harris v. Heinrich*, 919 F.2d

1 1515, 1516 (11th Cir. 1990). However, a district court “cannot decline to impose any sanction
2 where a violation has arguably occurred simply because the plaintiff is proceeding *pro se*.”
3 *Simpson*, 77 F.3d at 1177 (citing *Warren*, 29 F.3d at 1390).

4 In relevant part, Rule 11 reads:

5
6 (b) *Representations to the Court*. By presenting to the court a pleading, written
7 motion, or other paper—whether by signing, filing, submitting, or later
8 advocating it—an attorney or unrepresented party certifies that to the best of the
9 person’s knowledge, information, and belief, formed after an inquiry reasonable
10 under the circumstances:

- 11 (1) it is not being presented for any improper purpose, such as to harass, cause
12 unnecessary delay, or needlessly increase the cost of litigation;
- 13 (2) the claims, defenses, and other legal contentions are warranted by existing
14 law or by a nonfrivolous argument for extending, modifying, or reversing
15 existing law or for establishing new law;
- 16 (3) the factual contentions have evidentiary support or, if specifically so
17 identified, will likely have evidentiary support after a reasonable opportunity
18 for further investigation or discovery;

19 ...

20 (c) *Sanctions*.

21 (1) *In General*. If, after notice and a reasonable opportunity to respond, the
22 court determines that Rule 11(b) has been violated, the court may impose an
23 appropriate sanction on any attorney, law firm, or party that violated the rule or
24 is responsible for the violation.

25 ...

26 (3) *On the Court’s Initiative*. On its own, the court may order an attorney, law
27 firm, or party to show cause why conduct specifically described in the order
28 has not violated Rule 11(b).

(4) *Nature of a Sanction*. A sanction imposed under this rule must be limited
to what suffices to deter repetition of the conduct or comparable conduct by
others similarly situated. The sanction may include nonmonetary directives; an
order to pay a penalty into court; or, if imposed on motion and warranted for
effective deterrence, an order directing payment to the movant of part or all of
the reasonable attorney’s fees and other expenses directly resulting from the
violation.

1 (5) *Limitations on Monetary Sanctions*. The court must not impose a monetary
2 sanction:

3 (A) against a represented party for violating Rule 11(b)(2); or

4 (B) on its own, unless it issued the show-cause order under Rule 11(c)(3)
5 before voluntary dismissal or settlement of the claims made by or against
6 the party that is, or whose attorneys are, to be sanctioned.

7 (6) *Requirements for an Order*. An order imposing a sanction must describe the
8 sanctioned conduct and explain the basis for the sanction.

9 Fed. R. Civ. P. 11.

10 Rule 11 sanctions may be imposed on “a showing of objectively unreasonable conduct.”
11 *In re DeVille*, 361 F.3d 539, 548 (9th Cir. 2004). “Due process requires notice that the court is
12 considering sanctions and an opportunity to be heard in opposition.” *Buster v. Greisen*, 104
13 F.3d 1186, 1190 (9th Cir. 1997), *as amended on denial of reh’g* (Mar. 26, 1997). When
14 considering sanctions, “the opportunity to brief the issue fully satisfies due process
15 requirements.” *Lambright v. Ryan*, 698 F.3d 808, 826 (9th Cir. 2012) (quoting *Pac. Harbor
16 Capital, Inc. v. Carnival Air Lines, Inc.*, 210 F.3d 1112, 1118 (9th Cir.2000)).

17 ii. Application to Plaintiff’s Filings

18 Plaintiff has now filed a number of motions to compel, motions for attendance of
19 unincarcerated witnesses, and motions for the issuance of a third party subpoena that were not
20 substantially justified.

21 The Court has already denied several of these motions. The Court finds that the
22 following motions in particular were unwarranted, unreasonable, and not substantially justified
23 for the reasons described above and because they violated the procedures set forth in the
24 scheduling order as well as the Court’s subsequent orders:

- 25 • Plaintiff’s October 2, 2019 filing of two third party subpoenas without any
26 motion, representing that he had requested the information from Defendants, and
27 providing no explanation of the relevance of the documents. (ECF No. 98).
- 28 • Plaintiff’s November 7, 2019 motion requesting a subpoena form to have
incarcerated witnesses attend all future court hearings in this case, without

1 naming the witnesses or providing any reason for their attendance. (ECF No.
2 105).

- 3 • Plaintiff's November 7, 2019 motion requesting the Court to provide duces
4 tecum subpoena without naming any person or entity, the documents he sought,
5 or the reason why the documents are relevant. (ECF No. 106).

6 The Court also denies the following pending motions and finds them to be unwarranted,
7 unreasonable, and not substantially justified:

- 8 • Plaintiff's November 1, 2019 Motion for Subpoena Duces Tecum for certain
9 sentencing transcripts as well as photos and written reports regarding a
10 November 1, 2013 incident. (ECF No. 103). Defendants represented that they
11 had already sent Plaintiff the incident report and photos before Plaintiff filed his
12 motion. Regarding the sentencing transcripts, Defendants stated that Plaintiff
13 had not requested them in discovery, that Defendants did not have them in their
14 possession, custody, or control, and that they were not relevant to this case in
15 any event. (ECF No. 107). Plaintiff's only response is to show that he
16 submitted a Form 22 to his institution for the sentencing transcripts. A Form 22
17 request to the institution is not a discovery request on Defendants. He does not
18 show that he requested the remaining documents from Defendants. Plaintiff also
19 does not deny he already received certain documents from Defendants. He also
20 does not explain why sentencing transcripts from a separate criminal case are
21 relevant to this dispute.
- 22 • On December 16, 2019, Plaintiff's December 16, 2019 Motion to Produce
23 Documents for Inspection, (ECF No. 112), moving to compel Defendants to
24 produce "the entire unedited personnel files of Correctional officers Munoz and
25 Lt. Alvarez." Plaintiff did not request these documents from Defendants in
26 discovery before filing a motion to compel.²

27
28 ² It also appears that the requests should be denied in part if not in full as being inadmissible under Rule
404 ("Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that

1 The Court also denies Plaintiff's January 6, 2020 "Motion to Show Cause," (ECF No.
2 118), because it does not request any action from the Court. Rather, it appears to relate to
3 Plaintiff's response to the Court's order to show cause. (Id.).

4 Accordingly, and based on the Federal Rule of Civil Procedure 37, the Court orders
5 Plaintiff to pay Defendants their reasonable expenses in opposing the filings at ECF Nos. 98,
6 103, 105, 106, and 112.

7 If Plaintiff fails to pay this monetary sanction within the time set forth below, the Court
8 will recommend dismissal of this lawsuit under Rule 11.

9 **e. Plaintiff's Responses to the Court's Sanction Order**

10 Plaintiff did not pay the sanction, which, in total, was \$440 (ECF No. 134). Instead, on
11 June 12, 2020, Plaintiff filed responses to the Court's sanction order, arguing that he should not
12 be sanctioned. (ECF Nos. 126 & 127). Additionally, Plaintiff alleges that he cannot afford to
13 pay the sanction as required. (ECF No. 126, at p. 3).

14 **II. DISCUSSION**

15 **a. Rule 11**

16 Plaintiff was already given an opportunity to show cause why he should not be
17 sanctioned, Plaintiff already filed his response (ECF Nos. 117 & 118), and his responses have
18 already been addressed (ECF No. 123).

19 Even if the Court were to address Plaintiff's responses as if they were timely filed in
20 response to the order to show cause, it would not change the outcome. Plaintiff does attempt to
21 explain why he filed certain motions, and why those motions were relevant. Plaintiff also
22 alleges that he has never failed to respond to a motion deadline and that he has complied with
23 every court order to the best of his ability and knowledge (Plaintiff alleges that he has a low
24 grade point average, a lack of education, and little knowledge of legal issues). Finally, Plaintiff
25 asks the Court for the opportunity to properly re-file the motions and subpoenas before the
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28 on a particular occasion the person acted in accordance with the character."'). As the merits of the request were not
fully briefed, the Court declines to decide whether such discovery would be permitted if Plaintiff correctly filed a
motion.

1 Court determines that Rule 11(b) has been violated.

2 Even in his additional responses Plaintiff still does not adequately explain why, in his
3 filings, he failed to follow the Court's instructions on numerous occasions.

4 For instance, the Court repeatedly explained to Plaintiff how to properly request a
5 subpoena duces tecum. (*See, e.g.*, ECF No. 86, at pgs. 3-4; ECF No. 93; & ECF No. 99).
6 However, despite the Court's orders, Plaintiff continued to file motions for a subpoena duces
7 tecum in violation of those orders. Plaintiff does not explain why he failed to follow the
8 instructions in the Court's orders when repeatedly requesting the issuance of a subpoena duces
9 tecum.

10 As another example, Plaintiff alleges that, with respect to his motion for attendance of
11 witnesses, Plaintiff provided the Court with the names of the inmate witnesses, as well as their
12 CDCR numbers, as he was told to do. (ECF No. 126, at pgs. 1-2). This is true as to his first
13 motion for attendance of witnesses (ECF No. 87). However, this motion was denied, in part
14 because Plaintiff failed to follow the remainder of the instructions, which required Plaintiff to
15 provide a declaration showing that each witness has actual knowledge of relevant facts. (ECF
16 No. 92). Plaintiff then filed a second motion, (ECF No. 105), which appears to have violated
17 this Court's order telling Plaintiff not to re-file the motion until, at the earliest, "ninety days
18 before the Telephonic Trial Confirmation Hearing, which is currently scheduled for January 7,
19 2021," (ECF No. 92, at p. 2). In this second motion Plaintiff clearly did not name any
20 witnesses, did not provide any reason for their attendance, and did not include any declarations
21 showing that each witness has actual knowledge of relevant facts.

22 Plaintiff also alleges that he did in fact file discovery requests for Defendants' personnel
23 files, and that Defendants are lying when they say that he did not file a request. However,
24 Plaintiff does not allege when he served these requests, or provide a proof of service to show
25 that the requests were properly served before he filed the motion to compel.

26 As to Plaintiff's allegations regarding a low grade point average, a lack of education,
27 and little knowledge of legal issues, these are conclusory allegations and do not adequately
28 explain why Plaintiff failed to follow instructions that the Court provided, on some occasions

1 repeatedly. Moreover, Plaintiff’s allegation that he has little knowledge of legal issues is
2 denied by the fact that, according to public records available on PACER, Plaintiff has filed over
3 fifty civil cases and over twenty appeals.

4 Accordingly, for the reasons described above, the Court will recommend that this action
5 be dismissed under Rule 11. The Court will not give Plaintiff another opportunity to re-file his
6 motions because the Court already gave Plaintiff numerous opportunities to file the motions
7 correctly.³

8 **b. Dismissal for Failure to Comply with Court Orders**

9 Alternatively, the Court will recommend dismissal because of Plaintiff’s repeated
10 failure to comply with court orders.

11 “In determining whether to dismiss a[n] [action] for failure to prosecute or failure to
12 comply with a court order, the Court must weigh the following factors: (1) the public’s interest
13 in expeditious resolution of litigation; (2) the court’s need to manage its docket; (3) the risk of
14 prejudice to defendants/respondents; (4) the availability of less drastic alternatives; and (5) the
15 public policy favoring disposition of cases on their merits.” Pagtalunan v. Galaza, 291 F.3d
16 639, 642 (9th Cir. 2002) (citing Ferdik v. Bonzelet, 963 F.2d 1258, 1260-61 (9th Cir. 1992)).

17 “The public’s interest in expeditious resolution of litigation always favors dismissal.”
18 Id. (quoting Yourish v. California Amplifier, 191 F.3d 983, 990 (9th Cir. 1999)). Accordingly,
19 this factor weighs in favor of dismissal.

20 As to the Court’s need to manage its docket, “[t]he trial judge is in the best position to
21 determine whether the delay in a particular case interferes with docket management and the
22 public interest.... It is incumbent upon the Court to manage its docket without being subject to
23 routine noncompliance of litigants....” Pagtalunan, 291 at 639. As described in detail above,
24 Plaintiff has repeatedly failed to comply with this Court’s orders. These failures are interfering
25 with docket management. Therefore, the second factor weighs heavily in favor of dismissal.

26
27 ³ The Court notes that the unwarranted, unreasonable, and not substantially justified filings continue. On
28 June 22, 2020, Plaintiff filed an application to proceed in forma pauperis. (ECF No. 128). As Plaintiff is already
proceeding *in forma pauperis* (ECF No. 4), there was no reason for Plaintiff to file this motion, and it will be
denied as moot.

1 Turning to the risk of prejudice, “pendency of a lawsuit is not sufficiently prejudicial in
2 and of itself to warrant dismissal.” Id. at 642 (citing Yourish, 191 F.3d at 991). However,
3 “delay inherently increases the risk that witnesses’ memories will fade and evidence will
4 become stale,” id. at 643, and Plaintiff’s failure to comply with court orders has caused some
5 delay. However, the delay appears to be slight. Thus, at most, this factor weighs only slightly
6 in favor of dismissal.

7 As for the availability of lesser sanctions, at this stage in the proceedings there is little
8 available to the Court which would constitute a satisfactory lesser sanction while protecting the
9 Court from further unnecessary expenditure of its scarce resources. The Court attempted to
10 utilize a monetary sanction of \$440, which reflected the reasonable expenses Defendants
11 incurred in opposing certain of Plaintiff’s filings,⁴ but Plaintiff has alleged that he is unable to
12 pay the sanction as required. Thus, monetary sanctions appear to be of no use. And, given the
13 stage of these proceedings, the preclusion of evidence or witnesses is not available.

14 Finally, because public policy favors disposition on the merits, this factor weighs
15 against dismissal. Id.

16 After weighing the factors, the Court finds that dismissal with prejudice is appropriate.

17 **III. RECOMMENDATIONS AND ORDER**

18 Based on the foregoing, the undersigned HEREBY RECOMMENDS that:

- 19 1. This action be dismissed;
- 20 2. All outstanding motions be denied as moot; and
- 21 3. The Clerk of Court be directed to close this case.⁵

22 These findings and recommendations are submitted to the United States district judge
23

24 ⁴ The expenses consisted of two hours of attorney billing time at \$220 per hour. (ECF No. 124, at p. 2).

25 ⁵ While Plaintiff states that he has no money in his trust account or a spouse to support him, Plaintiff asks
26 that, if he is required to pay, he be allowed to make installment payments. (ECF No. 117, at p. 3). If Plaintiff files
27 a response stating that he is able to pay the sanction in full within six months and includes the first installment
28 payment of \$73.34 with his response, the Court will vacate these findings and recommendations. However, if
Plaintiff fails to pay the remainder of the installment payments, the Court would re-issue these findings and
recommendations.

1 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within thirty
2 (30) days after being served with these findings and recommendations, any party may file
3 written objections with the court. Such a document should be captioned “Objections to
4 Magistrate Judge’s Findings and Recommendations.” Any reply to the objections shall be
5 served and filed within seven (7) days after service of the objections. The parties are advised
6 that failure to file objections within the specified time may result in the waiver of rights on
7 appeal. Wilkerson v. Wheeler, 772 F.3d 834, 838-39 (9th Cir. 2014) (citing Baxter v.
8 Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

9 Additionally, IT IS ORDERED that Plaintiff’s application to proceed in forma
10 pauperis (ECF No. 128) is DENIED as moot.

11 IT IS SO ORDERED.

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13 Dated: June 22, 2020

14 /s/ Eric P. Gray
15 UNITED STATES MAGISTRATE JUDGE
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