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

RENO FUENTES RIOS,

Plaintiff,

No. 2:07-cv-0790 WBS KJN P

vs.

J.E. TILTON, et al.,

Defendants.

ORDER

_____ /

Plaintiff is a state prisoner proceeding without counsel and in forma pauperis in this civil rights action filed pursuant to 42 U.S.C. § 1983. This action is referred to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B), Local General Order No. 262, and E.D. Cal. L.R. (“Local Rule”) 302. Presently pending are several motions, identified below, filed by both plaintiff and defendants.

I. INTRODUCTION

This action proceeds on plaintiff’s original complaint, filed April 25, 2007, against defendants J.E. Tilton (Secretary, California Department of Corrections and Rehabilitation (“CDCR”)), T. Lockwood (Chief, Regulation and Policy Management Branch, CDCR), K. Brandon (Correctional Officer (“CO”) at California State Prison-Sacramento (“CSP-S”)), G. Parker (also a CSP-S Correctional Officer), and J.E. Mayfield (CSP-S Correctional

1 Counselor II).¹

2 The complaint (Dkt. No. 1) alleges that defendants erroneously validated plaintiff
3 as a gang member while incarcerated at CSP-S, resulting in his placement in the maximum
4 security housing unit (“SHU”) and continued following to his transfer to CSP-Corcoran, where
5 plaintiff remains incarcerated. Plaintiff contends that defendants acted without due process
6 because they allegedly relied on fraudulent or unreliable confidential information from staff or
7 other inmates, and/or relied inappropriately on plaintiff’s Hispanic ethnic status, locale of
8 commitment, and association with other prisoners within his ethnic group, and/or acted in
9 retaliation against plaintiff for filing administrative grievances. Plaintiff also alleges that his
10 gang validation and SHU placement have caused him to be repeatedly denied parole.²

11 Service of the complaint was found appropriate on the above-named defendants.
12 (Dkt. No. 8, filed March 6, 2008.) All defendants waived service of process (Dkt. Nos. 16, 22),
13 and filed a motion to dismiss (Dkt. No. 19). On March 3, 2009, the district judge adopted the
14 findings and recommendations of the former magistrate judge that defendants’ motion to dismiss
15 be granted on plaintiff’s due process claim against defendant Mayfield, but denied in all other
16 respects; Mayfield remains in this action on plaintiff’s other claims. (Dkt. Nos. 30, 31.)

17 Defendants answered the complaint on March 3, 2009 (Dkt. No. 32), and the court
18 thereafter, on March 13, 2009, issued an order authorizing the commencement of discovery
19 (without imposing deadlines) (Dkt. No. 33). Defendants filed a motion for summary judgment
20 on November 19, 2009 (Dkt. No. 45), amidst several unresolved discovery disputes. After the
21 reassignment of this case to the undersigned, this court issued two orders on March 26, 2010:
22 (1) a Discovery and Scheduling Order (Dkt. No. 57), setting a discovery and discovery-motion

23
24 ¹ Defendants’ official titles and positions are presented as they appear in the complaint;
they may no longer be current.

25 ² Plaintiff’s contention that he has been unfairly denied parole based on invalid gang
26 classification may be actionable in a separate action for a writ of habeas corpus; however, denial
of parole is not actionable in a civil rights suit pursuant to 42 U.S.C. § 1983.

1 deadline of July 1, 2010, and a dispositive motion deadline of September 30, 2010; and (2) an
2 order addressing the outstanding discovery disputes and denying defendants' motion for
3 summary judgment without prejudice to the filing of a timely-filed amended motion after the
4 close of discovery (Dkt. No. 58).

5 The court thereafter granted defendants' requests for extensions of time within
6 which to respond to discovery requests. (Dkt. Nos. 60 (filed 4/23/10), 63 (filed 6/18/10).) When
7 the court granted defendants' third request for extension of time, the undersigned extended the
8 discovery deadline to August 20, 2010, and the dispositive motion deadline to November 19,
9 2010. (Dkt. No. 66.) That order was signed on July 8, 2009, and filed on July 9, 2010.

10 Meanwhile, on July 7, 2010, defendants filed an Amended Motion for Summary
11 Judgment (Dkt. No. 67), while, on July 8, 2010, plaintiff filed a motion to compel discovery and
12 to file an amended complaint (Dkt. No. 71), and his fourth motion for appointment of counsel
13 (Dkt. No. 70). Defendants filed oppositions to plaintiff's motions (Dkt. Nos. 72, 73), while
14 plaintiff filed motions for extension of time, to strike defendants' motion for summary judgment,
15 and for protective order (Dkt. Nos. 74-76), as well as replies to defendants' opposition to
16 plaintiff's motions (Dkt. Nos. 77, 79, 80), and further briefing in support of plaintiff's motion for
17 protective order (Dkt. No. 78). These several matters are now addressed by the court.

18 II. DISCUSSION

19 A. MOTION TO STRIKE THE AMENDED MOTION FOR SUMMARY JUDGMENT

20 Defendants filed their Amended Motion for Summary Judgment (Dkt. No. 67) on
21 July 7, 2010. While timely filed within the prior deadlines, the court nearly simultaneously
22 extended the discovery deadline to August 20, 2010 (Dkt. No. 66), thus rendering the motion for
23 summary judgment prematurely filed (through no fault of defendants). This timing problem, and
24 the fact that there remain outstanding discovery disputes, require that defendants' summary
25 judgment motion be vacated without prejudice to the timely filing of a "Second Amended
26 Motion for Summary Judgment." Thus, the court will, in substance, grant plaintiff's "Motion to

1 Strike Defendants['] Premature Amended Motion for Summary Judgment Until This Court Rules
2 on Plaintiff[s] Motion to Compel Discovery” (Dkt. No. 75.)³

3 B. MOTION TO COMPEL DISCOVERY

4 Plaintiff has filed one motion that seeks both to compel discovery and leave of
5 court to file an amended complaint. (Dkt. No. 71.) The court first addresses plaintiff’s
6 discovery motion; that portion of plaintiff’s motion seeking leave to file an amended complaint is
7 addressed separately below.⁴

8 Plaintiff generally challenges defendants’ discovery responses as untimely and
9 inadequate, while specifically seeking disclosure of the “name[s] of prison officials who ha[ve] .
10 . . filed or approved confidential information which does not me[e]t the reliability criteria and
11 [was] filed against plaintiff . . . for retaliatory purposes or in [a] discriminatory manner to subject
12 plaintiff to be validated as a prison gang associate by false, unreliable, fraudulent information . .
13 . .” (Dkt. No. 71, at 14; see generally, id. at 30-73.)

14 Defendants respond in part that these same issues were asserted in plaintiff’s
15 discovery motion filed July 23, 2009 (Dkt. No. 39), and that the court has not yet ruled on that
16 motion. However, upon reassignment of this case and extension of the discovery deadline, the
17 undersigned denied this and other pending motions without prejudice to their renewal. (Dkt. No.
18 58, at 2, 4.) Thus, the court now addresses only those matters raised in plaintiff’s current
19 briefing; however, as necessary, the court references the discovery requests and responses fully
20 included in plaintiff’s July 23, 2009 filing (Dkt. No. 39).

21 ////

22 ³ Although the court could continue the currently filed motion for summary judgment
23 until after the discovery deadline, the undersigned does not know whether defendants will want
24 to revise the motion in light of the discovery ordered herein. Accordingly, the court vacates the
25 motion, subject to refile by the defendants.

26 ⁴ Because plaintiff filed a reply to defendants’ opposition to plaintiff’s discovery motion,
his request for an extension of time (Dkt. No. 74) within which to file such reply will be denied
as moot.

1 1. Plaintiff's Requests for Production (Set One)

2 Plaintiff served on all defendants his Requests for Production (Set One) on March
3 10, 2009, and responses were served by mail on April 24, 2009 (see Dkt. No. 39-1, at 50), which
4 were timely within the 45-day deadline set by the initial discovery order in this case (Dkt. No.
5 33). Plaintiff initially contends that he received defendants' responses three to four weeks late
6 because they were improperly addressed, failing to designate that plaintiff was housed in the
7 SHU, which had a separate postal box number.⁵ However, plaintiff does not assert that he was
8 prejudiced thereby and the court does not find any prejudice. Defendants sent their responses to
9 the correct inmate at the correct institution, and the institutional delay in plaintiff's receipt cannot
10 reasonably be attributable to defendants. Accordingly, plaintiff's motion will be denied to the
11 extent plaintiff seeks, based on an untimeliness argument, to strike defendants' production
12 responses or deem defendants' objections waived.

13 On May 11, 2009, plaintiff sent a letter to defendants requesting generally that
14 they supplement all of their responses. (Dkt. No. 39-1, at 21.) In a June 2, 2009 letter,
15 defendants responded in pertinent part (Dkt. No. 39-1, at 51) (emphasis added):

16 Regarding Defendants' response to Request No. 1 [which sought "[t]he
17 complete prison file of Reno Fuentes Rios" (Dkt. No. 39-1, at 14)], you
18 requested a **complete copy of your central file**. Defendants informed you
19 that the non-confidential portions of your central file are available for
20 inspection and copying under institutional policies and procedures. For
21 institutional safety and security reasons, you are **not allowed access to the**
22 **confidential portions of your central file**. Accordingly, because
23 Defendants informed you where the responsive documents can be located,
24 **Defendants' response is complete and cannot be supplemented.**

25 Regarding Defendants' response to Request No. 9 [which sought
26 "[a]ny and all debriefing reports that refer to or described Reno Fuentes
Rios" (Dkt. No. 39-1, at 16)], you requested **all debriefing reports that
refer to or describe you. These are confidential documents which
contain other inmates' names, CDC numbers, and gang association
information**. Disclosure of these documents would create a hazard to the
safety and security of the institution. Therefore, in the interest of ensuring

⁵ Plaintiff concedes that defendants began using plaintiff's correct mailing address in August 2009. (Dkt. No. 71, at 36.)

1 institutional safety and security, **Defendants will not produce any**
2 **responsive documents.**

3 Defendants also informed plaintiff that they had provided all documents responsive to plaintiff's
4 Request Nos. 2-8, and 10-14, that they had no documents responsive to plaintiff's Request No.
5 15, and that they were unable to respond to plaintiff's Request No. 16, which posed a question
6 rather than requested documents.

7 Plaintiff challenges each of defendants' responses. (Dkt. No. 71 at 54-64.)
8 However, for the reasons stated by defendants in their June 2, 2009 letter, the only documents
9 that remain in issue are those sought by plaintiff's Request Nos. 1 and 9.

10 Plaintiff contends that he requires access to his entire prison file (as sought
11 pursuant to Request No. 1) in order to obtain the identity of staff and inmates who provided
12 information about plaintiff's purported gang affiliations, to obtain evidence and identify
13 witnesses in support of plaintiff's claim that he has been wrongly identified as a gang member,
14 and in support of plaintiff's claim that one or more defendants have acted in retaliation against
15 plaintiff. Plaintiff argues that any truly confidential information can be redacted to protect
16 inmate and institutional security. In a separate filing, plaintiff has submitted a copy of a
17 completed CDC Form 810 ("Confidential Information Listing") which lists, with cursory details,
18 confidential information in plaintiff's central file that has been withheld from him. (Dkt. No. 78,
19 at 29-36.)

20 Plaintiff also contends that he requires access to any information obtained during
21 the debriefing of other inmates that has been used against plaintiff (as sought pursuant to Request
22 No. 9), for the same reasons set forth above. Plaintiff argues that the very nature of debriefings
23 creates unreliable information.⁶ Defendants respond by referencing their briefing filed August 6,
24

25 ⁶ As explained by plaintiff (Dkt. No. 71, at 63):

26 Any inmate who has a life sentence with the possibility of parole is subjected to a

1 2009. (Dkt. No. 73, at 3, referencing Dkt. No. 40.) However, defendants’ prior argument in
2 support of their response to plaintiff’s Request No. 1 (that defendants are not the custodian of
3 plaintiff’s central file) is nonresponsive.⁷ In contrast, defendants’ prior argument in support of
4 their response to plaintiff’s Request No. 9 focused on inmate and institutional security.⁸ At the
5

6 life sentence without the possibility of parole if he is validated as a prison gang
7 “associate,” unless he divulge[s] information against himself or others or
8 become[s] an informant for prison authorities or he will die in prison unless he
9 compl[ies] with this requirement and most of the inmates are erroneously
10 validated as a prison gang associate in a discriminatory manner because the
11 highest percentage of inmates validated as a prison gang associate are only
12 Hispanic inmates and usually most of the inmates are erroneously validated and
13 placed in segregation lock-up until they debrief and accept the information which
14 other inmates divulged against him due to the fact that when an inmate debriefs all
15 he has to do is state “x” prisoner is associated [with] a prison gang and usually
16 they target[] inmates they don’t like or because they had a personal dislike[]
17 against such inmate then an inmate will become[] labeled as a gang associate
18 without . . . receiving any timely notice of disciplinary report . . . because the
19 debriefer or informant is not required to verify under penalty of perjury that
20 information he gave is true, accurate and correct

21 ⁷ Defendants argued (Dkt. No. 40, at 4):

22 Defendants are not the custodian of records for Rios’s prison file. To obtain
23 Rios’s prison file, Defendants would need to obtain the permission of the
24 custodian of records. Because Defendants would need to obtain the permission of
25 another to access Rios’s prison file, Defendants are not in “control” of Rios’s
26 prison file and cannot be compelled to produce it. Moreover, Defendants cannot
be compelled to serve as a free copy service for Rios. Because Defendants had no
responsive documents in their possession, custody, and control, their response
complied with Federal Rule of Civil Procedure 34(a) and thus they cannot be
compelled to produce anything further.

⁸ Defendants argued (Dkt. No. 40, at 6-7) (citations omitted):

In [R]equest 9, Rios asks for all debriefing reports that refer to him. In
Defendants’ response, they refused to respond to this request because it requests
confidential information the disclosure of which would create a hazard to the
safety and security of the institution, and seeks to invade the privacy of other
inmates. Rios claims Defendants’ response is deficient because the objections are
frivolous and fail to explain why the information sought is not reasonably
calculated to lead to the discovery of admissible evidence.

Debriefing reports are generated after an inmate decides to drop out of a gang.
Debriefing reports are confidential memorandums. Contained within a debriefing
report is information regarding the inmate-dropout’s gang and active gang

1 heart of both disputed requests is the authority of the CDCR to identify information as
2 confidential and to withhold such information even from the inmate most directly impacted by it.

3 “California’s policy of assigning suspected gang affiliates to the SHU is not a
4 disciplinary measure, but an administrative strategy designed to preserve order in the prison and
5 protect the safety of all inmates. Although there are some minimal legal limitations, the
6 assignment of inmates within the California prisons is essentially a matter of administrative
7 discretion.” Munoz v. Rowland, 104 F.3d 1096, 1098 (9th Cir. 1997) (citations omitted).

8 Thus, while there exists a liberty interest in freedom from indefinite administrative segregation in
9 California prisons, see, e.g., Ashker v. Schwarzenegger, 2009 WL 801557 (N.D. Cal. 2009), at
10 *13, citing Toussaint v. McCarthy, 801 F.2d 1080 (9th Cir. 1986), cert. denied, McCarthy v.
11 Toussaint, 481 U.S. 1069 (1987), and due process requires a “quantum of process” that includes
12 an “informal, nonadversary evidentiary review” at the outset, subject to periodic review,
13 Toussaint, 801 F.2d at 1100-01, citing, inter alia, Hewitt v. Helms, 459 U.S. 460 (1983), not all
14 information relied upon to make the decision to administratively segregate a prisoner need be
15 disclosed to the prisoner.

16 State regulations expressly authorize prison officials to withhold as “confidential”
17 any information that would jeopardize the security of the institution or endanger the safety of any
18 person therein. Cal. Code. Regs., tit. 15, § 3321(a)(1), (2). An inmate may not have access to
19 confidential information contained in his own case file, id., § 3370(d) (“No inmate or parolee
20 shall access information designated confidential pursuant to section 3321 which is in or from

21 affiliates. Debriefing reports are kept in the confidential section of the prison
22 central files of those inmates who have debriefed.

23 If another inmate were to learn the name and CDC number of a gang dropout, it
24 would place the dropout’s safety in danger. Thus, disclosure of debriefing reports
25 to Rios would create a hazard to the safety and security of the institution. Also,
26 because debriefing reports are stored in the inmate-dropout’s central file,
disclosure of this information to Rios would violate other inmates’ privacy.
Accordingly, Defendants properly objected to Rios’s request and cannot be
compelled to produce anything in response to this request.

1 their own case records file”); nor may an inmate have access to the case records of other inmates,
2 id., § 3370(b) (“Except by means of a valid authorization, subpoena, or court order, no inmate or
3 parolee shall have access to another’s case records file, unit health records, or component
4 thereof”).

5 However, confidential information may be relied upon to validate an inmate as a
6 gang member only if such information “meets the test of reliability.” Id., § 3378(c)(2), citing §
7 3321.⁹ Such confidential information must be disclosed in limited fashion to the affected inmate
8 pursuant to a completed CDC Form 1030. Id., § 3378(c)(6)(C) (“All source items referenced in
9 the validation . . . shall be disclosed to the inmate at the time of notification. The inmate shall be
10 given copies of all non-confidential documents unless otherwise requested in writing by the
11 inmate. Confidential information used in the validation or inactive status review shall be
12 disclosed to the inmate via a CDC Form 1030 (Rev. 12/86), Confidential Information Disclosure
13 Form.”.) Such disclosure includes the following details: “The documentation given to the
14 inmate shall include: (A) The fact that the information came from a confidential source [and]
15 (B) As much of the information as can be disclosed without identifying its source including an
16 evaluation of the source’s reliability; a brief statement of the reason for the conclusion reached;
17 and, a statement of reason why the information or source is not disclosed.” Id., § 3321(b)(3)(A),
18 (B).

19 These regulations therefore require that defendants disclose to plaintiff, in
20 response to his Request No. 1, and in the restricted format set forth above, any information in

21 ⁹ See Cal. Code. Regs., tit. 15, § 3321(b)(1) (“No decision shall be based upon
22 information from a confidential source, unless other documentation corroborates information
23 from the source, or unless the circumstances surrounding the event and the documented
24 reliability of the source satisfies the decision maker(s) that the information is true.”); and §
25 3321(c) (“A confidential source’s reliability may be established by one or more of the following
26 criteria: (1) The confidential source has previously provided information which proved to be
true. (2) Other confidential source have independently provided the same information. (3) The
information provided by the confidential source is self-incriminating. (4) Part of the information
provided is corroborated through investigation or by information provided by non-confidential
sources. (5) The confidential source is the victim.”)

1 plaintiff's central file that has been designated "confidential" and relied upon to validate plaintiff
2 as a gang member. The information set forth in the CDC Form 810 responsive to plaintiff's
3 central file request does not appear to provide all of this information. Moreover, the prior
4 argument of defendants that they are not the custodian of records for plaintiff's prison file (see
5 n.6, supra) is unsatisfactory. The Attorney General's Office, which generally represents all
6 CDCR defendants, shall work with the litigation coordinators for CSP-Sacramento and CSP-
7 Corcoran, and any other implicated institution, to arrange for the disclosure of information from
8 plaintiff's central file as directed herein.

9 Accordingly, defendants shall, within thirty (30) days of the filing date of this
10 order, personally serve plaintiff with a supplemental response to plaintiff's Request No. 1, as
11 described in the conclusion of this order.

12 In contrast, plaintiff does not have a right to the debriefings of any other inmate.
13 To the extent that such information impacts plaintiff, it should be included in his central file and
14 will be discovered in limited form pursuant to his order. The court will therefore deny plaintiff's
15 motion to compel a further response to his Request No. 9.

16 2. Plaintiff's Interrogatories (Set One)

17 Plaintiff served on all defendants his Interrogatories (Set One) on April 3, 2009,
18 and responses were served by mail on May 18, 2009 (see Dkt. No. 39-3, at 13, 26, 41, 61, 69),
19 which were timely within the 45-day deadline set by the initial discovery order in this case (Dkt.
20 No. 33). Thus, plaintiff's initial contention that defendants waived their objections to plaintiff's
21 interrogatories because untimely served is without merit.

22 Plaintiff sent a letter to defendants on June 12, 2009, requesting that defendants
23 supplement their responses. In a June 30, 2009 letter, defendants responded in pertinent part
24 (Dkt. No. 39-3, at 70):

25 The only information omitted is in Defendant Brandon's response to
26 Interrogatory No. 11, part four, in which you request the names of the
inmates referred to in the confidential documents used to validate you as

1 an associate of the Mexican Mafia. This information cannot be revealed to
2 you because it would invade those inmates' privacy and place their safety
in danger.

3 Plaintiff now asserts only generally that “[e]ach defendant refused to fully
4 cooperate with discovery based on same repetitive objections and ambiguous assumptions, non-
5 responsive, incomplete, with frivolous answers.” (Dkt. No. 71, at 67.) Plaintiff also states,
6 incorrectly, that he “did not request[] the disclosure of confidential information which could
7 create a hazard to the safety and security of the institution or others.” (Id. at 66.)

8 Based on the principles of confidentiality set forth above, and because plaintiff
9 has failed to articulate any cognizable basis for ordering further answers to his Interrogatories
10 (Set One), this request will be denied.

11 3. Plaintiff’s Interrogatories (Set Two)

12 Plaintiff challenges the answers to his Interrogatories (Set Two) served,
13 respectively, on defendants Brandon (served on October 30, 2009), Parker (served on February 7,
14 2010), Mayfield (served on February 16, 2010), Tilton and Lockwood (each served on May 12,
15 2010). (Dkt. No. 71, at 69-72.)

16 Noting the shortened thirty-day deadline for serving discovery responses set by
17 this court’s March 26, 2010 Discovery and Scheduling Order (Dkt. No. 57), plaintiff first
18 contends that he has been prejudiced by this court’s extensions of time granted to defendants to
19 respond to plaintiff’s additional discovery, particularly Tilton and Lockwood, resulting in
20 disclosure so close to the previous discovery deadline of July 1, 2010, that it foreclosed a
21 mutually beneficial meet and confer. (Dkt. No. 71, at 69-70.) However, plaintiff’s motion was
22 drafted before this court extended the discovery deadline to August 20, 2010. Accordingly,
23 plaintiff’s motions on this basis as to Tilton and Lockwood will be denied.

24 Plaintiff challenges the refusal of defendants Brandon, Parker and Mayfield to
25 answer more than 25 of plaintiff’s interrogatories. (Id. at 71-73.) Defendants respond correctly
26 (Dkt. No. 73, at 6-8), that absent a stipulation of the parties or order of this court, they were not

1 required to answer more than the first twenty-five of plaintiff's interrogatories, which includes
2 subparts. See Fed. R. Civ. P. 33(a)(1) ("Unless otherwise stipulated or ordered by the court, a
3 party may serve on any other party no more than 25 written interrogatories, including all discrete
4 subparts"). While "[l]eave to serve additional interrogatories may be granted to the extent
5 consistent with Rule 26(b)(2),"¹⁰ id., plaintiff asserts only that "the information [that remains]
6 requested is reasonably calculated to lead to the discovery of admissible evidence in this action."
7 (Dkt. No. 71 at 72.) The court's review of plaintiff's interrogatories demonstrates that they are
8 ponderous and multifaceted, often assuming facts not in evidence and seeking inappropriate
9 answers from defendants, such as concessions to ultimate legal issues and citations to legal
10 authority. The court finds, therefore, that defendants' objections have been properly interposed,
11 that there is no basis upon to compel supplemental answers, and no basis upon which to
12 authorize the propounding of additional interrogatories. Accordingly, the court finds no error in
13 the answers of defendants Brandon, Parker or Mayfield to plaintiff's Interrogatories (Set Two),

14 4. Plaintiff's Requests for Admissions

15 Plaintiff challenges the answers of all defendants to plaintiff's Requests for
16 Admissions served on August 28, 2009.

17 _____
18 ¹⁰ Limitations on discovery are guided by Fed. R. Civ. P. 26(b)(2)(C), which provides in
19 full:

20 (C) On motion or on its own, the court must limit the frequency or extent of
discovery otherwise allowed by these rules or by local rule if it determines that:

21 (i) the discovery sought is unreasonably cumulative or duplicative, or can be
22 obtained from some other source that is more convenient, less burdensome, or less
expensive;

23 (ii) the party seeking discovery has had ample opportunity to obtain the
24 information by discovery in the action; or

25 (iii) the burden or expense of the proposed discovery outweighs its likely benefit,
26 considering the needs of the case, the amount in controversy, the parties'
resources, the importance of the issues at stake in the action, and the importance
of the discovery in resolving the issues.

1 Pursuant to the court’s review of plaintiff’s 190 requests for admission served
2 upon Tilton (Dkt. No. 77-1, at 55-124), and Tilton’s answers thereto (Dkt. No. 73, Exh. A), the
3 court concludes that defendant Tilton has fully complied with the requirements set forth in
4 Federal Rule of Civil Procedure 36. Tilton properly objected to Request Nos. 3-64, 70-74,
5 76-107, 110-46, 150, 164-65, 172-74, and 176, on the ground that each improperly asked
6 defendant to admit to the authenticity of quoted portions of the California Code of Regulations
7 and Department Operations Manual. Such requests are impermissible in scope and unduly
8 burdensome. Tilton’s answers to Request Nos. 69-70, 75, 108-09, 151, 156, 161-63, and 178,
9 were sufficient based on his statement that, after a reasonable inquiry, he did not have sufficient
10 information, knowledge, or belief to admit or deny each request. See Fed. R. Civ. P. 36(a)(4)
11 (“[t]he answering party may assert lack of knowledge or information as a reason for failing to
12 admit or deny only if the party states that it has made reasonable inquiry and that the information
13 it knows or can readily obtain is insufficient to enable it to admit or deny”). Finally, the court
14 agrees with defendant Tilton that he properly objected to plaintiff’s Request Nos. 152-55,
15 157-59, 165-71, 177, and 179-89, on the ground that each improperly sought defendant’s
16 admissions to allegations of the complaint. While a party may “not object solely on the ground
17 that the request presents a genuine issue for trial,” Fed. R. Civ. P. 36(a)(5), here the requests
18 improperly and repeatedly sought defendant’s acquiescence to the entirety of plaintiff’s
19 complaint.

20 Plaintiff similarly challenges the answers of defendants Lockwood, Brandon,
21 Parker and Mayfield to plaintiff’s Requests for Admissions (Set One). For the same reasons set
22 forth above, the court finds no merit to plaintiff’s challenges.

23 C. MOTION FOR PROTECTIVE ORDER

24 Plaintiff moves for a “protective order” requiring defendants to respond to
25 plaintiff’s outstanding discovery requests, subject to an *in camera* review if necessary, and
26 permitting plaintiff additional time within which to respond to defendant’s motion for summary

1 judgment. (Dkt. No. 76; see also Dkt. No. 78.) Plaintiff cites a 1999 order of this court
2 authorizing the disclosure of confidential information to a habeas corpus petitioner and his
3 counsel, pursuant to a protective order, Pifer v. Marshall, No.2:87-cv-1623 FCD KJM P (relevant
4 orders filed April 12, 1999 (Dkt. No. 289) and May 27, 1999 (Dkt. No. 290), and Pratt v.
5 Rowland, 770 F. Supp. 1399 (N.D. Cal. 1991), wherein a civil rights plaintiff seeking release
6 from administrative segregation was permitted access to confidential documents pursuant to a
7 “tightly drafted protective order.” Id. at 1401 n.1.

8 The court, at his juncture, does not perceive the need to order the disclosure of
9 confidential information or, therefore, to issue a protective order. The court has reviewed the
10 exhibits submitted by defendants in support of their motion for summary judgment, and it
11 appears that only a few rely on undisclosed confidential information. Plaintiff should respond to
12 this information to his best ability based on the information currently available to him. Should
13 the court determine, upon substantive review of defendants’ motion, that it is necessary to review
14 information that is being withheld, it will order the documents *in camera* and, at that time, decide
15 to what extent disclosure should be made to plaintiff.

16 Accordingly, plaintiff’s motion for protective order will be denied with respect to
17 the requested disclosure of confidential information; plaintiff’s further request for additional time
18 within which to respond to defendants’ motion for summary judgment will be denied as moot.

19 D. MOTION FOR LEAVE TO AMEND COMPLAINT

20 Plaintiff seeks leave of court “to amend his complaint and to add additional
21 defendants involved in this action for failing to correct inaccuracies and unreliable information
22 presented to the classification committee members to validate and retain plaintiff [] in the . . .
23 SHU. . . .” (Dkt. No. 71, at 8.) Plaintiff identifies the following as the defendants he seeks to
24 add: (1) “the CSP-Sacramento Warden T. Malfi and his classification committee members and
25 counselors for refusing to correct the unreliable and altered information . . . ,” (2) “the new Chief
26 Secretary Director assigned to the California Department of Corrections and Rehabilitation

1 (CDCR) for failing to prescribe . . . clear regulations which mandates (sic) what conduct is
2 prohibited. . . .” (3) “CDCR Office of Correctional Safety (OCS) members involved in this
3 action who are the decision makers in charge to validate inmates as a prison gang associate . . .,”
4 and (4) “the CSP-Corcoran SHU Warden and Classification Committee members for conducting
5 a meaningless classification review in regard to plaintiff’s alleged gang validation . . .” (*id.* at 8-
6 9.) Plaintiff has not included a copy of his proposed amended complaint (as required by Local
7 Rule 137(c), although this omission is not determinative under these circumstances.

8 Since defendants have answered the complaint and substantial discovery has
9 taken place in this case, plaintiff may amend his complaint only by leave of court or by written
10 consent of defendants. Fed. R. Civ. P. 15(a)(2). A court should freely grant leave to amend a
11 pleading when justice so requires. *Id.*; *Foman v. Davis*, 371 U.S. 178, 182 (1962). However,
12 here the court finds that amendment of the complaint at this time would be both futile and unduly
13 prejudicial to defendants. “Liberality in granting a plaintiff leave to amend is subject to the
14 qualification that the amendment not cause undue prejudice to the defendant, is not sought in bad
15 faith, and is not futile. Additionally, the district court may consider the factor of undue delay
16 [although] [u]ndue delay by itself . . . is insufficient to justify denying a motion to amend.”
17 *Bowles v. Reade*, 198 F.3d 752, 757-58 (9th Cir. 1999).

18 Nearly two years ago, in January 2009, when the former magistrate judge made
19 his findings and recommendations concerning defendants’ motion to dismiss, the court instructed
20 plaintiff how to seek leave to file an amended complaint. (See Dkt. No. 30, at 10-11.) When the
21 district judge adopted the magistrate judge’s findings and recommendations on March 3, 2009
22 (Dkt. No. 31), defendants immediately answered the original complaint (Dkt. No. 32) and a
23 discovery order issued (Dkt. No. 33). Plaintiff then proceeded with the discovery process (*see*,
24 *e.g.*, Dkt. No. 35 et seq.), and did not seek leave to amend his complaint. To grant plaintiff’s
25 request at this time may result in extensive additional (but likely duplicative) discovery and a
26 significant delay in the final disposition of this action. The defendants whom plaintiff now seeks

1 to add are new supervisory personnel who may be responsible, if at all, for the periodic review of
2 plaintiff's gang validation status rather than his initial classification, which is at the heart of this
3 action. To the extent that these individuals are successors in the official capacities held by the
4 named defendants, they will be parties to this action. Fed. R. Civ. P. 25(d)(1) (successor of
5 public officer defendant named in his official capacity is automatically substituted as a party).
6 The court therefore perceives no significant benefit to plaintiff by the addition of any of these
7 defendants at this time.

8 Accordingly, plaintiff's motion for leave of court to file an amended complaint
9 will be denied.

10 E. MOTION TO APPOINT COUNSEL

11 For the fourth time, plaintiff seeks appointment of counsel. (Dkt. No. 70; see also
12 Dkt. Nos. 25, 34, 41; see also, Dkt. Nos. 28, 42.) Plaintiff contends that he, compared to the
13 State Attorney General's office, is disadvantaged in legal training and resources, because English
14 is his second language, and because plaintiff has limited access to the prison law library due to
15 his incarceration in administratively segregated housing. Plaintiff asserts that the court's failure
16 to appoint counsel has resulted in a denial of due process and equal protection, and subjected
17 plaintiff to double jeopardy.

18 The challenges faced by plaintiff are not dissimilar to those faced by most
19 prisoners pursuing civil rights actions and do not implicate constitutional rights. District courts
20 lack authority to require counsel to represent indigent prisoners in § 1983 cases. Mallard v.
21 United States District Court, 490 U.S. 296, 298 (1989). In certain exceptional circumstances, the
22 court may request the voluntary assistance of counsel pursuant to 28 U.S.C. § 1915(e)(1). Terrell
23 v. Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991); Wood v. Housewright, 900 F.2d 1332, 1335-36
24 (9th Cir. 1990); Franklin v. Murphy, 745 F.2d 1221, 1236 (9th Cir. 1984). A finding of
25 exceptional circumstances requires a likelihood that plaintiff will succeed on the merits of his
26 action coupled with a limited ability to articulate his claims "in light of the complexity of the

1 legal issues involved.” Agyeman v. Corrections Corp. of America, 390 F.3d 1101, 1103 (9th Cir.
2 2004) (citations and internal quotations omitted). “Neither of these factors is dispositive and
3 both must be viewed together before reaching a decision on request of counsel under section
4 1915(d).” Wilborn v. Escalderon, 789 F.2d 1328, 1331 (9th Cir. 1986) (fn. omitted),

5 The court does not find the required exceptional circumstances in the instant case.
6 While there may be some likelihood of success on the merits of plaintiff’s claims, plaintiff has
7 repeatedly demonstrated his ability to adequately (and prolifically) present his claims, including
8 those pertinent to his discovery issues. Thus, the court again finds that appointment of counsel is
9 not warranted at this time.

10 F. ADMONITION TO PLAINTIFF

11 Plaintiff has sought to comply with the rules of this court and for conducting
12 discovery. However, the progress of this case has been impeded by plaintiff’s frequent,
13 voluminous and often repetitive filings. The instant matters have required the court’s review of
14 (and defendants’ response to) nearly a thousand pages of handwritten documents. Such
15 endeavors have been required throughout this case. This action is not the only case before this
16 court, yet it has required an inordinate amount of the court’s time, often to review briefs and
17 declarations that are duplicative in content yet presented with new titles. Plaintiff is formally
18 cautioned that a litigant proceeding in forma pauperis may suffer restricted access to the court
19 where it is determined that he has filed excessive motions in a pending action. DeLong v.
20 Hennessey, 912 F.2d 1144 (9th Cir. 1990); see also Tripati v. Beaman, 878 F2d 351, 352 (10th
21 Cir. 1989). Accordingly, if plaintiff does not exercise appropriate restraint in the future, the court
22 will expressly consider whether to restrict plaintiff’s access to the court for the remainder of this
23 litigation.

24 The dates for filing and responding to defendants’ further amended motion for
25 summary judgment are set forth below. Plaintiff is reminded of the content requirements of his
26

1 opposition.¹¹

2 III. CONCLUSION

3 For the foregoing reasons, IT IS HEREBY ORDERED that:

4 1. Plaintiff's Motion for Discovery (Dkt. No. 71) is granted in part. Within thirty
5 (30) days of the filing date of this order, defendants shall personally serve plaintiff with a
6 supplemental response to plaintiff's Request No. 1, Requests for Production (Set One), which
7 may be set forth in a CDC Form 1030 or similarly format, and includes all information contained
8 in plaintiff's central file that was initially relied upon to validate plaintiff as a gang affiliate, and
9 has been thereafter relied upon to maintain such validation, properly redacted as set forth in
10 California Code of Regulations, Title 15, Sections 3321 and 3378.

11 2. Plaintiff's Motion for Discovery (Dkt. No. 71) is denied on all other bases.

12
13 ¹¹ Pursuant to Rand v. Rowland, 154 F.3d 952, 957 (9th Cir. 1998) (en banc), cert.
14 denied, 527 U.S. 1035 (1999), and Klinge v. Eikenberry, 849 F.2d 409 (9th Cir. 1988), plaintiff
15 is advised of the following requirements for opposing a motion for summary judgment made by a
16 defendant pursuant to Rule 56 of the Federal Rules of Civil Procedure. Such a motion is a
17 request for an order for judgment in favor of the defendant without trial. A defendant's motion
18 for summary judgment will set forth the facts that the defendant contends are not reasonably
19 subject to dispute and that entitle the defendant to judgment. To oppose a motion for summary
20 judgment, plaintiff must show proof of his or her claims. Plaintiff may do this in one or more of
21 the following ways. Plaintiff may rely upon statements made under penalty of perjury in the
22 complaint if the complaint shows that plaintiff has personal knowledge of the matters stated and
23 plaintiff calls to the court's attention those parts of the complaint upon which plaintiff relies.
24 Plaintiff may serve and file one or more affidavits or declarations setting forth the facts that
25 plaintiff believes prove plaintiff's claims; the person who signs an affidavit or declaration must
26 have personal knowledge of the facts stated. Plaintiff may rely upon written records, but plaintiff
must prove that the records are what plaintiff claims they are. Plaintiff may rely upon all or any
part of the transcript of one or more depositions, answers to interrogatories, or admissions
obtained in this proceeding. If plaintiff fails to contradict the defendant's evidence with
counteraffidavits or other admissible evidence, the defendant's evidence may be taken as the
truth and the defendant's motion for summary judgment granted. If there is some good reason
why such facts are not available to plaintiff when required to oppose a motion for summary
judgment, the court will consider a request to postpone consideration of the defendant's motion.
If plaintiff does not serve and file a written opposition to the motion or a request to postpone
consideration of the motion, the court may consider the failure to act as a waiver of opposition to
the defendant's motion. If the defendant's motion for summary judgment, whether opposed or
unopposed, is granted, judgment will be entered for such defendant without a trial and the case
will be closed as to that defendant.

Plaintiff was previously reminded of these requirements in this court's order filed April
25, 2008. (Dkt. No. 15, at 3-4.)

1 3. Plaintiff's Motion for Leave of Court to File an Amended Complaint (Dkt. No.
2 71) is denied.

3 4. Plaintiff's Motion for Protective Order (Dkt. No. 76) is denied without
4 prejudice for the reasons set forth above.

5 5. Plaintiff's Request for an Extension of Time (Dkt. No. 74) is denied as moot.

6 6. Plaintiff's Motion for Appointment of Counsel (Dkt. No. 70) is denied without
7 prejudice.

8 7. Plaintiff's Motion to Strike (Dkt. No. 75) Defendants' Amended Motion for
9 Summary Judgment is granted.

10 8. Defendants' Amended Motion for Summary Judgment (Dkt. No. 67) is vacated
11 without prejudice to the filing of a "Second Amended Motion for Summary Judgment," which
12 should be served and filed during the week of November 15-19, 2010.¹²

13 9. Plaintiff shall serve and file his Opposition within twenty-one (21) days after
14 service of Defendants' Second Amended Motion for Summary Judgment.

15 10. Defendants may serve and file a Reply within fourteen (14) days after service
16 of plaintiff's Opposition.

17 SO ORDERED.

18 DATED: September 23, 2010

19
20
21 
22 KENDALL J. NEWMAN
23 UNITED STATES MAGISTRATE JUDGE

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24
25 _____
26 ¹² These dates are consistent with the deadlines set by the court's most recent scheduling
order. (Dkt. No. 69.)