



1           Motion for additional time

2           In his motion to reconsider, plaintiff contends he still needs additional time to solicit  
3 affidavits from four witnesses who have remained incarcerated at CMF. (Motion (Doc. 65) at 2-  
4 4.) Plaintiff alleges that the warden at CMF has failed to grant him permission to correspond with  
5 these inmate witnesses. He argues this obstruction “interfer[es] with Plaintiff’s investigation and  
6 [is an] impediment to Plaintiff presenting his claim”. (Id. at 6.) Plaintiff also renews his request  
7 that this court to issue subpoenas duces tecum and an order requiring the warden at CMF to allow  
8 him to communicate in writing with the inmate witnesses there.

9           First, the request for a subpoena duces tecum that plaintiff attached to his motion for  
10 additional time (Doc. 49, Ex. C at 27-29) propounded discovery requests that the court had  
11 already denied in ruling on plaintiff’s motion to compel (see Doc. No. 41) or were submitted well  
12 after the discovery deadline of March 15, 2013 previously established in this civil action by court  
13 order. Second, to the extent plaintiff seeks a subpoena in order to obtain sworn declarations from  
14 other inmates, “a subpoena duces tecum cannot be used to order the production of an affidavit.”  
15 Johnson v. Dovey, No. 1:08-cv-0640 LJO DLB PC, 2010 WL 1957278 at \*1 (E.D. Cal. May 14,  
16 2010). Under Federal Rule of Civil Procedure 45, a subpoena must “command each person to  
17 whom it is directed to do [one of] the following at a specified time and place: attend and testify;  
18 produce designated documents, electronically stored information, or tangible things in that  
19 person’s possession, custody, or control; or permit the inspection of premises[.]” An unexecuted  
20 and likely undrafted declaration of a non-party is not an existing document in anybody’s  
21 possession, custody or control. Therefore, a request to subpoena a non-party to produce an  
22 affidavit, such as plaintiff is requesting here, is beyond the scope of Rule 45. See Johnson, 2010  
23 WL 1957278 at \*1.

24           As for plaintiff’s request for an order requiring the warden at CMF to open the channels of  
25 correspondence between plaintiff and the alleged inmate witnesses from whom he seeks  
26 affidavits, the court will construe that request as one seeking a preliminary injunction. A  
27 preliminary injunction should not issue unless necessary to prevent threatened injury that would  
28 impair the court’s ability to grant effective relief in a pending action. “A preliminary injunction

1 . . . is not a preliminary adjudication on the merits but rather a device for preserving the status quo  
2 and preventing the irreparable loss of rights before judgment.” Sierra On-Line, Inc. v. Phoenix  
3 Software, Inc., 739 F.2d 1415, 1422 (9th Cir. 1984). In cases brought by prisoners involving  
4 conditions of confinement, any preliminary injunction “must be narrowly drawn, extend no  
5 further than necessary to correct the harm the court finds requires preliminary relief, and be the  
6 least intrusive means necessary to correct the harm.” 18 U.S.C. § 3626(a)(2).

7 “The proper legal standard for preliminary injunctive relief requires a party to demonstrate  
8 ‘that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the  
9 absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction  
10 is in the public interest.’” Stormans, Inc. v. Selecky, 586 F.3d 1109, 1127 (9th Cir. 2009) (citing  
11 Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 22 (2008) (internal quotations omitted)).  
12 “Speculative injury does not constitute irreparable injury sufficient to warrant granting a  
13 preliminary injunction.” Caribbean Marine Servs. Co. v. Baldrige, 844 F.2d 668, 674 (9th Cir.  
14 1988), citing Goldie’s Bookstore, Inc. v. Superior Court, 739 F.2d 466, 472 (9th Cir. 1984).  
15 Rather, a presently existing actual threat must be shown, although the injury need not be certain  
16 to occur. See Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130-31 (1969); FDIC  
17 v. Garner, 125 F.3d 1272, 1279-80 (9th Cir. 1997); Caribbean Marine, *supra*, 844 F.2d at 674.

18 A plaintiff cannot, as a general matter, obtain injunctive relief against non-parties.  
19 “Unrelated claims against different defendants belong in different suits[.]” George v. Smith, 507  
20 F.3d 605, 607 (7th Cir. 2007). However, a federal court does have the power to issue orders in  
21 aid of its own jurisdiction, 28 U.S.C. § 1651(a), and to prevent threatened injury that would  
22 impair the court’s ability to grant effective relief in a pending action. Sierra On-Line, Inc. v.  
23 Phoenix Software, Inc., 739 F.2d 1415, 1422 (9th Cir. 1984); Gon v. First State Ins. Co., 871 F.2d  
24 863 (9th Cir. 1989). Here, plaintiff alleges that the warden at CMF is interfering with his efforts  
25 to gather affidavits that would support his retaliation claim in this civil rights action. He asserts  
26 that at least two inmates at CMF witnessed conduct that plaintiff construes as defendant Dizon’s  
27 “harassment” of him in retaliation for his complaints to other officers. (Doc. 49 at 5.) Insofar as  
28 such testimony could be material to the defendant’s pending motion for summary judgment, the

1 allegation that the warden at CMF is obstructing plaintiff's access to those alleged inmate  
2 witnesses could, if proven, justify an order in furtherance of the court's ability to adjudicate this  
3 case.

4 Prisoners have a constitutional right to send and receive mail, but it is limited by the  
5 state's interest in maintaining safety and security in its prisons. Turner v. Safley, 482 U.S. 78, 89  
6 (1987). Thus inmates in California's prison system may correspond with other inmates "provided  
7 those persons meet the criteria of approval of no known gang affiliation, or involvement with a  
8 known terrorist group or racketeering enterprise." Cal. Admin. Code tit. 15, § 3139(b). The same  
9 regulation gives a warden authority to restrict an inmate in another facility from communicating  
10 with inmates in his custody. "[A]pproval to correspond may be revoked due to disciplinary  
11 violations involving correspondence between the inmates/parolees or as a result of classification  
12 action based on safety and security." 15 CCR § 3139(d). "If the request to correspond is denied  
13 at the . . . state correctional facility, the reason for denial shall be annotated on the CDC Form  
14 1074," and "staff at the sending institution/field office shall ensure that the 2<sup>nd</sup> page [of the form]  
15 is returned to the initiating inmate." 15 CCR § 3139(c)(4), (6). "If an inmate's request to  
16 correspond with another inmate/parolee is denied, the CCI [Correctional Counselor I] shall advise  
17 the inmate in writing." 15 CCR § 3139(c).

18 In his motion for additional time in which to oppose defendant's motion for summary  
19 judgment, plaintiff states that he requested permission for correspondence through his CCI as  
20 early as February of 2013, but that the warden at CMF "failed to grant his approval, making the  
21 process incomplete." (Doc. 49 at 3-4.) It is not entirely clear from plaintiff's filings with this  
22 court whether the warden (or other officer with authority) at CMF has denied plaintiff access to  
23 correspond with inmates there or whether the warden has simply failed to respond to plaintiff's  
24 attempt to gain that access. Title 15 CCR § 3139 makes clear that the safety and security of the  
25 state's correctional facilities could be implicated here, thus giving rise to the possible inference  
26 that the security of the prison may have been part of the decision to decline to disallow plaintiff  
27 from corresponding with the inmates he wants to sign affidavits for use in this case. However, if  
28 there has been an official denial of access, state law requires plaintiff to have received a document

1 reflecting that decision, if not the reason for it. 15 CCR § 3139(c)(4), (6). The court observes  
2 that plaintiff has been tenacious and thorough in prosecuting this action thus far. Accordingly,  
3 the absence of such a document may indicate that no official at CMF has decided whether to  
4 allow the correspondence – and thus that no security interest bars plaintiff from contacting  
5 inmates at CMF in order to obtain affidavits which he believes would support his claim and  
6 defeat summary judgment in favor of defendant. Though prison officials enjoy broad discretion  
7 in executing their duties, state officials must ‘assure indigent defendants an adequate opportunity  
8 to present his claims fairly.’” Bounds v. Smith, 430 U.S. 817, 823 (1977) (citation omitted).  
9 Blocking a prisoner access to a potentially material witness for no legitimate penological purpose,  
10 even inadvertently, unreasonably encroaches on his right of access to the court and the  
11 opportunity to present his claims fairly.

12           However, it is plaintiff who has the burden of proving that the balance of equities tips in  
13 favor of an injunction ordering the warden at CMF to allow him to correspond with certain  
14 alleged inmate witnesses incarcerated there. The court does not have enough information before  
15 it with which to rule on which way the balance tips – yet. Therefore the court will order the  
16 defendant to respond to the motion to reconsider on the issue of whether this court should order  
17 officials at CMF to allow plaintiff to correspond with the inmates he has named as potential  
18 witnesses to material facts alleged in his complaint. Defendant shall provide any and all  
19 documentation and information at his or his counsel’s disposal, including records in the custody  
20 or control of the California Department of Corrections and Rehabilitation (CDCR), reflecting the  
21 response, if any, of the warden or other official at CMF to plaintiff’s request for permission to  
22 contact certain alleged inmate witnesses concerning this case. If defendant’s counsel deems it  
23 necessary to submit documents under seal for in camera review, she may do so. Defendant shall  
24 also submit a written response to plaintiff’s request for an order requiring the warden to allow  
25 such correspondence.<sup>1</sup>

26 \_\_\_\_\_  
27 <sup>1</sup> If defendant determines there is no legitimate reason to prevent plaintiff from attempting to  
28 obtain the affidavits he seeks, his counsel should inform the court that defendant has no  
opposition. If the inmates with whom plaintiff seeks contact are no longer incarcerated at CMF,  
defendant should inform the court of their whereabouts.

1           Motion for appointment of counsel

2           Plaintiff renews his request for appointment of counsel, citing his mental disability. The  
3 United States Supreme Court has ruled that district courts lack authority to require counsel to  
4 represent indigent prisoners in § 1983 cases. Mallard v. United States Dist. Court, 490 U.S. 296,  
5 298 (1989). In certain exceptional circumstances, the district court may request the voluntary  
6 assistance of counsel pursuant to 28 U.S.C. § 1915(e)(1). Terrell v. Brewer, 935 F.2d 1015, 1017  
7 (9th Cir. 1991); Wood v. Housewright, 900 F.2d 1332, 1335-36 (9th Cir. 1990).

8           The test for exceptional circumstances requires the court to evaluate the plaintiff's  
9 likelihood of success on the merits and the ability of the plaintiff to articulate his claims pro se in  
10 light of the complexity of the legal issues involved. See Wilborn v. Escalderon, 789 F.2d 1328,  
11 1331 (9th Cir. 1986); Weygandt v. Look, 718 F.2d 952, 954 (9th Cir. 1983). Circumstances  
12 common to most prisoners, such as lack of legal education and limited law library access, do not  
13 establish exceptional circumstances that would warrant a request for voluntary assistance of  
14 counsel.

15           As noted above, plaintiff has prosecuted this action zealously thus far, apparently with the  
16 aid of other inmates. See Montano v. Solomon, No. 2:07-cv-0800 KJN P, 2010 WL 4137476 at  
17 \*7 (E.D. Cal. Oct. 19, 2010) (denying a motion for appointment of counsel because "plaintiff has  
18 adequately presented, albeit through another inmate, the salient factual allegations of this case").  
19 An incapacitating mental disability may be grounds for appointment of counsel in some cases, but  
20 a plaintiff making that argument must present substantial evidence of incompetence. See  
21 McElroy v. Cox, Civil No. 08-1221 JM (AJB), 2009 WL 4895360 at \*2 (E.D. Cal. Dec. 11,  
22 2009). Here, plaintiff merely alleges he has a mental disability in seeking the appointment of  
23 counsel; the court has no evidence detailing its nature or effects, which, again, plaintiff has thus  
24 far surmounted with the help of other inmates. Furthermore, as the assigned Magistrate Judge in  
25 the Montano case put it, "[t]his is a relatively straightforward Eighth Amendment case," so there  
26 are no complex legal issues sufficient to reverse the court's determination that appointment of  
27 counsel is unnecessary at this stage of the case. Montano, 2010 WL 4137476 at \*7.

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Accordingly, IT IS HEREBY ORDERED that:

1. Plaintiff's motion to reconsider (Doc. No. 65) is denied in part. The renewed requests for a subpoena duces tecum and for appointment of counsel are denied.

2. Within fourteen days of the date of this order, defendant shall respond to plaintiff's motion to reconsider only with respect to the issue of whether the court should order officials at California Medical Facility to allow plaintiff to correspond with the inmates he has named as potential witnesses to material facts alleged in his complaint. Defendant shall provide any and all documentation and information at his or his counsel's disposal, including records in the custody or control of the California Department of Corrections and Rehabilitation, reflecting the response, if any, of the warden at CMF to plaintiff's request for permission to contact certain inmates concerning this case.

3. The briefing schedule given in the court's order of December 11, 2013, is vacated. The court will issue a new schedule for briefing on the defendant's pending motion for summary judgment upon resolution of the portion of plaintiff's motion to reconsider that the court has construed as a request for preliminary injunction, herein.

Dated: January 8, 2014

  
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DALE A. DROZD  
UNITED STATES MAGISTRATE JUDGE

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