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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JONATHAN GRIGSBY,
Plaintiff,
v.
M. MUNGUIA, et al.,
Defendants.

No. 2:14-cv-0789 GEB AC P

ORDER

Plaintiff is a state prisoner proceeding pro se and in forma pauperis in this civil rights action brought pursuant to 42 U.S.C. § 1983. The action proceeds against defendant correctional officers Baker, Fairbanks/Balque,¹ Lee, Munguia, and Serrano on plaintiff’s Eighth Amendment excessive force claim. In addition to documents submitted under seal by defendants for in camera review, currently before this court are plaintiff’s various discovery motions, motions for appointment of counsel, motion to amend the complaint, motion for sanctions, writs of habeas corpus ad testificandum, motion for settlement conference, and motions for report of findings and court order.

I. Allegations of the Complaint

This case proceeds on plaintiff’s original complaint, ECF No. 1. Plaintiff alleges that

¹ Defendant Balque’s name has been changed to Fairbanks. For clarity, the court refers to her as “Fairbanks/Balque.”

1 defendant correctional officers Baker, Fairbanks/Balque, Lee, Munguia, and Serrano violated
2 plaintiff's rights under the Eighth Amendment by using excessive force against him on October
3 10, 2012. Specifically, plaintiff alleges that as he was walking on crutches towards his group
4 room, Officer Munguia told plaintiff to return to his group room. See ECF No. 1 at 4. Plaintiff
5 turned around and said, "I'm moving as fast as I can." Munguia then pepper sprayed plaintiff in
6 the face, blinding him. Id. Munguia knocked plaintiff's crutches out of his hands, told plaintiff to
7 submit to handcuffs, and placed plaintiff in a choke hold. Defendants Serrano, Fairbanks/Balque,
8 and Lee started hitting plaintiff with iron batons until he was "black and blue" and his leg was
9 broken. Id. at 5. While plaintiff was lying on the ground, defendant Baker kneed plaintiff in his
10 eye for no reason. Id. at 4. Plaintiff was then handcuffed with his hands behind his back and
11 "hog tied," causing plaintiff extreme pain in his injured leg. Id. Plaintiff alleges that as a result
12 of this incident, he received a large knot on his head, was temporarily blinded by pepper spray,
13 was choked unconscious, and suffered a broken kneecap. Id. at 4-5.

14 II. Relevant Procedural Background

15 The discovery deadline in this case expired on April 17, 2015. On April 14, 2015,²
16 plaintiff filed a motion to compel discovery, seeking production of: (1) a video of plaintiff's
17 October 10, 2012 "excessive force interview;" (2) a video of plaintiff's interview with Lieutenant
18 Hobart ("Lt. Hobart video"), conducted in November or December 2012; and (3) Lt. Hobart's
19 incident report. ECF No. 42. Plaintiff also requested an extension of time to conduct discovery.

20 By order dated May 28, 2015, plaintiff's motion to compel was denied in part and granted
21 in part. ECF No. 46. Plaintiff's request for production of the October 10, 2012 video was denied
22 as moot because defendants offered documentation that plaintiff had since been permitted to view
23 the video. Plaintiff's request for production of the Lt. Hobart video was granted to the extent that
24 defendants were required to produce the video to plaintiff if it was in their possession, custody, or
25 control. In light of defendants' assertion that they conducted a search for the Lt. Hobart video,
26 the court directed defendants to file a statement detailing their efforts to locate the video, in order

27 ² Since plaintiff is proceeding pro se, he is afforded the benefit of the prison mailbox rule. See
28 Houston v. Lack, 487 U.S. 266, 276 (1988).

1 to allow the court to determine if the search conducted was sufficiently diligent.³ As to the Lt.
2 Hobart incident report, the court declined to rule on plaintiff's motion because it was unclear
3 whether plaintiff had previously requested the incident report from defendants. The court granted
4 plaintiff leave to file a supplemental statement in support of his motion to compel production of
5 this report. Plaintiff was advised that in his motion, he should explain whether he previously
6 requested the report from defendants, how defendants responded, and why defendants' response
7 was unjustified. Also in the May 28, 2015 order, the court denied plaintiff's request for an
8 extension of the discovery deadline without prejudice. Plaintiff was granted leave to file a new
9 motion explaining what additional discovery he intended to serve on defendants and why he was
10 unable to serve the requests prior to the April 17, 2015 deadline. To the extent plaintiff sought
11 production of discovery he already served on defendants, plaintiff was granted leave to file an
12 untimely motion to compel in lieu of extending the discovery deadline.

13 On May 17, 2015, plaintiff filed a second motion to compel, which was filed by the clerk
14 on May 26, 2015.⁴ ECF No. 45. In that motion, plaintiff indicated that he was permitted to view
15 the October 10, 2012 video, but asserted that the video had been altered. Id. at 1. Plaintiff also
16 asserted that defendants did not produce the Lt. Hobart video. Id. at 2.

17 On June 4, 2015, defendants filed their response to the court's May 28, 2015 order. ECF
18 No. 47. In their response, defendants indicated that they conducted a search for the Lt. Hobart
19 video and were unable to find it. Id. at 2. Attached to their response is a declaration describing
20 counsel's efforts to locate the video. Id. at 4-5.

21 On June 12, 2015, defendants opposed plaintiff's second motion to compel. ECF No. 48.
22 In their motion, defendants again assert that they could not find the Lt. Hobart video. With
23 respect to the October 10, 2012 video, defendants asserted that plaintiff had no evidence that the
24 video has been tampered with. Id. at 1-2.

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27 ³ In the alternative, defendants were given the option to file a declaration confirming that plaintiff
28 had been permitted to see the Lt. Hobart video. ECF No. 46 at 11.

⁴ Plaintiff's second motion to compel was filed before he received the court's order addressing
his first motion to compel.

1 On June 9, 2015, plaintiff filed a motion to extend the discovery deadline, which was
2 docketed on June 22, 2015. ECF No. 49. Plaintiff's motion also included a "supplemental
3 statement and motion to compel." Id. at 2. Both motions were related to plaintiff's efforts to
4 compel production of the Lt. Hobart video and Lt. Hobart's related notes and incident report.

5 On June 19, 2015, plaintiff filed a reply to defendants' response to the court's May 28,
6 2015 order. ECF No. 50. In his reply, plaintiff again asserted that the October 10, 2012 video
7 had been altered and that the Lt. Hobart video and incident report had been concealed from him
8 or had been destroyed. Id. at 2-3.

9 On July 6, 2015, defendants opposed plaintiff's motion to extend the discovery deadline
10 and motion to compel discovery. ECF No. 51.

11 On March 9, 2016, the undersigned issued findings and recommendations and an order
12 that granted, in pertinent part, plaintiff's motion to compel production of CDCR's excessive force
13 report related to the incident that forms the basis of plaintiff's complaint. ECF No. 66. With
14 respect to plaintiff's allegations that the October 10, 2012 video was somehow altered, the order
15 explained:

16 As the court understands it, the October 10, 2012 video depicts
17 plaintiff being interviewed regarding the alleged incident of
18 excessive force that forms the basis of the instant complaint.
19 Plaintiff believes that the October 10, 2012 video was altered or
20 edited because he made statements about his knee injury during the
interview, which are not depicted in the video. As plaintiff has
personal knowledge of what he said during the interview, these
allegations provide some support for his contention that the video
has been altered.

21 Id. at 5. The order directed defendants to file a declaration with the court indicating whether the
22 October 10, 2012 video had been altered or edited before plaintiff was permitted to view it, and to
23 produce to plaintiff the excessive use of force report created in relation to the October 10, 2012
24 incident. Id. at 5, 35. The court also recommended that defendants' motion for summary
25 judgment be denied. Id. at 35. The district judge adopted the recommendations and denied
26 defendants' motion for summary judgment. ECF No. 69.

27 On March 25, 2016, defendants filed a motion for reconsideration of the portion of the
28 March 9, 2016 order requiring production of the excessive use of force report. ECF No. 68.

1 Defendants requested that the district judge reject the ruling or, in the alternative, that defendants
2 be granted the opportunity to file objections. Id. at 2.

3 Defendants served supplemental discovery responses on plaintiff on April 1, 2016. ECF
4 No. 85 at 7-9.

5 On April 14, 2016, the district judge granted in part defendants' motion for
6 reconsideration and ordered that defendants (1) submit the excessive force report to the
7 undersigned for in camera review and (2) file and serve their objections to disclosing the report to
8 plaintiff. ECF No. 72.

9 On April 25, 2016, defendants filed a supplemental response regarding the October 10,
10 2012 video. ECF No. 73. In support of their response, defendants submitted the declaration of
11 Annette L. Phillips, a legal analyst within the Correctional Writs and Appeals section of the
12 Office of the Attorney General. Id. at Ex. 1. Phillips declared that, in response to plaintiff's
13 discovery request, she requested a copy of the October 10, 2012 video conducted by Lt. Matthews
14 at CSP-Sacramento. ECF No. 73, Ex. 1, ¶¶ 1, 3. She directed that two copies of the video be
15 made; one copy was maintained in the litigation file, and the other copy was sent to the litigation
16 office at Kern Valley State Prison. Id. at ¶ 3. She confirmed that the October 10, 2012 video in
17 the litigation file was two minutes and forty-nine seconds in length. Id. at ¶ 4. The litigation
18 coordinator at Kern Valley State Prison confirmed that the October 10, 2012 video shown to
19 plaintiff had a total viewing time of two minutes and forty-nine seconds in length. Id. at ¶ 5. The
20 litigation coordinator at CSP-Sacramento confirmed that the October 10, 2012 recording was two
21 minutes and forty-nine seconds in length. Id. at ¶ 6. And, Sgt. Steele from the Investigative
22 Services Unit confirmed that the October 10, 2012 video was inventoried into the evidence locker
23 on October 10, 2012 and had a total recording time of two minutes and forty-nine seconds. Id. at
24 ¶ 7.

25 On May 6, 2016, pursuant to the court's order (ECF No. 72), defendants responded to the
26 discovery request that was in dispute and served plaintiff an amended supplemental response to
27 plaintiff's production request, an amended privilege log indicating defendants were withholding
28 certain documents pursuant to the official information privilege, and a declaration by J. Wall, the

1 Use of Force Coordinator at CSP-Sacramento. ECF Nos. 76, 81, 81-1, 81-2 at 12. Defendants
2 also submitted the required documents for in camera review. See ECF No. 76. The court has
3 conducted an in camera review of the documents and now enters this order.

4 III. In Camera Review

5 A. Legal Standard

6 The Supreme Court has long noted that privileges are disfavored. Jaffee v. Redmond, 518
7 U.S. 1, 9 (1996). “The party asserting an evidentiary privilege has the burden to demonstrate that
8 the privilege applies to the information in question.” Tornay v. United States, 840 F.2d 1424,
9 1426 (9th Cir. 1988). Privileges are to be “strictly construed” because they “impede full and free
10 discovery of the truth.” Eureka Fin. Corp. v. Hartford Accident & Indem. Co., 136 F.R.D. 179,
11 183 (E.D. Cal. 1991). “If the privilege is worth protecting, a litigant must be prepared to expend
12 some time to justify the assertion of the privilege.” Id.

13 In civil rights cases brought under section 1983, questions of privilege are resolved by
14 federal law. Kerr v. United States Dist. Court for the N. Dist. of Cal., 511 F.2d 192, 197 (9th Cir.
15 1975), aff’d 426 U.S. 394 (1976). “State privilege doctrine, whether derived from statutes or
16 court decisions, is not binding on federal courts in these kinds of cases.” Kelly v. City of San
17 Jose, 114 F.R.D. 653, 655-56 (N.D. Cal. 1987).

18 In Kerr, the Ninth Circuit Court of Appeals examined the government’s claim of the
19 official information privilege as a basis to withhold documents sought under the Freedom of
20 Information Act. It explained that the “common law governmental privilege (encompassing and
21 referred to sometimes as the official or state secret privilege) . . . is only a qualified privilege,
22 contingent upon the competing interests of the requesting litigant and subject to disclosure.”
23 Kerr, 511 F.2d at 198 (internal citations and quotations omitted).

24 The Ninth Circuit has since followed Kerr in requiring a balancing of interests and in
25 camera review in ruling on the government’s claim of the official information privilege. See,
26 e.g., Seminara v. City of Long Beach, 68 F.3d 481 (9th Cir. 1995) (affirming Magistrate Judge
27 order compelling disclosure and stating “[f]ederal common law recognizes a qualified privilege
28 for official information”); Breed v. United States Dist. Court for N. Dist. of Cal., 542 F.2d 1114,

1 1116 (9th Cir. 1976) (“Also, as required by Kerr, we recognize ‘that in camera review is a highly
2 appropriate and useful means of dealing with claims of governmental privilege.’”). “Government
3 personnel files are considered official information. To determine whether the information sought
4 is privileged, courts must weigh the potential benefits of disclosure against the potential
5 disadvantages. If the latter is greater, the privilege bars discovery.” Sanchez v. City of Santa
6 Ana, 936 F.2d 1027, 1033-34 (9th Cir. 1990), as amended on denial of reh’g (Feb. 27, 1991), as
7 amended on denial of reh’g (May 24, 1991) (internal citations and quotations omitted). “In the
8 context of civil rights suits against [corrections officials], this balancing approach should be
9 ‘moderately pre-weighted in favor of disclosure.’” Soto v. City of Concord, 162 F.R.D. 603, 613
10 (N.D. Cal. 1995) (quoting Kelly, 114 F.R.D. at 661, 662).

11 The party invoking the privilege must at the outset make a “substantial threshold
12 showing” by way of a declaration or affidavit from a responsible official with personal
13 knowledge of the matters attested. Soto, 162 F.R.D. at 613. “The claiming official must ‘have
14 seen and considered the contents of the documents and himself have formed the view that on
15 grounds of public interest they ought not to be produced’ and state with specificity the rationale
16 of the claimed privilege.” Kerr, 511 F.2d at 198 (citation omitted). The affidavit must include:
17 (1) an affirmation that the agency generated or collected the material in issue and has maintained
18 its confidentiality; (2) a statement that the official has personally reviewed the material in
19 question; (3) a specific identification of the governmental or privacy interests that would be
20 threatened by disclosure of the material to plaintiff and/or his lawyer; (4) a description of how
21 disclosure subject to a carefully crafted protective order would create a substantial risk of harm to
22 significant governmental or privacy interests, and (5) a projection of how much harm would be
23 done to the threatened interests if disclosure were made. Soto, 162 F.R.D. at 613. In addition,
24 “[t]he asserting party, as in any case where a privilege is claimed, must sufficiently identify the
25 documents so as to afford the requesting party an opportunity to challenge the assertion of
26 privilege.” Miller v. Panucci, 141 F.R.D. 292, 300 (C.D. Cal. 1992).

27 B. Analysis

28 Defendants have withheld reports related to CDCR’s internal investigation associated with

1 the underlying event in this case. Specifically, the withheld documents include:

- 2 • Institutional Executive Review Committee (IERC) Critique and Qualitative Evaluation,
3 dated December 27, 2012 (Privilege Log, Item No. 1);
- 4 • IERC Use of Force Review and further Action Recommendation, dated December 27,
5 2012 (Privilege Log, Item No. 2);
- 6 • IERC Allegation Review, dated December 27, 2012 (Privilege Log, Item No. 3);
- 7 • Two Reports of Findings, dated October 12, 2012 and November 9, 2012 (Privilege Log,
8 Item Nos. 4, 5).
- 9 • Incident Commander's Review/Critique Use of Force report, dated October 16, 2012
10 (Privilege Log, Item No. 6); and
- 11 • Manager Review Use of Force reports for two levels of review, dated October 25, 2012
12 and October 30, 2012 (Privilege Log, Item Nos. 7, 8).

13 The Declaration of J. Wall details a number of reasons why the documents should not be
14 disclosed. Among other reasons, Wall states that the process and findings of investigations
15 conducted by CDCR are confidential and that such confidentiality promotes truthfulness in the
16 investigation. Wall also argues that the investigatory process the CDCR uses must be protected
17 from inmates to preserve it from potential manipulation. Moreover, Wall asserts, the documents
18 include investigations of use-of-force incidents, which constitute "confidential documents" and
19 are protected by state law. Finally, Wall contends that the documents contain disciplinary and
20 personnel information not related to defendants and not available to staff or inmates. ECF No. 76
21 at 8-11.

22 Defendants may withhold any personal information that is required to protect the privacy
23 and security of correctional officers. This decision is without prejudice to a later request by
24 plaintiff for sufficient information about the witnesses to compel their attendance at deposition or
25 trial, if necessary. To the extent the documents discuss the investigation policies or procedures
26 that CDCR follows or used in its internal investigation, they are also privileged. Where, however,
27 the documents discuss the underlying facts of the case, no privilege attaches and the documents
28 are discoverable. The court finds it relevant to plaintiff's excessive force claims whether the

1 prison's investigation concluded that excessive force had been used against plaintiff during the
2 incident on October 10, 2012.⁵ Accordingly, plaintiff is entitled to documentation reflecting the
3 investigators' conclusions regarding the use of force following the investigation.⁶ In some cases,
4 the reviewed documents contain both privileged and unprivileged information and it is therefore
5 appropriate to redact the documents before production.

6 Specifically, Privilege Log No. 5 is a report completed by Lt. Matthews on October 12,
7 2012 that summarizes an interview of plaintiff that was conducted after the incident. This
8 document consists of factual information that plaintiff provided in his interview with correctional
9 officers. It does not appear to include information of administrative actions or investigations
10 related to post-incident conduct by non-parties. This document should thus be produced.

11 Privilege Log Item Nos. 1, 4, and 6 contain a variety of information, including factual
12 information about the incident in question. They also discuss, however, information and
13 investigations of post-incident conduct by non-parties that are not relevant to the claim in this
14 case. The court thus determines that these documents may be produced in redacted form. In
15 particular, the portions of the documents that describe only the underlying use-of-force incident
16 by defendants, and the conclusions and recommendations related thereto (i.e. whether the prison's
17 investigation concluded that excessive force had been used against plaintiff during the incident),
18 should be produced to plaintiff. The portions of the documents that contain information related to
19 administrative actions or investigations of post-incident conduct by non-parties must be redacted.

20 In addition to these redactions, the court directs defendants to redact the following information in
21 Privilege Log Item Nos. 1 and 4:

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24 ⁵ "Evidence is relevant if it has any tendency to make a fact more or less probable than it would
25 be without the evidence, and the fact is of consequence in determining the action." Fed. R. Evid.
401.

26 ⁶ Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's
27 claim or defense, and for good cause, the court may order discovery of any matter relevant to the
28 subject matter involved in the action. Fed. R. Civ. P. 26(b)(1). Relevant information need not be
admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of
admissible evidence. Id.

1 In Privilege Log Item No. 1 defendants are instructed to redact the name, title, and
2 signature of the CDCR employee designated as “Analyst.”

3 Privilege Log Item No. 4 includes the name and CDC number of an inmate witness.
4 Defendants must redact the name, identifying information and any information that may
5 potentially identify the inmate witness, and redesignate this witness as “Inmate #1.”

6 The court further notes that the two medical reports attached to Privilege Log Item No. 4
7 appear to have already been produced to plaintiff. See ECF No. 81-1 at 46-47. If those
8 documents have in fact previously been produced to plaintiff, defendants do not need to produce
9 those documents again. In addition, plaintiff’s handwritten statement dated November 6, 2012,
10 attached as part of Privilege Log Item No. 4, should be produced to plaintiff.

11 The court will allow defendants to withhold Privilege Log Item Nos. 2, 3, 7, and 8 in their
12 entirety. Those documents focus largely on the administrative investigation of actions by non-
13 parties following the use-of-force incident and contain little or no unique factual information
14 describing the underlying incident. In particular, Privilege Log Item No. 7 contains detailed
15 information about, and investigation into, post-incident actions of a non-party correctional officer
16 not related to plaintiff’s Eighth Amendment excessive use of force claim. Similarly, Privilege
17 Log Item Nos. 2, 3, and 8 contain only information related to administrative actions taken with
18 respect to non-party CDCR employees. Such internal CDCR proceedings regarding post-incident
19 actions by non-parties are not relevant to the factual questions in this case, and any relevant
20 information is outweighed by concerns regarding revealing internal CDCR procedures.

21 Furthermore, these documents do not contain any relevant information beyond that already
22 provided to plaintiff, i.e., they reflect that defendants’ use of force did not violate CDCR policy.
23 See ECF No. 81-2 at 14, 20-21. Thus, the privilege is properly asserted with respect to these
24 documents and disclosure is not required. See Sansone v. Thomas, No. 1:13-cv-01942 DAD EPG
25 (PC), 2016 WL 6896047, at *2-3, 2016 U.S. Dist. LEXIS 162154, at *5-6 (E.D. Cal. Nov. 22,
26 2016).

27 C. Protective Order

28 Defendants have requested that if the court orders production of the documents, the

1 documents be kept at the litigation office of the institution where plaintiff is housed,
2 and plaintiff should be permitted to review the documents upon request and take notes, but not
3 allowed to take the confidential documents to his cell. See ECF No. 76 at 6

4 A protective order is indeed warranted given the institutional concerns articulated by
5 defendants. In light of the relatively straightforward nature of defendants' request, there is no
6 need for defendants to file a separate motion seeking a protective order. The court's Protective
7 Order shall issue, sue sponte, as follows:

8 Defendants shall produce the said material, and plaintiff may review it and use it in
9 litigating this matter subject to and strictly in accordance with following terms and conditions:

- 10 1. The confidential documents may be submitted to the possession of the following
11 persons:
 - 12 a. The Litigation Coordinator at the institution where plaintiff is now housed;
 - 13 b. Counsel for plaintiff in this action, should plaintiff acquire counsel;
 - 14 c. Paralegal, stenographic, clerical, and secretarial personnel regularly
15 employed by counsel for plaintiff;
 - 16 d. Court personnel and stenographic reporters engaged in such proceedings as
17 are incidental to the preparation for trial or trial of this action;
 - 18 e. Any outside expert or consultant retained by plaintiff's counsel for
19 purposes of this action; and
 - 20 f. Non-inmate witnesses to whom the materials need be disclosed as
21 necessary for preparation for trial and trial of this case, provided that each
22 witness shall be informed of and agree in writing to be bound by the terms
23 of this order, and shall not, in any event, be permitted to take or retain
24 copies of the material.
- 25 2. Plaintiff will be allowed to review the confidential materials, but he may not copy
26 them, retain them, or retain copies of them in his possession. The Litigation
27 Coordinator at plaintiff's institution shall allow plaintiff up to 90 minutes to
28 review the materials and to take notes. Plaintiff may not disclose the documents

1 to, or discuss their content with, any other inmate, nor may any other inmate
2 review or have possession of the materials or plaintiff's notes.

- 3 3. All material produced hereunder in possession of the Litigation Coordinator shall
4 be destroyed or returned to defendants' counsel no later than thirty days after trial
5 of this matter.
- 6 4. Upon final judgment and resolution of any appeal, plaintiff or his counsel shall
7 return or destroy all such materials still in or subject to their possession or control,
8 and shall provide defendants' counsel with sworn declarations stating they have
9 done so.
- 10 5. Confidential material obtained by plaintiff or his counsel shall not be disclosed,
11 except as is necessary to the litigation of this case or its appeal, and for no other
12 purpose.
- 13 6. Any confidential material filed with the court by either party shall be filed and
14 maintained under seal.
- 15 7. Any violation of this Protective Order may be punishable as Contempt of Court
16 and also may subject the violating party to litigation sanctions, including
17 dispositive sanctions, in the court's discretion;
- 18 8. Nothing in this Protective Order is intended to prevent officials or employees of
19 the State of California, or other authorized government officials, from having
20 access to confidential material to which they would have access in the normal
21 course of their official duties.
- 22 9. The provisions of this Protective Order are without prejudice to the right of any
23 party:
 - 24 a. To apply to the court for a further protective order relating to this or any
25 confidential material or relating to discovery in this litigation;
 - 26 b. To apply to the court for an order removing the confidential material
27 designation from any documents;

- 1 c. To apply to the court for an order modifying this Protective Order for good
2 cause shown; or
3 d. To object to a discovery request.

4 10. The provisions of this order shall remain in full force and effect until further order
5 of this court.

6 IV. Discovery Motions

7 A. Motion Opposing Reconsideration (ECF No. 77)

8 Plaintiff has filed a “Motion Opposing Reconsideration” of the March 9, 2016 order,
9 asserting that the Office of the Attorney General lied, hid the truth, mislead, and confused him in
10 connection with his document requests for the excessive use reports and the video interview
11 conducted by Lt. Hobart. ECF No. 77. The motion for reconsideration of the March 9, 2016 was
12 ruled on and granted in part on April 14, 2016. ECF No. 72. Thus, plaintiff’s instant motion
13 appears moot.

14 To the extent plaintiff asserts that defendants have not complied with the April 14, 2016
15 order (ECF No. 72) or have hid Lt. Hobart’s video and report, plaintiff’s assertions are
16 unsupported. As set forth above, defendants have complied with the court’s April 14, 2016 order
17 by submitting documents to the court for in camera review and filing objections to the disclosure
18 of those reports. The court’s review of those documents is discussed above. Specifically, the
19 court has determined that Lt. Hobart’s report dated November 9, 2012 (Privilege Log Item No. 4),
20 must be produced to plaintiff with the appropriate redactions. Thus, plaintiff’s request for this
21 document has been granted.

22 With respect to plaintiff’s allegations that defendants hid the Lt. Hobart video, the
23 undersigned has already resolved that the Lt. Hobart video could not be located and denied
24 plaintiff’s motion to compel that video. ECF No. 66 at 5-6. The court reasoned as follows:

25 Defendants assert that they conducted a search for the Lt.
26 Hobart video and have been unable to locate it. ECF No. 48 at 2;
27 ECF No. 47 at 2. Counsel for defendants filed a declaration with
28 the court explaining that she contacted the Litigation Coordinator at
California State Prison-Sacramento, the Litigation Coordinator at
the Office of Internal Affairs, and a sergeant from the Investigative
Services Unit. ECF No. 47 Exh. 1 at 4-5. Counsel’s search

1 revealed that one use of force video was placed in the evidence
2 locker on October 10, 2012. Id. at 5. None of the parties contacted
3 were able to locate a DVD of a second interview of plaintiff. Id. at
4 5.

5 While plaintiff speculates that the Lt. Hobart video has been
6 hidden or destroyed, counsel for defendants has declared under
7 penalty of perjury that she has been unable to locate the video
8 despite a diligent search. The court has reviewed counsel's
9 declaration and finds the search conducted for the Lt. Hobart video
10 to be sufficiently diligent. Under these circumstances, the court
11 cannot compel further production of the Lt. Hobart video from
12 defendants. Defendants cannot be compelled to produce a video
13 they do not have. . . .

14 ECF No. 66 at 5-6. The court further advised plaintiff that, even without the Lt. Hobart video,
15 plaintiff would be able to provide his account of the October 10, 2012 events in the form of his
16 own direct testimony should this case proceed to trial. Id. at 6.

17 The court cannot require defendants to produce a videotape that does not exist. Plaintiff's
18 motion to compel a further response is therefore denied.

19 Plaintiff also asserts a due process violation in connection with the administrative appeals
20 process. ECF No. 77 at 2-5. This case is proceeding on plaintiff's Eighth Amendment excessive
21 use of force claim. Accordingly, allegations regarding violations of due process during the
22 appeals process are not relevant. In addition, plaintiff's contentions that certain documents
23 submitted in connection with the administrative appeals are false or fabricated are unclear and
24 unfounded. Finally, plaintiff's assertions that correctional officers submitted false reports that
25 resulted in his placement in administrative segregation are also irrelevant to the discovery
26 response in this case. Plaintiff appears to be disputing the administrative disciplinary findings,
27 which are not at issue here. Plaintiff's Motion Opposing Reconsideration (ECF No. 77) is
28 therefore denied.

29 B. Motion to Compel (ECF No. 84)

30 Plaintiff has filed another motion to compel. ECF No. 84. This motion contains many of
31 the same due process arguments advanced in plaintiff's Motion Opposing Reconsideration (ECF
32 No. 77). Those arguments fail for the same reasons set forth above in Section IV(A).

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1 Plaintiff also asserts that defendants did not submit the correct documents for in camera
2 review and requests that the court review Lt. Hobart's report and video and Lt. Matthew's report
3 and video. ECF No. 84 at 2. The court has reviewed in camera the two reports and directed
4 defendants to produce to plaintiff Lt. Hobart's report dated November 9, 2012 (Privilege Log
5 Item No. 4), with the appropriate redactions, and Lt. Matthew's report dated October 12, 2012
6 (Privilege Log Item No. 5). Therefore, plaintiff's request to compel production of these reports is
7 now moot. With respect to the video requests, the October 10, 2012 video has been produced to
8 plaintiff. And, as previously resolved by this court, the second video tape could not be located.
9 Accordingly, plaintiff's motion to compel (ECF No. 84) is denied.

10 C. Discovery Motion (ECF No. 92)

11 Plaintiff has filed a motion entitled "Discovery Event" urging the court to respond to his
12 previous motions and to conduct an in camera review. ECF No. 92. The undersigned has now
13 completed the in camera review, and by this order resolves plaintiff's outstanding discovery
14 motions directs defendants to produce certain documents to plaintiff. Thus, plaintiff's motion
15 (ECF No. 92) is denied as moot.

16 V. Motion to Amend Complaint (ECF No. 87)

17 Plaintiff seeks to amend his complaint to add a Fourteenth Amendment Due Process
18 claim. ECF No. 87.

19 Pursuant to Rule 15, "leave to amend should be granted unless amendment would cause
20 prejudice to the opposing party, is sought in bad faith, is futile, or creates undue delay." Johnson
21 v. Mammoth Recreations, Inc., 975 F.2d 604, 607 (9th Cir. 1992) (citing DCD Programs, Ltd. v.
22 Leighton, 833 F.2d 180, 185-87 (9th Cir. 1987)).

23 As an initial matter, plaintiff has not filed a proposed amended complaint with his current
24 motion, as required by Local Rule 137(c). As a prisoner, plaintiff's pleadings are subject to
25 evaluation by this court pursuant to the in forma pauperis statute. See 28 U.S.C. § 1915A.
26 Because plaintiff did not submit a proposed amended complaint, the court is unable to evaluate it.
27 Furthermore, as set forth below, review of the motion shows that plaintiff's proposed amendment
28 should be denied.

1 “Late amendments to assert new theories are not reviewed favorably when the facts and
2 the theory have been known to the party seeking amendment since the inception of the cause of
3 action.” In re W. States Wholesale Natural Gas Antitrust Litig., 715 F.3d 716, 739 (9th Cir.
4 2013), aff’d sub nom. Oneok, Inc. v. Learjet, Inc., 135 S. Ct. 1591 (2015) (citation omitted).
5 Plaintiff’s allegations in support of his proposed amended claim relate to his administrative
6 appeals and/or the handling of his disciplinary hearing, which all occurred before plaintiff filed
7 his original complaint. ECF No. 1-2, Ex. B. This court finds that plaintiff had knowledge of the
8 relevant facts at the inception of this action and thus has unduly delayed seeking to amend his
9 complaint.⁷

10 The court also finds that amendment at this late stage would unduly delay this litigation
11 and unfairly prejudice defendants. The discovery deadline in this case expired on April 17, 2015,
12 and dispositive motions have been filed and resolved. Moreover, if plaintiff files an amended
13 complaint, the court will be required to screen the amended complaint and proceed with service
14 of process and further discovery, which could take months or even years.

15 Based on the foregoing, the court does not find good cause to grant plaintiff’s motion to
16 amend the complaint (ECF No. 87), and the motion shall be denied.

17 VI. Motion for Sanctions (ECF No. 91)

18 Plaintiff has filed a “Motion Seeking Understanding and Sanctions.” ECF No. 91.

19 Rule 37 permits the district court, in its discretion, to enter a default judgment against a
20 party who fails to comply with an order compelling discovery. Fed. R. Civ. P. 37(b)(2)(C); see
21 also Computer Task Grp., Inc. v. Brotby, 364 F.3d 1112, 1115 (9th Cir. 2004). Where drastic
22 sanctions of dismissal or default are imposed, the noncompliance must be due to willfulness,
23 fault, or bad faith. Computer Task Grp., 364 F.3d at 1115.

24 As set forth above, defendants have filed supplement responses and submitted documents
25 for in camera review as ordered by the court. Specifically, defendants submitted for in camera

26 ⁷ Plaintiff has filed a federal habeas corpus action asserting claims similar to those he proposes to
27 assert in an amended complaint – that he was denied a fair hearing on November 16, 2012, and
28 was not provided documentary evidence. See Grigsby v. Mungia, No. 2:16-cv-01105 (E.D. Cal.
2016); ECF No. 89, Ex. 1.

1 review Lt. Matthew's report dated October 12, 2012 (Privilege Log Item No. 5) and Lt. Hobart's
2 report dated October 12, 2012 (Privilege Log Item No. 4), and this court has directed defendants
3 to produce those reports to plaintiff. Plaintiff has not shown that defendants failed to comply with
4 the court's discovery orders.

5 Defendants also produced to plaintiff a copy of the October 10, 2012 video. Plaintiff
6 asserts, however, that the wrong video was produced because the interview was conducted by Sgt.
7 Williams – not Lt. Matthews – and that any assertion that the interview was not conducted by Lt.
8 Matthews is a lie. ECF 91 at 1. Plaintiff further alleges that the interview was conducted at or
9 around 12:47 p.m. and that the interview that was produced was at 2:55 p.m. Id. Plaintiff is
10 mistaken: the incident at issue occurred on October 10, 2012 at or around 12:47 p.m., and at
11 approximately 1455 hours (or 2:55 p.m.), Sgt. Williams was assigned as the camera operator for
12 the October 10, 2012 interview regarding that incident. See ECF No. 47 at 12-13.

13 Pursuant to the court's order (ECF No. 66 at 5), defendants have submitted credible
14 evidence that the October 10, 2012 video produced to plaintiff was not altered. Specifically,
15 defendants submitted the declaration of Annette L. Phillips, a legal analyst within the
16 Correctional Writs and Appeals section of the Office of the Attorney General, who confirmed that
17 all copies of the October 10, 2012 video, including the copy plaintiff reviewed, were two minutes
18 and forty-nine seconds in length. ECF No. 73, Ex. 1, ¶¶ 1, 3-7. That all copies of the video were
19 the same length leads to the conclusion that none of the video copies was tampered with.

20 Furthermore, as previously resolved by this court, the second video tape could not be
21 located and defendants cannot be compelled to produce what it does not have. ECF No. 66 at 5-6.
22 Defendants also submitted a confidential report under seal (Privilege Log Item No. 2) that
23 confirms a second video could not be located.

24 Plaintiff again asserts in his motion for sanctions that his due process rights were violated
25 and that documents have been falsified in connection with the administrative appeal process.
26 ECF No. 91 at 2. As stated above, these arguments are not relevant to his Eighth Amendment
27 excessive use of force claim. Therefore, the court will not consider them here.

28 Based on the foregoing, plaintiff's motion for sanctions (ECF No. 91) is denied.

1 VII. Motions for Writ of Habeas Corpus Ad Testificandum (ECF Nos. 75, 80)

2 Plaintiff has also filed motions for writ of habeas corpus ad testificandum. ECF Nos. 75,
3 80. As plaintiff's case has not yet been set for trial, plaintiff's motions are premature. The
4 motion is denied at this time, but plaintiff may re-file his motion should this case proceed to trial.

5 VIII. Motions for Appointment of Counsel (ECF Nos. 71, 74, 78)

6 Plaintiff has requested appointment of counsel. In three identical motions, plaintiff asserts
7 that appointment of counsel is warranted because he has limited legal knowledge and has been
8 denied the Lt. Hobart video and other related documents from defendants. ECF Nos. 71, 74, 78.
9 Plaintiff asserts that the attorney general has "purposefully withheld" the Lt. Hobart video, and
10 the CDCR has either "destroyed or thrown out key evidence in [his] lawsuit." ECF Nos. 71 at 1,
11 74 at 1, 78 at 1. Plaintiff argues that counsel could more easily request these documents and "see
12 documents that [plaintiff] [is] not entitled to see." ECF Nos. 71 at 3, 74 at 3, 78 at 3.

13 The United States Supreme Court has ruled that district courts lack authority to require
14 counsel to represent indigent prisoners in § 1983 cases. Mallard v. United States Dist. Court, 490
15 U.S. 296, 298 (1989). In certain exceptional circumstances, the district court may request the
16 voluntary assistance of counsel pursuant to 28 U.S.C. § 1915(e)(1). Terrell v. Brewer, 935 F.2d
17 1015, 1017 (9th Cir. 1991); Wood v. Housewright, 900 F.2d 1332, 1335-36 (9th Cir. 1990).

18 When determining whether "exceptional circumstances" exist, the court must consider
19 plaintiff's likelihood of success on the merits as well as the ability of the plaintiff to articulate his
20 claims pro se in light of the complexity of the legal issues involved. Palmer v. Valdez, 560 F.3d
21 965, 970 (9th Cir. 2009). The burden of demonstrating exceptional circumstances is on the
22 plaintiff. Id. Circumstances common to most prisoners do not establish exceptional
23 circumstances.

24 In the present case, the court does not find the required exceptional circumstances at this
25 time. Plaintiff's excessive force claim is not particularly complex, and plaintiff has thus far been
26 able to articulate his claims pro se. Indeed, the court has denied defendants' motion for summary
27 judgment and is directing defendants to produce further documents to plaintiff relevant to his
28 claim. Plaintiff's limited legal knowledge and discovery disputes with defendants are

1 circumstances common to most prisoners that do not warrant appointment of counsel. Therefore,
2 plaintiff's request for appointment of counsel will be denied without prejudice.

3 IX. Motions for Report of Findings and Court Order (ECF Nos. 94, 100)

4 Plaintiff has filed motions requesting that the court conduct an in camera review of the
5 documents submitted by defendants, that Lt. Hobart's report and video be produced, and that he
6 be allowed to amend his complaint. ECF Nos. 94, 100. As previously stated, defendants
7 produced Lt. Hobart's report for in camera review, and this court has reviewed the documents and
8 directed defendants to produce to plaintiff several documents, including Lt. Hobart's report with
9 appropriate redactions. Furthermore, this court previously found that defendants do not possess a
10 second video interview with Lt. Hobart and plaintiff. Finally, as set forth above in Section V, this
11 court denied plaintiff's motion to amend his complaint. Accordingly, plaintiff's motions for
12 report of findings and court order are denied as moot.

13 X. Motion for Settlement Conference (ECF No. 99)

14 Plaintiff has filed a motion for a settlement conference indicating his willingness to settle
15 the case instead of going to trial. See ECF No. 99. Defendants have not responded to plaintiff's
16 motion. Defendants are ordered to file a response to plaintiff's motion for settlement conference
17 within twenty-one days of this order.

18 XI. Conclusion

19 In accordance with the above, IT IS HEREBY ORDERED that:

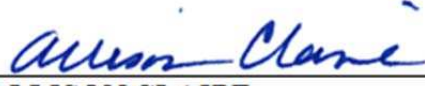
- 20 1. Defendants shall produce to plaintiff the documents listed above, and redacted as
21 directed, in Section III(B), within twenty-one days of this order and subject to the
22 Protective Order set forth in Section III(C).
- 23 2. Plaintiff's Motion Opposing Reconsideration (ECF No. 77) is denied.
- 24 3. Plaintiff's motion to compel (ECF No. 84) is denied.
- 25 4. Plaintiff's discovery motion (ECF No. 92) is denied.
- 26 5. Plaintiff's motion to amend the complaint (ECF No. 87) is denied.
- 27 6. Plaintiff's motion for sanctions (ECF No. 91) is denied.

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- 7. Plaintiff's motions for writ of habeas corpus ad testificandum (ECF Nos. 75, 80) are denied without prejudice to their re-filing should this case proceed to trial.
- 8. Plaintiff's motions for appointment of counsel (ECF Nos. 71, 74, 78) are denied without prejudice.
- 9. Plaintiff's motions for report of findings and court order (ECF Nos. 94, 100) are denied.
- 10. Defendants shall file a response to plaintiff's motion for settlement conference (ECF No. 99) within twenty-one days of this order.

DATED: February 15, 2017



ALLISON CLAIRE
UNITED STATES MAGISTRATE JUDGE