

1 and wrist during an approximately one-year period beginning in March 2015. See id. at 9-10.
2 Plaintiff's claims against Phui are based upon an alleged lack of treatment for severe pain and
3 Hepatitis C that began when Phui took over as plaintiff's health care provider in November 2018.
4 Id. at 17-19.

5 II. Motion for a Restraining Order

6 A temporary restraining order is an extraordinary measure of relief that a federal court
7 may impose without notice to the adverse party if, in an affidavit or verified complaint, the
8 movant "clearly show[s] that immediate and irreparable injury, loss, or damage will result to the
9 movant before the adverse party can be heard in opposition." Fed. R. Civ. P. 65(b)(1)(A). The
10 standard for issuing a temporary restraining order is essentially the same as that for issuing a
11 preliminary injunction. Stuhlbarg Int'l Sales Co. v. John D. Brush & Co., 240 F.3d 832, 839 n.7
12 (9th Cir. 2001) (stating that the analysis for temporary restraining orders and preliminary
13 injunctions is "substantially identical").

14 "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on
15 the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the
16 balance of equities tips in his favor, and that an injunction is in the public interest." Winter v.
17 Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008) (citations omitted). The propriety of a request
18 for injunctive relief hinges on a threat of irreparable injury that must be imminent in nature.
19 Caribbean Marine Servs. Co. v. Baldrige, 844 F.2d 668, 674 (9th Cir. 1988) (citation omitted).
20 "Speculative injury does not constitute irreparable injury sufficient to warrant granting a
21 preliminary injunction." Id. (citing Goldie's Bookstore, Inc. v. Superior Ct., 739 F.2d 466, 472
22 (9th Cir. 1984)).

23 Plaintiff alleges that since his retaliatory transfer to Kern Valley State Prison (KVSP), he
24 has been denied access to the law library and has been unable to obtain legal supplies or copies.
25 ECF No. 117. He seeks an order from this court directing that he be sent back to the E-Yard at
26 Substance Abuse and Treatment Facility (SATF) where he will have access to the law library or,
27 alternatively, that the warden at KVSP be ordered to provide him at least four hours of law library
28 access per week for ninety days. Id. at 5.

1 Although plaintiff alleges that his transfer and lack of library access are in retaliation for
2 pursuing this lawsuit, he provides no evidence to support this allegation. Furthermore, plaintiff
3 has since filed a notice of change of address that indicates that he has been transferred from
4 KVSP to California State Prison, Lancaster. ECF No. 124. His numerous and often lengthy
5 filings since that time indicate that he is currently receiving access to the law library and adequate
6 copy service and supplies. See ECF Nos. 126-130, 137, 138, 140. Because plaintiff has not
7 demonstrated that he will be subject to irreparable harm absent the issuance of a temporary
8 restraining order or preliminary injunction, and because he is no longer housed at KVSP and has
9 not demonstrated a reasonable expectation of being returned to that facility, the motion should be
10 denied. See Nelson v. Heiss, 271 F.3d 891, 897 (9th Cir. 2001) (“[W]hen a prisoner is moved
11 from a prison, his action [for injunctive relief] will usually become moot as to conditions at that
12 particular facility” (citing Dilley v. Gunn, 64 F.3d 1365, 1368-69 (9th Cir. 1995))); Johnson v.
13 Moore, 948 F.2d 517, 519 (9th Cir. 1991) (per curiam) (claims for injunctive relief related to
14 conditions of confinement were moot where prisoner was transferred to another facility and
15 “demonstrated no reasonable expectation of returning to [the original facility].” (citing Darring v.
16 Kincheloe, 783 F.2d 874, 876 (9th Cir. 1986))).

17 III. Discovery Motions

18 Plaintiff currently has three discovery motions pending before the court. ECF Nos. 118,
19 128, 130. Defendants oppose the motions to compel. ECF Nos. 132, 139.

20 A. Motion for Producing Documents

21 Plaintiff’s first motion, styled as a motion for producing documents under Federal Rule of
22 Civil Procedure 34, is comprised of declarations and an index of various exhibits that plaintiff
23 seeks to have “stored in the CM/ECF for trial,” discovery requests for defendants Mays and Phui,
24 a request for expert testimony under Federal Rule of Civil Procedure 35, and a subpoena for
25 plaintiff’s appearance at trial. ECF No. 118.

26 Plaintiff has been previously advised that he should not file exhibits with the court unless
27 they are attached to and being used in support of or in opposition to a pending motion, ECF No.
28 103 at 1 n.1, and his request to be permitted to file the exhibits in order to store them for trial will

1 be denied. In the event this case proceeds to trial, plaintiff will have an opportunity to submit
2 exhibits. With respect to the attached discovery requests to defendants, the motion indicates that
3 at the time of filing they had not yet been served on defendants,¹ ECF No. 118 at 30, and plaintiff
4 is advised that requests for discovery are not to be filed with the court unless they are being used
5 in the proceedings or the court orders them filed, Fed. R. Civ. P. 5(d)(1)(A).

6 Plaintiff's motion also includes a request for an independent medical examination under
7 Federal Rule of Civil Procedure 35. ECF No. 118 at 101-02. Federal Rule of Civil Procedure
8 35(a) provides that

9 [t]he court where the action is pending may order a party whose
10 mental or physical condition . . . is in controversy to submit to a
11 physical or mental examination by a suitably licensed or certified
12 examiner. The court has the same authority to order a party to
produce for examination a person who is in its custody or under its
legal control.

13 However, "Rule 35 does not allow for a physical examination of oneself." Berg v. Prison Health
14 Servs., 376 F. App'x 723, 724 (9th Cir. 2010) (citing Fed. R. Civ. P. 35; Schlagenhauf v. Holder,
15 379 U.S. 104, 118-19 (1964)); see also Hanna v. Chudy, 2011 WL 2039421, at *1, 2011 U.S.
16 Dist. LEXIS 55972, at *3 (N.D. Cal. May 25, 2011) (collecting district court cases holding same).
17 Furthermore, even if the court were to grant plaintiff's request for an examination, he would be
18 responsible for the costs associated with the examination because the statute authorizing
19 plaintiff's in forma pauperis status does not authorize the expenditure of public funds for expert
20 witnesses. See 28 U.S.C. § 1915; Tedder v. Odel, 890 F.2d 210, 211-12 (9th Cir. 1989) (per
21 curiam) (expenditure of public funds on behalf of indigent litigant is proper only when authorized
22 by Congress); Boring v. Kozakiewicz, 833 F.2d 468, 474 (3d Cir. 1987) (no provision to pay fees
23 for expert witnesses). The motion will therefore be denied.

24 Finally, plaintiff requests a subpoena to secure his presence at trial. ECF No. 118 at 30,

25 ¹ The motion requests that plaintiff be provided with two copies of the motion so that he can send
26 the requests to defendants. ECF No. 118 at 30. However, his later filed reply in support of his
27 first motion to compel indicates that they have since been served. ECF No. 137 at 6. Plaintiff is
28 advised that the court does not provide free copy services. The Clerk's Office provides copies of
documents at \$0.50 per page, and any requests for copies must be accompanied by the appropriate
fees.

1 103. It has not yet been determined that this action will proceed to trial. Furthermore, should this
2 case proceed to trial, a subpoena for plaintiff's presence is not necessary and the court will issue
3 any writs necessary to secure plaintiff's appearance at the appropriate time. The request for a
4 subpoena will therefore be denied.

5 B. Motions to Compel

6 Plaintiff has filed two motions to compel. ECF Nos. 128, 130. In the first motion,
7 plaintiff alleges that defendants have completely failed to respond to his requests for production
8 and admissions. ECF No. 128. The second motion seeks to compel responses to interrogatories
9 and requests for admission on the ground that defendants' objections were improper. ECF No.
10 130. Defendants oppose the first motion on the ground that they timely responded to the
11 discovery requests and the second motion on the ground that plaintiff has failed to specifically
12 identify the responses he believes are deficient. ECF Nos. 132, 139. They further oppose both
13 motions on the ground that plaintiff did not comply with Local Rule 251. Id.

14 As an initial matter, the discovery and scheduling order specifically exempts this case
15 from the requirements of Local Rule 251. ECF No. 111 at 5, ¶ 6. Furthermore, while Federal
16 Rule of Civil Procedure 37(a)'s requirement that the movant attempt to confer with the other
17 party prior to bringing a motion to compel has not been explicitly excused and the court
18 encourages parties to attempt to resolve disputes prior to seeking court intervention, because of
19 plaintiff's status as a pro se prisoner, it will not be enforced here and will not provide grounds for
20 denying the motion.

21 Plaintiff's first motion to compel alleges that he served defendants with requests for
22 admission and the production of documents during the last week of June 2021, and that he had
23 not received any response as of September 3, 2021. ECF No. 128 at 1. Defendants oppose the
24 motion and assert that they did not receive the requests until July 26, 2021, that they were
25 accompanied by a certificate of service that indicated they were mailed on July 11, 2021, and that
26 they served timely responses on August 25, 2021. ECF No. 132 at 2-3. In reply, plaintiff
27 clarifies that on June 23, 2021, he mailed interrogatories and a letter directing defendants' counsel
28 to the requests for admission and production that he had filed with the court because he was

1 unable to obtain copies. ECF No. 137 at 5. Then on July 6, 2021, he mailed copies of the
2 requests for admissions and production to counsel, but believes that he must have mistakenly
3 written July 11, 2021, on the certificate of service. Id. at 6.

4 Plaintiff's referral of counsel to the discovery requests he filed with the court did not
5 constitute proper service of the discovery requests, and did not obligate defendants to respond to
6 the requests at that time. Furthermore, it appears that defendants timely responded to plaintiff's
7 requests based upon the information available to them. Plaintiff's motion to compel responses to
8 his requests for admission and production will therefore be denied.

9 Plaintiff's second motion seeks compelled responses to his interrogatories and requests for
10 admissions, on the ground that defendants' objections were improper. ECF No. 130. However,
11 plaintiff has not provided a copy of the requests and objections and, with the exception of
12 Interrogatory No. 12 to defendant Phui, plaintiff does not specifically identify any responses that
13 he believes are deficient. Furthermore, although plaintiff states that the response to Interrogatory
14 No. 12 is deficient, he does not provide the request or the response. Id. at 2.

15 The Court does not hold prisoners proceeding pro se to the same
16 standards that it holds attorneys. However, at a minimum, as the
17 moving party plaintiff bears the burden of informing the court of
18 which discovery requests are the subject of his motion to compel and,
for each disputed response, why defendant's objection is not
justified.

19 Waterbury v. Scribner, No. 1:05-cv-0764 OWW DLB PC, 2008 WL 2018432, at *1, 2008 U.S.
20 Dist. LEXIS 53142, at *3 (E.D. Cal. May 8, 2008). Because plaintiff has not specifically
21 identified the responses at issue or provided the requests and responses, the court is unable to
22 evaluate the sufficiency of defendants' responses or the appropriateness of their objections. The
23 motion accordingly will be denied.

24 IV. Motion for Appointment of Counsel

25 Plaintiff has requested the appointment of counsel. ECF No. 120. The United States
26 Supreme Court has ruled that district courts lack authority to require counsel to represent indigent
27 prisoners in § 1983 cases. Mallard v. United States Dist. Court, 490 U.S. 296, 298 (1989). In
28 certain exceptional circumstances, the district court may request the voluntary assistance of

1 counsel pursuant to 28 U.S.C. § 1915(e)(1). Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir.
2 1991); Wood v. Housewright, 900 F.2d 1332, 1335-36 (9th Cir. 1990).

3 “When determining whether ‘exceptional circumstances’ exist, a court must consider ‘the
4 likelihood of success on the merits as well as the ability of the [plaintiff] to articulate his claims
5 *pro se* in light of the complexity of the legal issues involved.’” Palmer v. Valdez, 560 F.3d 965,
6 970 (9th Cir. 2009) (quoting Weygandt v. Look, 718 F.2d 952, 954 (9th Cir. 1983)). The burden
7 of demonstrating exceptional circumstances is on the plaintiff. Id. Circumstances common to
8 most prisoners, such as lack of legal education and limited law library access, do not establish
9 exceptional circumstances that would warrant a request for voluntary assistance of counsel.

10 Plaintiff requests counsel on the ground that he was assaulted by officers at KVSP and had
11 some of his property taken in retaliation for pursuing this lawsuit. ECF No. 120. Although
12 plaintiff’s allegations are serious, he has not provided any evidence to substantiate his claims that
13 he is being retaliated against. Moreover, plaintiff has not demonstrated that he is unable to pursue
14 this action without the assistance of counsel, and his numerous filings up to this point have
15 demonstrated that even if he is not always successful, he is capable of articulating his claims and
16 arguments without assistance. For these reasons, plaintiff has not shown the existence of
17 extraordinary circumstances warranting the appointment of counsel and the motion will be
18 denied.

19 V. Motion to be Interviewed

20 Plaintiff has filed a motion requesting that the court order an investigator from the
21 Inspector General’s Office to interview him in relation to an alleged assault by correctional
22 officers on July 13, 2021. ECF No. 123. This request is outside the authority of the court and
23 will therefore be denied. If plaintiff seeks to pursue claims related to the alleged assault, he may
24 do so by initiating a separate lawsuit based on those claims after exhausting any available
25 administrative remedies.

26 VI. Motion for Summary Judgment

27 Plaintiff has filed a one-hundred-and-twenty-page motion for summary judgment, not
28 including exhibits or his separate statement of facts. ECF No. 126. A review of the motion

1 reveals that a significant portion of the motion is comprised of a lengthy and rambling recitation
2 of plaintiff's medical encounters and appeals that includes numerous allegations of deficient care
3 by other individuals, including previously dismissed defendants. Id. at 23-100. Plaintiff also
4 appears to be attempting to reinstate some of his claims against previously dismissed defendants,
5 id. at 105-08; and makes a number of allegations unrelated to the claims in the complaint, see,
6 e.g., id. at 13-20, 78-79, 98, 110-11, 117, 119-20. The motion further includes a request for leave
7 to amend the complaint, id. at 20; indicates that plaintiff is still awaiting supporting
8 documentation that he requested during discovery and seeks to compel, id. at 68, 74, 112, 114-18;
9 and requests a "Third Party Examination and Expert Testimony" under Federal Rule of Civil
10 Procedure 35, id. at 113, 116-17. Additionally, although it appears that plaintiff has attempted to
11 comply with applicable the rules, his separate statement of facts does not comply with Federal
12 Rule of Civil Procedure 56(c) or Local Rule 260(a). The statement of facts contains arguments
13 and legal citations, does not contain separately numbered facts, and does not contain citations to
14 *specific* portions of the record for each fact set forth.²

15 The undersigned's standing orders limit motions on non-discovery matters to twenty
16 pages. Although pro se prisoners who submit handwritten documents may be afforded some
17 leeway, plaintiff's motion for summary judgment far exceeds the permissible page limit and the
18 excessive page count appears to be due in no small part to plaintiff's failure to limit his motion to
19 a request for summary judgment on the claims presently before the court. Furthermore, plaintiff's
20 motion states his desire to amend the complaint and compel discovery, indicating that the motion
21 may be premature. In light of the excessive length and scope of plaintiff's motion and his failure
22 to comply with Federal Rule of Civil Procedure 56(c) or Local Rule 260(a), the motion for
23 summary judgment will be stricken. Because the motion is being stricken, defendants' motion for
24 an extension of time to respond to the motion for summary judgment, ECF No. 133, will be
25 denied as moot.

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27 ² Although there are some specific citations, some citations are to lengthy exhibits and do not
28 identify specific, relevant page numbers, and other citations are to the motion for summary
judgment itself.

1 If plaintiff chooses to file another motion for summary judgment, the motion must be
2 limited to facts and arguments necessary to demonstrate that plaintiff is entitled to summary
3 judgment on his claims against defendants May and Phui. Requests for relief that are not related
4 to summary judgment must be brought by separate motion. Any motion for summary judgment
5 should be limited to twenty pages, and should plaintiff need to exceed the twenty-page limit, the
6 motion should be accompanied by a motion requesting leave to exceed the page limit. Finally,
7 plaintiff's separate statement of facts should contain separately numbered facts that cite to
8 specific portions of the record and should not contain arguments or citations to legal authority.

9 VII. Motion to Amend

10 A plaintiff may amend his complaint once as a matter of course within "(A) 21 days after
11 serving it, or (B) if the pleading is one to which a responsive pleading is required, 21 days after
12 service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f),
13 whichever is earlier." Fed. R. Civ. P. 15(a)(1). Defendants' answer was filed on August 24,
14 2020. ECF No. 89. Although the case was stayed at the time, the stay of this case was lifted on
15 June 7, 2021, ECF No. 111, and plaintiff did not file his motion to amend until September 8,
16 2021,³ ECF No. 127. Plaintiff is therefore outside the time to file an amended complaint as a
17 matter of course and must obtain leave of the court or defendants' consent. See Fed. R. Civ. P.
18 15(a)(2).

19 To the extent the motion to amend seeks to substitute defendant Diaz with Kathleen
20 Allison, the current Secretary of the CDCR, the motion will be treated as a motion to substitute
21 and will be granted. To the extent the motion seeks to amend the complaint to add additional
22 claims and defendants, the motion is not accompanied by a copy of the proposed amended
23 complaint as required by the Local Rules, see L.R. 137(c), and it will therefore be denied without
24 prejudice to a motion that includes a copy of the proposed amended complaint. Plaintiff is further
25 advised that any proposed amended complaint must contain all the claims he seeks to make as the

26 ³ Since plaintiff is a prisoner proceeding pro se, he is afforded the benefit of the prison mailbox
27 rule. Houston v. Lack, 487 U.S. 266, 276 (1988) (establishing rule that a prisoner's court
28 document is deemed filed on the date the prisoner delivered the document to prison officials for
mailing).

1 court will not consider piecemeal allegations and filings.

2 The court notes that the motion to amend indicates that the claims plaintiff seeks to add
3 are based on allegations that correctional officers at KVSP assaulted plaintiff on July 13, 2021.
4 ECF No. 127. Based on the limited information before the court, it does not appear that these
5 claims would be properly joined in this action. Plaintiff is advised that he may join multiple
6 claims only if they are all against a single defendant, Fed. R. Civ. P. 18(a), and he may join
7 defendants only where the right to relief arises out of the same “transaction, occurrence, or series
8 of transactions,” and “any question of law or fact common to all defendants will arise in the
9 action,” Fed. R. Civ. P. 20(a)(2). In other words, joining more than one claim is only proper
10 when it is against one defendant, and joining multiple defendants in one complaint is only proper
11 when the claims against them are based on the same facts. Attempts to amend the complaint to
12 include improperly joined defendants or claims will result in denial of the motion. Plaintiff is free
13 to attempt to pursue additional claims not properly joined in this case by initiating a new lawsuit
14 based on those claims after he has exhausted any available administrative remedies.

15 CONCLUSION

16 Accordingly, IT IS HEREBY ORDERED that:

- 17 1. Plaintiff’s motion for production of documents, ECF No. 118, is DENIED.
- 18 2. Plaintiff’s motions to compel, ECF Nos. 128, 130, are DENIED.
- 19 3. Plaintiff’s motion to appoint counsel, ECF No. 120, is DENIED.
- 20 4. Plaintiff’s motion to be interviewed, ECF No. 123, is DENIED.
- 21 5. The Clerk of the Court is directed to strike plaintiff’s motion for summary judgment,
22 ECF No. 126.
- 23 6. Plaintiff’s motion to substitute Kathleen Allison for defendant Diaz, ECF No. 127, is
24 GRANTED. The Clerk of the Court is directed to update the docket to substitute current CDCR
25 Secretary Kathleen Allison, in her official capacity, for defendant Ralph Diaz.
- 26 7. Plaintiff’s motion to amend the complaint, ECF No. 127, is DENIED without
27 prejudice to a motion in the proper form.
- 28 8. Defendants’ motion for an extension of time, ECF No. 133, is DENIED as moot.

1 IT IS FURTHER RECOMMENDED that plaintiff's motion for a temporary restraining
2 order, ECF No. 117, be DENIED.

3 These findings and recommendations are submitted to the United States District Judge
4 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one days
5 after being served with these findings and recommendations, any party may file written
6 objections with the court and serve a copy on all parties. Such a document should be captioned
7 "Objections to Magistrate Judge's Findings and Recommendations." Any response to the
8 objections shall be served and filed within fourteen days after service of the objections. The
9 parties are advised that failure to file objections within the specified time may waive the right to
10 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

11 DATED: November 29, 2021

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13 ALLISON CLAIRE
14 UNITED STATES MAGISTRATE JUDGE
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