

1                                    IN THE UNITED STATES DISTRICT COURT  
2                                    FOR THE NORTHERN DISTRICT OF CALIFORNIA

3  
4 KEVIN ROBY,

5                                    Plaintiff,

6                                    v.

7 T. STEWART, et al.,

8                                    Defendants.  
9

Case No.: C 08-1113 CW (PR)

ORDER DENYING MOTION FOR  
SUMMARY JUDGMENT WITHOUT  
PREJUDICE, DENYING MOTION FOR  
EXTENSION OF TIME AS MOOT,  
GRANTING LEAVE TO CONDUCT  
WRITTEN DEPOSITIONS AND DENYING  
MOTION TO COMPEL WITHOUT  
PREJUDICE

10                                    (Docket nos. 86, 96, 105, 107)

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12                                    Plaintiff, a state prisoner proceeding pro se, filed the  
13 present civil rights action pursuant to 42 U.S.C. § 1983,  
14 alleging the violation of his First and Eighth Amendment rights  
15 by prison officials at Pelican Bay State Prison (PBSP).

16                                    On March 30, 2012, the Court granted in part and denied in  
17 part Defendants' motion to dismiss the claims as time-barred and  
18 directed Defendants to file a motion for summary judgment. In so  
19 doing, the Court granted the parties leave to take discovery.  
20 Thereafter, Plaintiff filed a motion requesting that the Court  
21 appoint a court officer to depose Defendants by way of written  
22 deposition.

23                                    On December 21, 2012, Defendants filed a motion for summary  
24 judgment. On January 29, 2013, the Court granted Plaintiff's  
25 motion for an extension of time to file his opposition because he  
26 was in the process of being transferred from PBSP to another  
27 prison, all of his property had been packed and removed from his  
28 cell, and he did not know how long it would take for his property

1 to be returned to him once he had been transferred. Plaintiff  
2 was directed to file his opposition by no later than April 19,  
3 2013.

4 On April 4, 2013, Plaintiff filed a notice of change of  
5 address to Corcoran State Prison and a motion to compel  
6 discovery. On April 7, 2013, he filed a motion to extend the  
7 deadline to file his opposition to the motion for summary  
8 judgment in view of his outstanding motion to compel and because  
9 he has not yet been allowed access to his legal property at  
10 Corcoran.

11 Rule 56(d) of the Federal Rules of Civil Procedure provides  
12 a procedure by which a party may avoid summary judgment when such  
13 party has not had sufficient opportunity to discover affirmative  
14 evidence necessary to oppose the motion. See Garrett v. San  
15 Francisco, 818 F. 2d 1515, 1518 ( 9th Cir. 1987). In particular,  
16 Rule 56(d) provides that a court may deny a summary judgment  
17 motion and permit the opposing party to conduct discovery where  
18 it appears that the opposing party, in the absence of such  
19 discovery, is unable to present facts essential to opposing the  
20 motion. Fed. R. Civ. P. 56(d). A pending discovery motion is  
21 sufficient to raise a question as to whether the party opposing  
22 summary judgment should be permitted additional discovery, even  
23 if no request under Rule 56(d) has been made. See Garrett, 818  
24 F.2d at 1518.

25 The Ninth Circuit has made clear that in cases involving pro  
26 se prisoners, summary judgment is not favored when discovery  
27 requests for relevant evidence are pending. In particular, the  
28 Ninth Circuit has noted:

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Under Rule 56(f), the court may postpone ruling on a summary judgment motion where the nonmoving party needs "additional discovery to explore 'facts essential to justify the party's opposition.'" Crawford-El v. Britton, 523 U.S. 574, 599 n.20 (1998) (quoting Fed. R. Civ. Pro. 56(f)). Though the conduct of discovery is generally left to a district court's discretion, summary judgment is disfavored where relevant evidence remains to be discovered, particularly in cases involving confined pro se plaintiffs. Klinge v. Eikenberry, 849 F.2d 409, 412 (9th Cir. 1988); Harris v. Pate, 440 F.2d 315, 318 (7th Cir. 1971) (Stevens, J.) (observing that the combined disabilities of self-representation and confinement hinder a plaintiff's ability to gather evidence). Thus summary judgment in the face of requests for additional discovery is appropriate only where such discovery would be "fruitless" with respect to the proof of a viable claim. Klinge, 849 F.2d at 412.

Jones v. Blanas, 393 F.3d 918, 930 (9th Cir. 2004) (parallel citations omitted).

Here, Plaintiff states that he is unable to oppose the motion for summary judgment because Defendants have refused to provide him with copies of an internal affairs report and portions of the Associate Warden's Central file concerning the events at issue in this case, which occurred more than seven years ago. He further maintains that Defendants have provided non-responsive answers to his requests for admissions and interrogatories concerning those events by asserting that they are unable to answer because of the lapse of time since the events transpired. As noted, Plaintiff has filed a motion to compel the production of the requested documents and information, and also seeks the appointment of a court officer to conduct written depositions.

1           The Court finds that the information sought by Plaintiff's  
2 outstanding discovery requests is relevant to the matters at  
3 issue herein and appears likely to lead to discovery that would  
4 not be fruitless with respect to proof of his First and Eighth  
5 Amendment claims. Accordingly, Defendants' motion for summary  
6 judgment is DENIED without prejudice to Defendants filing a  
7 renewed motion for summary judgment once the pending discovery  
8 matters have been resolved. See Fed. R. Civ. P. 56(d)(1).  
9 Plaintiff's motion for an extension of time to oppose the motion  
10 for summary judgment is DENIED as moot.

11           The Court further finds that the motion to compel is  
12 premature, because there is no evidence in the record to suggest  
13 that Plaintiff has addressed this matter with Defendants' counsel  
14 before asking the Court to intervene, or that the parties have  
15 made a good faith effort to meet and confer to attempt to resolve  
16 any discovery dispute.<sup>1</sup> Accordingly, the motion to compel is  
17 DENIED without prejudice. The motion may be renewed if the  
18 discovery dispute is not resolved when the parties meet and  
19 confer.

20           The Court GRANTS Plaintiff leave to conduct written  
21 depositions pursuant to Rule 31 but finds the request for  
22 appointment of a court officer unnecessary; therefore, that

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24           <sup>1</sup> The district court generally is not involved in the  
25 discovery process and only becomes involved when there is a  
26 dispute between the parties about discovery responses, which  
27 normally are exchanged between the parties without any copy sent  
28 to the court. See Fed. R. Civ. P. 5(d). Before filing any  
motion to compel discovery, the parties must make a good faith  
effort to meet and confer to attempt to resolve any discovery  
dispute, as is required by Civil Local Rule 37-1. When a party  
is incarcerated, the parties may meet and confer via written  
communication.

1 request is DENIED. Under Rule 31, Plaintiff may propound in  
2 written form the very same questions he would have asked orally.  
3 As with oral depositions, parties as well as non-parties may be  
4 examined by way of written depositions. Fed. R. Civ. P.  
5 31(a)(1). Typically, a deponent answers written deposition  
6 questions orally, in the presence of a court officer. See Fed.  
7 R. Civ. P. 31(b). In the interest of justice, however, if  
8 Plaintiff uses the written deposition procedure, the Court will  
9 modify the procedure to allow the deponents to provide written  
10 answers to the written deposition questions. This procedure will  
11 also resolve the issue of taking the testimony under oath, for  
12 the witnesses must verify the written responses (just as answers  
13 to written interrogatories are verified).

14 The parties shall comply with the discovery and briefing  
15 schedules set forth below.

16 CONCLUSION

17 For the reasons stated above, the Court orders as follows:

- 18 1. Defendants' motion for summary judgment is DENIED  
19 without prejudice. Docket no. 96.
- 20 2. Plaintiff's motion for an extension of time to file an  
21 opposition to the motion for summary judgment is DENIED as moot.  
22 Docket no. 107.
- 23 3. Plaintiff's motion to compel discovery is DENIED  
24 without prejudice. Docket no. 105.
- 25 4. Plaintiff's motion for a court appointed officer to  
26 conduct written depositions is DENIED. Docket no. 86.
- 27 5. The parties shall abide by the following discovery and  
28 briefing schedules:

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- a. No later than July 1, 2013, the parties shall complete all discovery.
- b. No later than July 15, 2013, the parties shall file all discovery-related motions.
- c. No later than September 1, 2013, Defendants shall file their motion for summary judgment.
- d. No later than September 30, 2013, Plaintiff shall file his opposition to Defendants' motion.
- e. No later than October 15, 2013, Defendants shall file their reply to the opposition.
- 6. No extensions of time with respect to the above deadlines will be granted absent compelling circumstances.

This Order terminates Docket nos. 86, 96, 105 and 107.

IT IS SO ORDERED.

Dated: 4/16/2013

  
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CLAUDIA WILKEN  
UNITED STATES DISTRICT JUDGE