

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

3  
4 MARK ANTHONY CANDLER,

5                                    Plaintiff,

6                                    v.

7 SANTA RITA COUNTY JAIL WATCH  
8 COMMANDER, et al.,

9                                    Defendants.

Case No.: C 11-1992 CW (PR)

ORDER DENYING MOTION FOR  
SUMMARY JUDGMENT WITHOUT  
PREJUDICE, DENYING MOTION TO  
COMPEL, SETTING DISCOVERY AND  
BRIEFING SCHEDULES AND  
DIRECTING ALL PARTIES TO  
CONSENT OR DECLINE TO PROCEED  
BEFORE MAGISTRATE JUDGE FOR ALL  
FURTHER PROCEEDINGS

(Docket nos. 12, 33)

11  
12                                    Plaintiff, a state prisoner incarcerated at Pelican Bay  
13 State Prison, filed this pro se civil rights action pursuant to  
14 42 U.S.C. § 1983, complaining about his conditions of confinement  
15 during the period of his incarceration as a pretrial detainee at  
16 the Santa Rita County Jail (SRCJ). Specifically, Plaintiff  
17 alleges (1) that from June 17, 2008 through December 13, 2010,  
18 Defendants held him in disciplinary lock-up without disciplinary  
19 charges or a hearing, and did not provide him with cleaning  
20 materials for his cell or with the requisite minimum of three  
21 hours of exercise a week, and (2) from March 2009 through  
22 December 2010, he routinely went for more than seventy-two hours  
23 without a shower. Plaintiff claims Defendants placed him in such  
24 adverse conditions of confinement not because of his conduct but,  
25 instead, in retaliation and at the request of the District  
26 Attorney. He claims the violation of his right to due process  
27 and that Defendants acted with deliberate indifference.  
28

1 I. Summary Judgment

2 On October 5, 2012, Defendants filed a motion for summary  
3 judgment. Thereafter, Plaintiff moved for a stay of further  
4 proceedings because he was scheduled to be transferred to another  
5 prison. On November 20, 2012, the Court denied the stay but  
6 granted Plaintiff an extension of time to January 4, 2013, to  
7 file his opposition to the motion for summary judgment. On  
8 January 9, 2013, the Court received Plaintiff's opposition, in  
9 which he wrote that he had been transferred to Pelican Bay State  
10 Prison and had not yet received his legal property. He objected  
11 to several alleged factually inaccurate statements made by  
12 Defendants in support of their motion for summary judgment.

13 Defendants filed a reply and an objection to Plaintiff's  
14 factual assertions, arguing that they are inadmissible hearsay  
15 and improper opinion evidence. Plaintiff then filed a sur-reply  
16 and a motion to compel discovery. Defendants opposed the motion  
17 on the grounds that discovery has not yet opened in the case  
18 because there has been no case management conference order,  
19 Plaintiff has not made any formal discovery request and he has  
20 not attempted to meet and confer. Plaintiff responded that he  
21 sent Defendants requests for production of documents, to which  
22 they did not respond.

23 In the order of service in this case, the Court wrote:  
24 "Discovery may be taken in this action in accordance with the  
25 Federal Rules of Civil Procedure. Leave of the Court pursuant to  
26 Rule 30(a)(2) is hereby granted to Defendants to depose Plaintiff  
27 and any other necessary witnesses confined in prison." Docket  
28 no. 4 at 6:9-12. Consequently, no case management conference

1 order is required and Plaintiff's discovery requests cannot be  
2 objected to on that ground.

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

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

21 Under Rule 56(f), the court may postpone  
22 ruling on a summary judgment motion where the  
23 nonmoving party needs "additional discovery to  
24 explore 'facts essential to justify the party's  
25 opposition.'" Crawford-El v. Britton, 523 U.S.  
26 574, 599 n.20 (1998) (quoting Fed. R. Civ. Pro.  
27 56(f)). Though the conduct of discovery is  
28 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

1 Cir. 1971) (Stevens, J.) (observing that the  
2 combined disabilities of self-representation and  
3 confinement hinder a plaintiff's ability to gather  
4 evidence). Thus summary judgment in the face of  
5 requests for additional discovery is appropriate  
6 only where such discovery would be "fruitless"  
7 with respect to the proof of a viable claim.  
8 Klinge, 849 F.2d at 412.

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

11 Here, Defendants have filed a motion for summary judgment  
12 and have objected to Plaintiff's evidence in opposition thereto  
13 as inadmissible hearsay and improper opinion evidence. The  
14 parties, however, have not conducted any discovery; consequently,  
15 Plaintiff has not been able to obtain evidence from Defendants  
16 that may be relevant to opposing their motion and proving his  
17 claims. Under such circumstances, the Court finds it proper to  
18 allow Plaintiff to conduct discovery before opposing Defendants'  
19 motion for summary judgment.<sup>1</sup>

20 <sup>1</sup> Plaintiff is advised that a district court may consider  
21 only admissible evidence in ruling on a motion for summary  
22 judgment. See Fed. R. Civ. P. 56(c); Orr v. Bank of America, 285  
23 F.3d 764, 773 (9th Cir. 2002). Such evidence may include a sworn  
24 affidavit or declaration that is made on personal knowledge, sets  
25 out facts that would be admissible in evidence, and shows that  
26 the affiant or declarant is competent to testify on the matters  
27 stated. Fed. R. Civ. P. 56(c)(4). A verified complaint may be  
28 used as an opposing affidavit under Rule 56, as long as it is  
based on personal knowledge and sets forth specific facts  
admissible in evidence. See Schroeder v. McDonald, 55 F.3d 454,  
460 & nn.10-11 (9th Cir. 1995) (treating plaintiff's verified  
complaint as opposing affidavit where, even though verification  
not in conformity with 28 U.S.C. § 1746, plaintiff stated under  
penalty of perjury that contents were true and correct, and  
allegations were not based purely on his belief but on his  
personal knowledge); see also Keenan v. Hall, 83 F.3d 1083, 1090  
n.1 (9th Cir. 1996), amended, 135 F.3d 1318 (9th Cir. 1998)  
(treating allegations in prisoner's verified amended complaint as  
opposing affidavit).

1           Accordingly, Defendants' motion for summary judgment is  
2 DENIED without prejudice to them filing a renewed motion for  
3 summary judgment after the parties have conducted discovery.  
4 See Fed. R. Civ. P. 56(d)(1). Plaintiff's motion to compel is  
5 DENIED without prejudice as premature.<sup>2</sup>

6           The parties shall comply with the discovery and briefing  
7 schedules set forth in the Conclusion of this Order.

8 II. Consent or Declination to Proceed Before Magistrate Judge

9           In order to encourage the just, speedy and inexpensive  
10 determination of 42 U.S.C. § 1983 cases filed in this district,  
11 the parties may waive their right to proceed before a district  
12 judge and consent to proceed before a magistrate judge for all  
13 purposes. Attached to this Order is a Notice of Option to  
14 Consent to Proceed Before United States Magistrate Judge and an  
15 Order requiring the parties to notify the Court whether they  
16 consent or decline to so proceeding. The parties shall complete  
17 the requisite consent or declination form and return it to the  
18 Court no later than fourteen days from the date of this Order.

19 CONCLUSION

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

21 1. Defendants' motion for summary judgment is DENIED  
22 without prejudice. Docket no. 12.

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23 <sup>2</sup> The district court generally is not involved in the  
24 discovery process and only becomes involved when there is a  
25 dispute between the parties about discovery responses, which  
26 normally are exchanged between the parties without any copy sent  
27 to the court. See Fed. R. Civ. P. 5(d). Before filing any  
28 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.

