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CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BY:

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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

DALE HURD,

Plaintiff,

vs.

SYLVIA GARCIA, Warden;¹ et al.,

Defendants.

CASE NO. 02-cv-0460 BEN (WMc)

ORDER ADOPTING REPORT AND
RECOMMENDATION, GRANTING
MOTION FOR SUMMARY
JUDGMENT, AND DENYING
REQUEST TO AMEND JUDGMENT

BACKGROUND

Plaintiff Dale Hurd, a prisoner at Calipatria State Prison and proceeding pro se, filed a Third Amended Complaint ("Complaint") under 42 U.S.C. § 1983 against prison officials Warden Garcia, Captain W. J. Price, Lieutenant R. Anti, and Sergeant Richards. Plaintiff alleges that the conditions during a lock down of the Calipatria facility from December 2001 to March 2002 violated his rights to due process, to equal protection and to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments. Plaintiff also alleges Defendants failed to protect him from assault by another inmate, in violation of the Eighth Amendment, and that he was retaliated against for the exercise of his First Amendment rights. Plaintiff seeks monetary damages and an injunction

¹ On August 16, 2006, Warden George Giurbino was substituted in place of Warden Sylvia Garcia. (Docket No. 149.)

1 preventing any future long-term deprivations of outdoor exercise.

2 On April 21, 2006, Defendants filed a motion for summary judgment (“Motion”). (Docket No.
3 131.) Plaintiff filed an opposition, and Defendants filed a reply. (Docket Nos. 137, 141.) On August
4 31, 2006, Magistrate Judge McCurine filed a Report and Recommendation, recommending that
5 Defendants’ motion be granted. (Docket No. 151.) Plaintiff did not file Objections to the Report and
6 Recommendation. Accordingly, on September 28, 2006, this Court adopted the Report and
7 Recommendation and granted Defendants’ Motion. (Docket No. 157.) On September 29, 2006,
8 Judgment was entered against Plaintiff. (Docket No. 158.)

9 Thereafter, on October 17, 2006, Plaintiff filed a Motion for New Trial and for Amendment
10 of Judgment pursuant to Federal Rule of Civil Procedure 59. (Docket No. 160.) The motion was
11 made on the grounds that Plaintiff never received a copy of the Report and Recommendation and never
12 had an opportunity to file objections. *Id.*

13 On April 9, 2007, the Court granted Plaintiff’s motion and reopened the case. (Docket No.
14 177.) Pursuant to the Court’s order, on May 3, 2007, Plaintiff filed his Objection to the Magistrate
15 Judge’s Report and Recommendation. (Docket No. 178.) Defendants filed a reply. (Docket No. 184.)

16 On March 20, 2008, Plaintiff then filed a “Memorandum of Points and Authorities in Support
17 of Plaintiff’s Objections to Report and Recommendation.” Among other things, this document moved
18 to continue determination of the Motion pursuant to Federal Rule of Civil Procedure 56(f) and on the
19 grounds that Plaintiff had not been able to obtain all documents necessary to fully respond to the
20 Motion. (Docket No. 189.) The Court referred Plaintiff’s Rule 56(f) request and related discovery
21 issues to Magistrate Judge McCurine. (Docket No. 190.)

22 On April 8, 2009, Magistrate Judge McCurine entered an order granting in part and denying
23 in part Plaintiff’s Rule 56(f) motion. (Docket No. 196.) The order required Defendants to deliver
24 certain identified documents to the Court for in camera inspection so the Court could determine if the
25 discovery raised a genuine issue of material fact and if disclosure of such documents to Plaintiff was
26 necessary. *Id.* Court conducted several status conferences regarding the discovery to determine what
27 other discovery existed and what other discovery Plaintiff claimed he needed. (Docket Nos. 205, 208-
28 210, 212, 213.)

1 On July 8, 2010, Magistrate Judge McCurine, after conducting an in camera inspection of the
2 court-ordered discovery, entered an order finding that no discovery germane to the issues in this case
3 had been withheld. (Docket No. 214.) The Court further concluded that no additional discovery
4 existed that would allow Plaintiff to demonstrate that a genuine issue of material fact existed for
5 purposes of amending the Judgment. *Id.*

6 Defendants' motion for summary judgment having been fully briefed, and both parties now
7 having had an opportunity to respond to the Report and Recommendation, the Court now considers
8 the merits of the Motion, the analysis set forth in the Report and Recommendation, and whether
9 amendment of the Judgment is appropriate. For the reasons set forth below, the Court affirms the
10 Judgment.

11 DISCUSSION

12 I. FACTUAL ALLEGATIONS

13 A. PRISON LOCK DOWN

14 Plaintiff alleges that, on December 2, 2001, Defendant Garcia, the Warden of Calipatria,
15 ordered a lock down of the facility where Plaintiff was housed. (TAC, pg. 3.) The lock down
16 continued until March 27, 2002 and was continued at such other times that Plaintiff claims he was
17 denied any exercise time from December 2, 2001 through May 1, 2002. *Id.* Plaintiff alleges this
18 deprivation of exercise time violated his constitutional right to be free from cruel and unusual
19 punishment under the Eighth Amendment, right to due process of law under the Fourteenth
20 Amendment, and right to equal protection under the Fourteenth Amendment. (TAC, Counts 1-3.)

21 B. PRISON GANG CONTROL

22 Plaintiff also alleges that, since December 2, 2001, a prison gang controlled by Caucasian
23 supremacists has operated at Calipatria. (TAC, pg. 13.) Plaintiff alleges Defendants use the gang to
24 control and discipline Caucasian inmates, and the gang operated with the knowledge and tacit approval
25 of the Defendants. (TAC, pgs. 13-17.) Defendants also allegedly knew of the gang's policy of
26 requiring all Caucasian inmates to attack any Black inmate whenever they had the chance. *Id.*
27 Nonetheless, on April 30, 2002, Defendants published a status report stating Plaintiff was, and would
28 continue to be, housed with a Black inmate. (TAC, pg. 15.) According to Plaintiff, the gang was,

1 therefore, aware that Plaintiff had the opportunity to attack a Black inmate but had chosen not to do
2 so. (TAC, pgs. 15-17.)

3 On May 1, 2002, Plaintiff was transferred to another facility. (TAC, pg. 16.) Defendants
4 allegedly knew that, even at this new facility, Plaintiff was at risk of being attacked by the gang for
5 failure to carry out the terms of the gang's policy. *Id.* On May 4, 2002, Plaintiff was, in fact, assaulted
6 by another inmate and suffered bodily injury. (TAC, pg. 17.) According to Plaintiff, the attack was
7 in retaliation for not attacking a Black inmate when he had a chance. *Id.* Plaintiff alleges Defendants'
8 actions violated his constitutional rights under the Eighth Amendment. (TAC, Counts 4-6.)

9 C. FREE SPEECH AND RETALIATION

10 Plaintiff also alleges Defendants retaliated against him for exercising his right to free speech.
11 (TAC, pg. 27.) Plaintiff alleges that, on December 18, 2001, he submitted an inmate grievance to
12 Defendant Garcia, complaining of the lock down conditions. *Id.* On March 6, 2002, and then again
13 on April 7, 2002, Plaintiff sent a letter to Defendant Garcia that expressed his intent to file a civil
14 rights complaint regarding the lock down. *Id.* at pgs. 27-28.

15 Allegedly as a result of these complaints, on April 11, 2002, Defendants searched Plaintiff's
16 cell, including several other cells, and confiscated every ink pen and piece of paper in Plaintiff's cell.
17 (TAC, pgs. 28-29.) According to Plaintiff, Defendants claim Plaintiff had "too many" of them. *Id.*
18 During a meeting on April 18, 2002, Plaintiff complained about the search and general climate of
19 lawlessness to Senator Burton's staff. *Id.*

20 As noted, on May 1, 2002, despite Defendants' alleged knowledge of the Caucasian prison
21 gang's policy, Defendants transferred Plaintiff to another facility, and, on May 4, 2002, Plaintiff was
22 assaulted. (TAC, pg. 29.) Plaintiff alleges Defendants' actions violated his constitutional right to free
23 speech under the First Amendment. (TAC, Count 7.)

24 II. SUMMARY JUDGMENT

25 Summary judgment should be granted when "the pleadings, the discovery and disclosure
26 materials on file, and any affidavits show that there is no genuine issue as to any material fact and that
27 the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2); *see also Celotex Corp.*
28 *v. Catrett*, 477 U.S. 317, 322 (1986).

1 On August 31, 2006, Magistrate Judge McCurine entered a Report and Recommendation,
2 recommending that this Court grant Defendants' motion for summary judgment in its entirety. On
3 May 3, 2007, Defendant filed an Objection to the Report and Recommendation. Section 636(b)(1)(C)
4 of Title 28 of the United States Code provides, "A judge of the [district] court shall make a de novo
5 determination of those portions of the [magistrate judge's] report or specified proposed findings or
6 recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(C). Accordingly, the Court
7 reviews de novo those specific portions of the Report and Recommendation to which Plaintiff objects,
8 if any. Because Plaintiff's Objections also appear to incorporate Plaintiff's Rule 56(f) motion, the
9 Court also addresses the issues raised in the Rule 56(f) motion, the Magistrate Judge's Order on the
10 Rule 56(f) motion, and Plaintiff's objection thereto, below.

11 **A. PLAINTIFF'S RULE 56(f) MOTION AND DISCOVERY ISSUES**

12 Plaintiff objects to the Report and Recommendation on the grounds that, at the time the Report
13 and Recommendation was issued, certain discovery issues set forth in Plaintiff's Rule 56(f) motion
14 were outstanding and the resolution of those issues was necessary for Plaintiff to respond to the
15 Motion. (Obj., ¶¶ 1, 2, 4.)

16 The Court first notes that, at the time the Report and Recommendation was issued (i.e., August
17 31, 2006), Plaintiff had not yet filed his Rule 56(f) motion. Rather, the record shows Plaintiff filed
18 his Rule 56(f) motion on February 10, 2009. Therefore, the Rule 56(f) motion was not properly before
19 the Court. *Brae Transp., Inc. v. Coopers & Lybrand*, 790 F.2d 1439, 1443 (9th Cir. 1986)
20 (recognizing that the failure to properly file a Rule 56(f) motion is not grounds for delaying resolution
21 of a pending summary judgment motion).

22 Notwithstanding, to the extent the Magistrate Judge was aware of outstanding discovery issues,
23 if any, the Court finds Plaintiff has not demonstrated those discovery issues would have changed the
24 findings in the Report and Recommendation or that he was otherwise prejudiced by the failure to
25 obtain the requested discovery. First, while the Motion was pending, the Magistrate Judge conducted
26 an in camera review of the documents which Defendants objected to as privileged. (Docket No. 150.)
27 After weighing the needs and concerns of both parties, on August 24, 2006, i.e., before issuing the
28 Report and Recommendation, the Magistrate Judge denied Plaintiff's motion to compel production

1 of the documents. (*Id.*) The denial obviated any need for a continuance.

2 Even with respect to the Rule 56(f) motion, which as noted was not before the Court prior to
3 its issuance of the Report and Recommendation, Plaintiff's only contention is that he needs additional
4 discovery to respond to Defendants' affirmative defense of good faith. (Obj. [Docket No. 215-1], pg.
5 3.) The discovery at issue in the Rule 56(f) motion relates to the identity of prison informants and the
6 identity of certain gang leaders and middlemen. *Id.* Plaintiff contends he must know the identity of
7 these individuals in order to best address Defendants' affirmative defense that they acted in good faith
8 and in accordance with established law, including the policies of the California Department of
9 Corrections. (Obj. [Docket No. 215-1], pg. 3.) However, the Report and Recommendation did not
10 find that Defendants were entitled to summary judgment on their affirmative defense. Rather, the
11 Report and Recommendation found Plaintiff had not carried his burden of demonstrating any
12 constitutional violations. *Id.* Based thereon, the Magistrate Judge stated the Court "need not reach
13 any issues regarding qualified immunity." (Report and Recommendation, pgs. 14, 17, 21, 23, 25.)
14 Accordingly, the absence of this discovery did not implicate the findings in the Report and
15 Recommendation or prejudice Plaintiff's ability to present his case, oppose the Motion, or respond to
16 the Report and Recommendation. Therefore, the Court finds Plaintiff's objection lacks merit and is
17 not grounds for rejecting the findings set forth in the Report and Recommendation.

18 **B. APPLICATION OF LAW TO FACTS**

19 Plaintiff next objects to the Report and Recommendation on the grounds the Magistrate Judge
20 failed to properly apply law to facts and failed to consider the significance of Plaintiff's facts. (Obj.
21 [Docket No. 178], ¶¶ 3, 5-7.) Plaintiff fails to provide legal or factual support for his objection and
22 fails to identify the portions of the Report and Recommendation to which his objection pertains.

23 It is well-established that a party objecting to a Report and Recommendation must cite specific
24 instances of error in the Report and Recommendation. *See* Fed. R. Civ. P. 72(b)(2); *United States v.*
25 *Midgette*, 478 F.3d 616, 621 (4th Cir. 2007) ("Section 636(b)(1) does not countenance a form of
26 generalized objection to cover all issues addressed by the magistrate judge; it contemplates that a
27 party's objection to a magistrate judge's report be specific and particularized, as the statute directs the
28 district court to review only *those portions* of the report or *specified* proposed findings or

1 recommendations to which objection is made.”) (internal citations and quotations omitted) (emphasis
2 in the original). As the Fourth Circuit stated,

3 [A] party must object to the finding or recommendation on that issue
4 with sufficient specificity so as reasonably to alert the district court of
5 the true ground for the objection. . . . To conclude otherwise would
6 defeat the purpose of requiring objections. We would be permitting a
7 party to appeal any issue that was before the magistrate judge,
8 regardless of the nature and scope of objections made to the magistrate
9 judge’s report. Either the district court would then have to review every
10 issue in the magistrate judge’s proposed findings and recommendations
11 or courts of appeals would be required to review issues that the district
12 court never considered. In either case, judicial resources would be
13 wasted and the district court’s effectiveness based on help from
14 magistrate judges would be undermined.

15 *Id.* at 622; *see also* Fed. R. Civ. P. 72(b)(2) (requiring objecting party to file “specific written
16 objections to the proposed findings and recommendations”).

17 As Plaintiff does not identify the portions of the Report and Recommendation that purportedly
18 misapply the law to facts or fail to consider the significance of Plaintiff’s facts, the Court overrules
19 Plaintiff’s objection. To the extent Plaintiff’s objection pertains to the Magistrate Judge’s alleged
20 failure to consider Plaintiff’s need for discovery, then for the same reasons stated above, Plaintiff’s
21 objection is overruled. Plaintiff also cannot rely on the Memorandum of Points and Authorities to
22 support his Objection, as the Memorandum was filed over nine months past the already-extended
23 deadline. *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121-22 (9th Cir. 2003). To hold otherwise
24 would circumvent the procedural safeguards of this Court. *Id.*

25 Notwithstanding the above, after conducting a thorough and independent review of the issues
26 presented, the Court finds the Magistrate Judge’s analysis in the Report and Recommendation is sound
27 and well-reasoned and the Memorandum setting forth objections lacks merit.

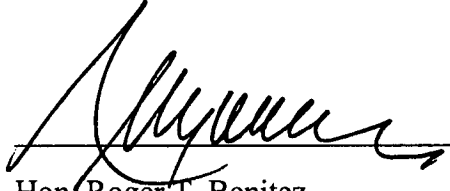
28 III. CONCLUSION

For the reasons stated above, the Court overrules Plaintiff’s objections and finds, after a careful
and independent review of the Report and Recommendation and entire file in this case, the Report and
Recommendation is supported by the record and is sound and well-reasoned. Accordingly, the Court
ADOPTS the Report and Recommendation dated August 31, 2006 in its entirety, **GRANTS**
Defendants’ Motion for Summary Judgment, and **DENIES** Plaintiff’s request to amend the Judgment

1 of September 29, 2006.

2 **IT IS SO ORDERED.**

3 Date: August 8, 2010



Hon. Roger T. Benitez
United States District Court Judge

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