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**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA**

TROAS V. BARNETT,	)	Case No.: 1:05-cv-01022-BAM (PC)
Plaintiff,	)	
v.	)	ORDER REGARDING DEFENDANTS’
MARTIN GAMBOA, et al.,	)	OBJECTIONS TO PRETRIAL ORDER
Defendants.	)	(ECF No. 385)
	)	
	)	
	)	

Plaintiff Troas Barnett (“Plaintiff”) is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. This action proceeds on Plaintiff’s claims that Defendants Gamboa, Duran, and Torres used excessive physical force against him in violation of his rights under the Eighth Amendment of the United States Constitution, and that Defendant Torres failed to intervene to protect Plaintiff from harm in violation of his rights under the Eighth Amendment. The parties have consented to magistrate judge jurisdiction. (ECF Nos. 9, 62.) A jury trial is set to commence in this matter on February 23, 2016.

On January 7, 2016, Defendants filed timely objections to the Court’s December 18, 2015 pretrial order in this matter. (ECF No. 385.) Defendants first seek clarification as to whether the facts set forth as “Plaintiff’s Undisputed Facts” in the pretrial order will be treated by the Court as undisputed by both parties. (ECF No. 385, pp. 1-2.) Since the parties submitted separate pretrial statements, the Court has set forth in the pretrial order the facts each party asserted were undisputed. To the extent that both parties’ facts are in agreement, the Court will treat them as undisputed.

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1 Defendants also request that certain factual issues that Plaintiff listed as disputed be added to  
2 their own list of disputed factual issues in the pretrial order. These issues include whether the  
3 Defendants used malicious/sadistic force, whether they filed any false rules violation reports or  
4 criminal charges against Plaintiff, and whether Plaintiff was severely or seriously injured when  
5 Defendant Torres fired a round from the 40mm launcher. (ECF No. 385, p. 2.) Adding these  
6 statements to Defendants' list of disputed factual issues is superfluous and will not aid in the  
7 management of the case. Fed. R. Civ. P. 16(e) (court may modify the pretrial order "only to prevent  
8 manifest injustice"). The pretrial order already reflects that Plaintiff concedes those issues are disputed  
9 by the parties. Thus, Defendants' request to modify the pretrial order is denied.

10 Next, Defendants object to the language in section VII of the pretrial order, regarding  
11 "Witnesses," which states that the list of witnesses includes "rebuttal and impeachment witnesses" and  
12 that no other witnesses may be called at trial, unless the parties stipulate or upon a showing that the  
13 pretrial order should be modified to prevent manifest injustice. (ECF No. 368, p. 7.) Defendants argue  
14 that the need may arise to present a rebuttal or impeachment witness depending on the testimony  
15 elicited at trial, and that they should not be precluded from calling such witnesses during trial despite  
16 them not being disclosed in their pretrial statement, nor should they be required to have such witnesses  
17 present at the beginning of trial for Plaintiff to call in his case-in-chief. Therefore, Defendants seek to  
18 have the language that the witness list includes "rebuttal and impeachment witnesses" removed from  
19 the pretrial order. (Id.)

20 The Court denies Defendants' request to modify the pretrial order, but offers clarification  
21 which will address the matters raised by Defendants. The Local Rules require the parties to list all  
22 prospective witnesses for trial, and only those witnesses so listed will be permitted to testify, except as  
23 otherwise provided in the pretrial order. Local Rule 281(b)(10). Thus, a witness whom a party knows  
24 that they intend to call to contradict an expected or anticipated portion of their opponent's case must  
25 be listed in the party's pretrial statement, and those witnesses not be allowed to testify if they are not  
26 listed in the Court's pretrial order. The language in the pretrial order discussing "rebuttal and  
27 impeachment witnesses" refers to these types of witnesses.

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1 If a party calls a witness to testify regarding unexpected, surprise evidence or facts presented  
2 by the opposing party, the Court retains the broad latitude to allow such a witness to testify, depending  
3 on the circumstances. Also, if a witness will testify solely for impeachment purposes, the pretrial order  
4 will not preclude such testimony, since witnesses used solely for impeachment need not be disclosed  
5 prior to trial. See Fed. R. Civ. P. 26(a)(1)(A)(i) (no disclosure requirement if a witness is used solely  
6 for impeachment).

7 Finally, Defendants object to the pretrial order to the extent that it would preclude the use of  
8 rebuttal and impeachment exhibits, and they seek to add language to the pretrial order specifically  
9 allowing for the use of rebuttal and impeachment exhibits not listed in the pretrial order. (ECF No.  
10 385, pp. 3-4.) Although Defendants seek to add language regarding rebuttal and impeachment  
11 evidence, their arguments solely focus on impeachment evidence.

12 Defendants' request is denied, but the Court again offers clarification to address the issues  
13 raised. The Local Rules require the parties to provide a list of all exhibits they expect to offer at trial,  
14 and excludes exhibits not so listed. Local Rule 281(b)(11). Whether certain evidence should be  
15 allowed into evidence to rebut new, surprise facts brought out by the opposing party will be addressed  
16 by the Court at the time such an issue is presented, under the relevant circumstances. Exhibits offered  
17 at trial solely for impeachment purposes do not need to be identified in the pretrial order or disclosed  
18 prior to trial, and therefore the fact that such exhibits are not listed in the pretrial order will not  
19 preclude their use. Fed. R. Civ. P. 26(a)(3)(A) (exempting evidence to be used solely for impeachment  
20 from pretrial disclosure requirement); see also Fresno Rock Taco, LLC v. National Sur. Corp., No.  
21 1:11-cv-00845-SKO, 2013 WL 3803911, \*4 (E.D. Cal. Jul. 19, 2013) (discussing exemption from  
22 disclosure of impeachment-only evidence). The Court will consider if evidence that has impeachment  
23 or rebuttal value was subject to mandatory disclosure or was requested in discovery, and a litigant who  
24 fails to identify such evidence faces having it excluded at trial, or other ramifications.

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1 For the reasons explained above, it is HEREBY ORDERED that Defendants' objections to the  
2 Court's December 18, 2015 pretrial order in this matter (ECF No. 385) are OVERRULED.

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4 IT IS SO ORDERED.

5 Dated: January 12, 2016

/s/ Barbara A. McAuliffe  
6 UNITED STATES MAGISTRATE JUDGE  
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