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8 **UNITED STATES DISTRICT COURT**  
9 **EASTERN DISTRICT OF CALIFORNIA**  
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11 JACQUES FEARENCE,  
12 Plaintiff,  
13 v.  
14 S. HOPKINS, et al.,  
15 Defendant.

Case No. 1:08-cv-00615-SAB-PC

PRETRIAL ORDER

***Motion In Limine Deadlines:***

Filing: March 1, 2016

Response: March 15, 2016

Hearing: March 28, 2016, at 3:00 p.m. in  
Courtroom 9 (SAB)

***Trial Date:***

April 5, 2016, at 8:30 a.m. in Courtroom 9  
(SAB) (2-3 days)

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19 This Court conducted a telephonic pretrial conference hearing on February 16, 2016.  
20 Plaintiff Jacques Fearence appeared pro se and Defendants Hopkins, Duffy, Busby, Beckett and  
21 Davis appeared by counsel David Carrasco and Andrew Whisnand. Pursuant to Federal Rule of  
22 Civil Procedure 16(e) and Local Rule 283, the Court issues this final pretrial order.

23 This action is proceeding against Defendant Hopkins for excessive force and against  
24 Defendants Busby, Davis, Beckett and Duffy for failure to intervene, in violation of the Eighth  
25 Amendment.

26 **I. JURISDICTION AND VENUE**

27 This Court has jurisdiction and venue is proper. This Court has subject matter  
28 jurisdiction under 28 U.S.C. § 1331. Venue is proper because the conduct alleged occurred in

1 this judicial district. 28 U.S.C. § 1391.

2 **II. TRIAL**

3 Trial will begin on April 5, 2016, at 8:30 a.m. before United States Magistrate Judge  
4 Stanley A. Boone in Courtroom 9 (SAB). The trial will be trial by jury. Defendant estimates a  
5 two to three - day jury trial. Plaintiff does not provide an estimate. The Court will instruct the  
6 jury that the trail will be 2 to 3 days.

7 **III. FACTS AND EVIDENTIARY ISSUES**

8 **A. Undisputed Facts**

9 **Plaintiff contends that the following facts are undisputed:**

- 10 1. At all times relevant to this action, Plaintiff was a state inmate in the custody of  
11 the CDCR at California Correctional Institution (CCI) Tehachapi, California.
- 12 2. At all times relevant to this action, Defendants were employed by CDCR at  
13 CCI in the following capacities: Davis (Correctional Officer); Duffy (Correctional  
14 Officer); Busby (Correctional Officer); Hopkins (Correctional Lieutenant);  
15 Beckett (Correctional Sergeant).
- 16 3. On August 11, 2005, Plaintiff was placed in a temporary holding cell (Dining  
17 Hall 4, Holding Cell 13) in the course of a housing reassignment.
- 18 4. Plaintiff wore mechanical restraints on his wrists and ankles while in the holding  
19 cell.

20 **Defendants contend that the following facts are undisputed:**

- 21 1. At all times relevant, Plaintiff was a state prisoner in the custody of the CDCR  
22 incarcerated at CCI Tehachapi.
- 23 2. At all times relevant, Defendants were employed at CCI as follows: Davis  
24 (Correctional Officer); Duffy (Correctional Officer); Busby (Correctional  
25 Officer); Hopkins (Correctional Lieutenant); Beckett (Correctional Sergeant).
- 26 3. On August 11, 2005, Plaintiff was placed in a temporary holding cell (Dining Hall  
27 4, Holding Cell 13) in the course of a housing reassignment.

1 4. Plaintiff wore mechanical restraints on his wrists and ankles while in the holding  
2 cell.

3 **B. Disputed Facts**

4 **Plaintiff contends the following facts are disputed:**

- 5 1. Whether Defendant Hopkins threw water on Plaintiff and slapped him while he  
6 was in the holding cell.
- 7 2. Whether Defendants Davis, Duffy, Busby, and Beckett failed to intervene when  
8 Defendant Hopkins allegedly threw water on Plaintiff and slapped him.
- 9 3. The extent of Plaintiff's injuries, if any, resulting from the August 11, 2005,  
10 incident.

11 **Defendants contend the following facts are disputed:**

- 12 1. Whether Defendant Hopkins threw water on Plaintiff and slapped him while he  
13 was in the holding cell.
- 14 2. Whether Defendants Davis, Duffy, Busby, and Beckett failed to intervene when  
15 Defendant Hopkins allegedly threw water on Plaintiff and slapped him.
- 16 3. The extent of Plaintiff's injuries, if any, resulting from the August 11, 2005,  
17 incident.

18 **C. Disputed Evidentiary Issues**

19 **Defendants raise the following disputed evidentiary issues:**

- 20 1. Evidence should be excluded when it lacks relevance, consists of hearsay, is mere  
21 opinion, has not been authenticated, or when its probative value is substantially outweighed by  
22 the danger of unfair prejudice, confusion or needless delay. Fed R. Evid. 402, 403, 602, 701,  
23 802, 901(b).
- 24 2. Should Plaintiff or any other incarcerated witness testify, Defendants will seek to  
25 impeach such witnesses by presenting evidence of prior felony convictions, pursuant to Federal  
26 Rule of Evidence 609. Fed. R. Evid. 609; see U.S. v. Bernal-Obeso, 989 F.2d 331, 336 (9th Cir.  
27 1993)(“As any trial lawyer knows, felony convictions trench heavily upon such a person’s  
28 credibility”). The verdict will heavily depend on witness credibility. Therefore, Defendants

1 should be permitted to question Plaintiff or any other inmate-witness about their prior felony  
2 convictions. Defendants will also contest the admissibility of any written statements of inmate-  
3 witnesses including, but not limited to, any declarations or affidavits.

4 3. Defendants will contest any improper opinion testimony offered by Plaintiff, such  
5 as testimony concerning a medical diagnosis of a physical or psychological condition Fed. R.  
6 Evid. 701-702.

7 **IV. SPECIAL FACTUAL INFORMATION**

8 **Defendant's Special Factual Information:**

9 a. Plaintiff alleges that Defendant Hopkins threw water on him and slapped him on  
10 August 11, 2005, and that Defendants Busby, Davis, Duffy, and Beckett failed to  
11 intervene, but he suffered no harm from these alleged actions. The doctrines of  
12 strict liability and res ipsa loquitur do not apply in this case.

13 b. Plaintiff is a thirty five year old male in the custody of the CDCR, and is currently  
14 housed at California State Prison Los Angeles County in Lancaster, California.  
15 At the time of the incident, Plaintiff was twenty five years old and was housed at  
16 CCI in Tehachapi, California. Plaintiff is serving a prison sentence of twenty five  
17 years to life, imposed on September 22, 2004. Due to his incarceration, Plaintiff  
18 has no viable claims for lost wages or earning capacity. Any medical treatment  
19 Plaintiff received following this incident was provided by Defendant's employer,  
20 the CDCR.

21 **V. RELIEF SOUGHT**

22 Plaintiff seeks the following relief: a declaration that Defendants violated his rights; an  
23 injunction ordering Defendants to expunge his disciplinary record stemming from the events at  
24 issue in the third amended complaint; compensatory damages in the amount of \$5,000 against  
25 each Defendant; punitive damages in the amount of \$5,000 against each Defendant; and any  
26 other relief this Court deems proper. (ECF No. 65 at 3.4.)

27 Defendants pray for a judgment in their favor, with Plaintiff taking nothing, and an award  
28 of attorney's fees and costs.

1           **VI.     POINTS OF LAW**

2           **Defendants raise the following points of law:**

3           **A.   Eighth Amendment - Excessive Force**

4           The potential liability of the Defendants is measured by the standard articulated by the  
5 Supreme Court in Hudson v. McMillan, 501 U.S. 1, 9 (1992). The Eighth Amendment protects  
6 inmates from cruel and unusual punishment. In the excessive force context, the United States  
7 Supreme Court has stated that the Eighth Amendment is only violated when a correctional  
8 officer employs force “maliciously and sadistically for the very purpose of causing harm.”  
9 Hudson, 501 U.S. at 9; see also Meredith v. Arizona, 523 F.2d 481, 483 (9th Cir. 1975); Johnson  
10 v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973). Furthermore, prison officials are to be accorded  
11 “wide-ranging deference” as they “must make their decisions ‘in haste, under pressure, and  
12 frequently without the luxury of a second chance.’” Hudson, 501 U.S. at 6. This is so because  
13 “prison officials are authorized and indeed required to take appropriate measures to maintain  
14 prison order and discipline and protect staff and other prisoners from such violent behavior”  
15 when inmates become disruptive. LeMaire v. Maass, 12 F.3d 1444, 1458 (9th Cir. 1993).

16           When prison officials are accused of using excessive force on an inmate in violation of  
17 the Eighth Amendment, the core judicial inquiry is “whether force was applied in a good-faith  
18 effort to maintain or restore discipline, or maliciously and sadistically to cause harm.” Hudson,  
19 501 U.S. at 4. “Not every push or shove, even if it may later seem unnecessary in the peace of a  
20 judge's chambers, violates a prisoner's constitutional rights.” Meredith v. Arizona, 523 F.2d at  
21 483 (9th Cir. 1975). In determining whether force was wanton and unnecessary, the Court may  
22 properly consider such factors as: 1) the extent of the inmate's injury; 2) the need for the use of  
23 force; 3) the relationship between the need for force and the amount of force used; 4) the threat  
24 reasonably perceived by the officers; and 5) any efforts the officers made to temper the severity  
25 of the forceful response. Hudson, 501 U.S. at 7; Whitley v. Albers, 475 U.S. 312, 321 (1986).

26           **B.     Eighth Amendment – Failure to Intervene**

27           A prisoner’s rights can be violated by a prison official’s deliberate indifference in failing  
28 to intervene. Robins v. Meecham, 60 F.3d 1436, 1442 (9th Cir. 1995). Prison officials are

1 required “to take reasonable steps to protect inmates from physical abuse.” Hoptowit v. Ray,  
2 682 F.2d 1237, 1250 (9th Cir. 1982). To state a claim, Plaintiff must show that Defendants acted  
3 with deliberate indifference. Thomas v. Ponder, 611 F.3d 1144, 1150 (9th Cir. 2010)(citations  
4 omitted). Deliberate indifference requires a showing that “prison officials were aware of a  
5 ‘substantial risk of serious harm’ to an inmate’s health or safety and that there was no  
6 ‘reasonable justification for the deprivation, in spite of that risk.’” Id. (quoting Farmer v.  
7 Brennan, 511 U.S. 825, 837 (1994)). Additionally, an officer can only be held liable for failing to  
8 intercede if he had a realistic opportunity to intercede and failed to do so. Cunningham v. Gates,  
9 229 F.3d 1271, 1289-90 (9th Cir. 2000).

### 10 **C. Type and Extent of Injury Required**

11 Under the Prison Litigation Reform Act (PLRA), Plaintiff must show that he suffered a  
12 physical injury to recover damages for emotional or mental injury. 42 U.S.C. § 1997e(e)(“no  
13 federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional  
14 facility, for mental or emotional injury suffered while in custody without a prior showing of  
15 physical injury.”) Absent a physical injury, damages for emotional or mental injuries are  
16 unrecoverable. Id.

17 Only extreme deprivations rise to the level of a constitutional violation. The existence of  
18 an injury that a reasonable doctor or patient would find worthy of treatment, the presence of a  
19 medical condition that significantly affects an individual’s daily activities, or the existence of  
20 chronic and substantial pain are recognized examples of conditions that rise to the level of an  
21 objectively serious deprivation or injury under the Eighth Amendment. McGuckin v. Smith, 974  
22 F.2d 1050, 1059-60 (9th Cir. 1991). Minor cuts and bruises do not constitute serious injury. Hill  
23 v. Dekalb Youth Detention Center, 40 F.3d 1176, 1188 (11th Cir. 1994). Likewise, “verbal  
24 harassment generally does not violate the Eighth Amendment.” Keenan v. Hall, 83 F.3d 1083,  
25 1092 (9th Cir. 1996).

26 Plaintiff must show more than a de minimis injury. “[N]ot every malevolent touch by a  
27 prison guard gives rise to a federal cause of action.” Wilkins v. Gaddy, 559 U.S. 34, 37  
28 (2010)(quoting Hudson, 503 U.S. at 9). The Eighth Amendment’s prohibition of cruel and

1 unusual punishment “necessarily excludes from constitutional recognition de minimis uses of  
2 physical force, provided that the use of force is not of a sort repugnant to the conscience of  
3 mankind.” Id. at 37-38. “An inmate who complains of a push or shove that causes no  
4 discernible injury almost certainly fails to state a valid excessive force claim.” Id. at 38. In the  
5 excessive force context, “the extent of injury may also provide some indication of the amount of  
6 force applied.” Id.

7 A slap does not rise to the level of an Eighth Amendment violation. See Anthony v.  
8 Shackmann, No. 07-CV-698-HU, 2009 WL 1065071, at\*1 (D. Or. Apr. 17, 2009)(holding that  
9 officer’s “slapping of [the inmate] was a de minimis use of force and, therefore, . . . did not  
10 violate [the inmate’s] rights under the Eighth Amendment”), aff’d in part, vacated in part on  
11 other grounds, and remanded sub nom by Anthony v. Schackmann, 402 F. App’x 207, 208 (9th  
12 Cir. 2010)(“Summary judgment on qualified immunity grounds was proper as to excessive force  
13 claim because, even construing the facts in his favor, defendant[‘s unprovoked, single slap  
14 constituted only de minimis force . . . . “); see also Afeworki v. Thompson, No. C06-628 P, 2007  
15 WL 1751120, at \*7 (W.D. Wash. June 13, 2007)(citing several out of circuit cases that hold that  
16 a slap or slaps “constitutes a ‘de minimis’ use of force under Hudson and does not give rise to a  
17 constitutional violation.”); Siglar v. Hightower, 112 F.3d 191, 193 (5th Cir. 1997)(holding that  
18 an inmate’s bruised ear, resulting from an officer twisting it, was de minimis and not actionable  
19 under the Eighth Amendment).

#### 20 **D. Qualified Immunity**

21 If one or more of the Defendants are found liable to Plaintiff, they are entitled to  
22 consideration of the defense of qualified immunity. For the purpose of qualified immunity, the  
23 court must consider whether the infringed right was clearly established, and “if a reasonable  
24 officer could have believed, in light of the clearly established law, that his conduct was lawful.”  
25 Saucier v. Katz, 533 U.S. 194, 199, 201-02 (2001). More recently, in Pearson v. Callahan, 555  
26 U.S. 223 (2009), the Court held that the first step of the test established in Saucier may be  
27 bypassed to facilitate proper qualified immunity analysis. Id. at 236. Therefore, if the conduct  
28

1 of the government official is inherently reasonable, the Court may extend qualified immunity to  
2 a government official without first ruling on the constitutionality of the official's conduct. Id.

### 3 **E. Punitive Damages**

4 Plaintiff must prove more than a violation of his Eighth Amendment right to recover  
5 punitive damages. In a § 1983 action, punitive damages are recoverable only if the defendants  
6 intended to violate federal law, or acted in a reckless or callous disregard of plaintiff's federally  
7 protected rights. Smith v. Wade, 461 U.S. 30, 51 (1983). It is not enough that defendants may  
8 have acted in an objectively unreasonable manner; their subjective state of mind must be  
9 assessed. Wulf v. City of Wichita, 883 F.2d 842, 867 (10th Cir. 1989). Where there is no  
10 evidence that a Section 1983 defendant has acted with evil intent, there is no legal right to  
11 punitive damages. Ward v. City of San Jose, 967 F.2d 280, 286 (9th Cir. 1991).

### 12 **F. Impeachment By Evidence of Prior Felony Convictions**

13 The verdict in this case will be decided by the jury after consideration of each witness's  
14 credibility. In order to meet his burden of proof at trial, Johnson is expected to testify to his  
15 version of the events that occurred and to the basis for his belief that his constitutional rights  
16 were violated. Rule 609 of the Federal Rules of Civil Procedure provides that evidence of a  
17 witness's prior conviction of a felony may be used to impeach that witness's testimony.  
18 Additionally, any of Plaintiff's incarcerated witnesses who testify are also subject to  
19 impeachment under Rule 609.

20 Further, evidence that a witness has been convicted of any crime which involves an act of  
21 dishonesty or a false statement is admissible regardless of the balancing test under Federal Rule  
22 of Civil Procedure 403. Fed. R. Evid. 609(a)(2). Thus, Defendants will seek to impeach  
23 Plaintiff's trial testimony using any prior convictions involving dishonesty, such as crimes of  
24 fraud, false statement, and forgery.

### 25 **VII. STIPULATIONS**

26 Defendants request a stipulation as to the authenticity of Plaintiff's prison central file and  
27 medical file. Defendants stipulate that the parties need not introduce evidence to prove any  
28 undisputed fact as set forth above.



1           **VIII. AMENDMENTS/DISMISSALS**

2           Defendant does not request any amendments to the pleadings, or additions or substitution  
3 of parties. The Court clarifies that Plaintiff is proceeding on a failure to protect claim against  
4 Defendant Busby.

5           **IX. SETTLEMENT NEGOTIATIONS**

6           Defendants do not believe that settlement negotiations or a court settlement conference  
7 would be helpful.

8           **X. AGREED STATEMENT**

9           None.

10          **XI. SEPARATE TRIAL OF ISSUES**

11          To the extent that Plaintiff claims punitive damages at trial, Defendants request  
12 bifurcation on the issue of punitive damages. Defendants request that no evidence concerning  
13 their financial status be admitted unless and until after the finder of fact determines that punitive  
14 damages are warranted in this case. Bifurcation should be granted under Federal Rules of Civil  
15 Procedure 42(b) because it will expedite and economize the matter. Should Defendants prevail  
16 on liability, no trial on punitive damages will be necessary. Should the jury determine that  
17 punitive damages are appropriate, Defendants request a separate trial on the amount of punitive  
18 damages.

19          Federal Rule of Civil Procedure 42(b) provides that “for convenience, to avoid prejudice,  
20 or to expedite and economize, the court may order a separate trial of one or more separate  
21 issues.” Fed. R. Civ. P. 42(b). Under Rule 42(b), bifurcation of a trial into liability and damages  
22 phases may be appropriate where doing so would be economical and efficient, and where there is  
23 little overlap in the evidence that would be presented at each phase. Arthur Young & Co. v. U.S.  
24 Dist. Court (Kaufmann), 549 F.2d 686, 697 (9th Cir. 1979).

25          Whether to bifurcate a decision is reserved to the trial court’s “sound discretion.” See  
26 Cravens v. County of Wood, Ohio, 856 F.2d 753, 755 (6th Cir. 1988); Davis & Cox v. Summa  
27 Corp., 751 F.2d 1057, 1517 (9th Cir. 1985). In exercising this discretion, a court should consider  
28 such factors as the “potential prejudice to the parties, potential confusion to the jury, and the

1 relative convenience and economy which could result.” Cravens, 856 F.2d at 755 (quotation  
2 omitted); see also Bates v. UPS, 204 F.R.D. 404, 488 (N.D. Cal. 2001)(factors include “avoiding  
3 prejudice, separability of the issues, convenience, judicial economy, and reducing risk of  
4 confusion”). “A decision ordering bifurcation is dependent on the facts and circumstances of  
5 each case.” Saxio v. Titan-C-Manufacturing, 86 F.3d 553, 556 (6th Cir. 1996).

6 Under federal law, Defendants bear the burden of proving financial worth when arguing  
7 in mitigation of damages. Davis v. Mason County, 927 F.2d 1473, 1485 (9th Cir. 1991)(refusing  
8 to consider challenge to punitive damages on ground that defendants could not pay where no  
9 evidence of net worth was offered to the jury); Tri-Ton v. Velto, 525 F.2d 432, 438 (9th Cir.  
10 1975)(refusing to interfere with award that was not outrageously disproportionate to  
11 circumstances when appellants offered no evidence of financial worth). But it is patently unfair  
12 to require a defendants to choose between divulging his personal assets to an inmate and  
13 properly defending himself from an unfair award of punitive damages in this action. Punitive  
14 damages involve intrusive questions, which are intensified in the prison context. Prisoners and  
15 prison staff are strictly prohibited from familiarity between each other for obvious reasons. See  
16 Cal. Code Regs. tit. 15, § 3400. An inmate’s access to staff’s personal and confidential  
17 information could lead to harassment and potential safety and security concerns for the staff  
18 members involved. To protect this interest, Defendants should be permitted to reserve their  
19 testimony as to net financial worth until after any entitlement to punitive damages has been  
20 established. Defendants’ counsel anticipates that less than five minutes of additional testimony  
21 would be required to present this information to the jury, should this request be granted. And if  
22 Plaintiff fails to establish that punitive damages are warranted, this additional testimony would  
23 be unnecessary, thus shortening the length of trial and protecting Defendants’ private  
24 information from disclosure to an inmate. For these reasons, Defendants request that the Court  
25 bifurcate the issue of punitive damages, if the Court determines they are at issue, from the rest of  
26 the trial.

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1           **XII. IMPARTIAL EXPERTS/LIMITATION OF EXPERTS**

2           Defendants indicated that the appointment of an impartial expert, or limitation on the  
3 number of experts is not necessary or advisable.

4           **XIII. PRE TRIAL FILING DEADLINES**

5           **A. Motions In Limine and Hearing.**

6           Any party may file a motion in limine, which is a procedural mechanism to limit in  
7 advance testimony or evidence in a particular area. United States v. Heller, 551 F.3d 1108, 1111  
8 (9th Cir. 2009). In the case of a jury trial, the Court’s ruling gives Plaintiff and Defendants’  
9 counsel advance notice of the scope of certain evidence so that admissibility is settled before  
10 attempted use of the evidence before the jury. Id. at 1111-1112. Although the Federal Rules do  
11 not explicitly provide for the filing of motions in limine, the Court has the inherent power to hear  
12 and decide such motions as a function of its duty to expeditiously manage trials by eliminating  
13 evidence that is clearly inadmissible for any purpose. Luce v. United States, 469 U.S. 38, 41 n.4  
14 (1984).

15           This Court further orders the parties to file motions in limine only with respect to  
16 important, critical issues. Motions in limine on abstract evidentiary issues or issues more  
17 appropriately addressed by the Court on a case-by-case basis (such as a motion in limine to  
18 exclude all irrelevant evidence) will be looked upon with disfavor. After satisfying the forgoing,  
19 if a motion in limine still seeks to address the admissibility of a particular trial exhibit, the  
20 exhibit in question must be referenced by the trial exhibit number so that the court can review the  
21 actual exhibit for admissibility. If the exhibit sought to be admitted would not be in the court’s  
22 possession one week prior to the motion in limine hearing, then the exhibit in question must be  
23 included in the motion. Failure to properly reference or attach an exhibit in the motion will  
24 result in the request being denied.

25           The parties shall not file separate motions in limine for every issue presented to the  
26 Court. Rather, each party may file one consolidated motion in limine which is subdivided into  
27 separate sections for each issue setting for the legal authority and analysis. The responding party  
28 shall file one opposition in response addressing each motion in limine issue in a separate section.

1 As set forth in the Trial Scheduling Order (ECF No. 110), the deadline for service and filing  
2 of motions in limine is **March 1, 2016**. The deadline for service and filing of an opposition, if any,  
3 **March 15, 2016**. A telephonic motions in limine hearing will be held on **March 22, 2016, at 2:00**  
4 **p.m.** in Courtroom Nine, before the undersigned. Counsel for defendants is directed to arrange for  
5 telephone contact with Plaintiff and to contact the Courtroom Deputy, Mamie Hernandez, at (559)  
6 499-5672, prior to the hearing date, to receive instructions regarding the conference call. The parties  
7 are directed to the Court previous order regarding the format and scope of the motion in limine and  
8 such motion and opposition shall conform to those requirements.

9 **B. Trial Witnesses:**

10 No later than **March 29, 2016**, each party shall file and serve a final witness list,  
11 including the name of each witness and omitting witnesses listed in the joint pretrial statement  
12 which the parties no longer intend to call. **Only witnesses who are listed in this pretrial order**  
13 **may appear on the final witness list.** The parties may not call any witness that is not on the  
14 **final witness list unless (1) it is solely for impeachment or rebuttal purposes, (2) the parties**  
15 **stipulate, (3) additional witnesses are required in light of the Court's ruling on a motion in**  
16 **limine<sup>1</sup>, or (4) it is necessary to prevent "manifest injustice."** Fed. R. Civ. P. 16(e); Local  
17 Rule 281(b)(10).

18 During trial, the parties' are obligated to provide the opposing party, by the close of the  
19 prior business day, the names of the witnesses the party intends to call on the next trial day. If  
20 evidentiary problems are anticipated, the parties' shall immediately notify the Court that a  
21 hearing will be required.

22 The following is a list of witnesses that the parties expect to call at trial:  
23  
24  
25  
26

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27 <sup>1</sup> Any party seeking to add additional witnesses beyond those named in the final witness list in light of the Court's  
28 ruling on a motion in limine must file a notice with the Court within two (2) days after the Court's order on the  
motion in limine.

1           1.     Plaintiff Anticipates Calling the Following Witness:

2                     Plaintiff Jaques Fearence.

3  
4           2.     Defendants Anticipate Calling the Following Witnesses:

5           a.     Defendant T. Davis

6           b.     Defendant D. Duffy

7           c.     Defendant S. Hopkins

8           d.     Defendant J. Busby

9           e.     Defendant J. Beckett

10          f.     Custodian of Records for Plaintiff's CDCR Central File ("C-File")

11          g.     Custodian of Records for Plaintiff's Electronic Unit Health Records ("eUHR")

12                     Although the custodians of Plaintiff's C-File and eUHR will be available to testify  
13                     at trial, to avoid undue expense, and absent any dispute about the authenticity of  
14                     documents to be presented, Defendants request that the custodians be permitted to  
15                     authenticate the documents via declaration.

16          3.     Expert Witnesses Who Will Testify

17                     None.

18                     **The parties are forewarned that every witness they intend to call must**  
19 **appear on their own witness list. The mere fact that a witness appears on the opposing**  
20 **party's witness list is not a guarantee that the witness will be called at trial or otherwise be**  
21 **available for questioning by other parties. Each party must undertake independent efforts**  
22 **to secure the attendance of every witness they intend to call at trial.**

23           **C.     Exhibits**

24                     As noted below, no later than **March 15, 2016**, the parties shall file and serve their final  
25 exhibit list and pre-marked exhibits.

26           1.     Pre-Marked Exhibits:

27                     All exhibits must be pre-marked with an exhibit sticker or other legible  
28

1 numbering/lettering by the party who seeks to use it. If the individual exhibit includes multiple  
2 pages and is not easily identified as to each page (i.e., Bates stamp numbering), then the exhibit  
3 must be page numbered. This requirement that exhibits be pre-marked applies both to evidence  
4 that will be formally admitted into evidence as well as any other exhibits that will be presented in  
5 any manner during trial, such as “demonstrative” evidence. Each individual “original” exhibit  
6 that will be submitted to the jury must be stapled/fastened so that the exhibit does not become  
7 separated. Further, exhibits submitted to the jury must be pre-marked on the front page only in  
8 the manner described above. Impeachment or rebuttal evidence need not be pre-marked.

9       **a. Joint Exhibits:** Joint exhibits are those exhibits which all parties agree may be  
10 admitted into evidence without the need for laying a proper foundation under the  
11 Federal Rules of Evidence. Joint exhibits must be pre-marked with the  
12 designation “J-[Number]” (e.g., J-1, J-2). Those exhibits may be introduced at  
13 any time during the course of the trial. However, unless the parties agree  
14 otherwise on the record, joint exhibits are not “automatically” admitted into  
15 evidence: at least one of the parties must admit a joint exhibit into evidence. If an  
16 exhibit is not admitted by any party, the exhibit will not be given to the jury  
17 despite its “joint” designation as an exhibit.

18       **b. Plaintiff’s Exhibits:** Plaintiff’s exhibits must be pre-marked using **numbers**  
19 beginning with 1 (e.g., 1, 2, etc). The Plaintiff must pre-mark his exhibits before  
20 they are provided to the Defendant(s).

21       **c. Defendant’s Exhibits:** Defendant’s exhibits must be pre-marked using **letters**  
22 beginning with A (e.g., A, B, C...AA, BB, CC...AAA, BBB, CCC, etc.).

23       2. Exchange and Filing of Exhibits List and Exhibits

24       No later than **March 1, 2016** the parties shall exchange their proposed exhibits. No later  
25 than **March 15, 2016**, the parties shall file and serve their final exhibit list and pre-marked  
26 exhibits.

1 Each party shall submit three (3) complete, legible and identical sets of exhibits in  
2 binders on or about **March 15, 2016**. Within the binders, the pre-marked exhibits must be  
3 separately tabbed and assembled in sequential order. The binders shall be delivered as follows:

4 a. **Two (2) binder sets** shall be delivered to Courtroom Clerk Mamie Hernandez  
5 (one for use by the Court and one for use at the witness stand); and

6 b. **One binder set** shall be provided for opposing counsel's use.

7 3. Exhibits

8 The following is a list of documents or other exhibits that the parties expect to offer at  
9 trial. As set forth above, exhibits must be pre-marked. See discussion, supra, Part XIII.C.1. No  
10 exhibit, other than those listed in this section, may be admitted unless the parties stipulate or  
11 upon a showing that this order should be modified to prevent "manifest injustice." Fed. R. Civ.  
12 P. 16(e); Local Rule 281(b)(11).

13 a. **Plaintiff's Exhibits**

14 i. All exhibits in the third amended complaint

15 ii. Plaintiff indicates that he would like to introduce his deposition transcript "as  
16 soon as the Defendants provide a copy to him, and would like to introduce request  
17 of admissions, production of documents, and interrogatories"

18 b. **Defendants' Exhibits**

19 i. Affidavit of Custodian of Records of Plaintiff's C-File records with CDCR, dated  
20 January 11, 2016, including the following records:

21 a. Abstract of Judgment, Superior Court of California, County of Los  
22 Angeles, No. NA060375, dated September 22, 2004, for two felony  
23 Convictions on July 12, 2004.

24 b. CDCR Form 7219, Medical Report of Injury or Unusual Occurrence,  
25 dated August 11, 2005.

26 c. CDC Form 115, Rules Violation Report, dated August 11, 2005.

27 ii. Photographs of Dining Hall 4, Holding Cell 13, at CCI.

28 iii. Affidavit of Custodian of Record of Plaintiff's eUHR records, dated January 25,

1 2016, including the following records:

- 2 a. CDCR Form 7230, Interdisciplinary Progress Notes, dated August 11, 2015.
- 3 b. CDCR Form 7362, Health Care Services Request Form, dated September 16,  
4 2015.
- 5 c. Encounter Form: Inflammatory Skin Condition, dated September 16, 2015.

6 Defendants reserve the right to introduce documents not listed above for purposes of  
7 impeachment or rebuttal, including but not limited to, abstracts of judgments of Plaintiff's  
8 inmate witnesses. Defendants further reserve the right to introduce any documents not listed by  
9 Plaintiff.

10 The Court will address objections to exhibits as they arise during trial. If the parties  
11 intend to use copies of exhibits or evidence at trial, those copies must be legible. The Court may,  
12 on its own motion, exclude illegible copies from evidence.

13 4. Responses to Discovery Requests

14 The parties may admit responses to discovery requests<sup>2</sup> into evidence. The parties shall  
15 file and serve a list of all responses to discovery requests intended to be used at trial no later than  
16 **March 15, 2016**. The list shall identify the responses to discovery requests by title and set  
17 number.

18 If a party seeks to admit a physical copy of the discovery responses into evidence at trial,  
19 the discovery responses must be pre-marked as an exhibit in the same manner discussed above.  
20 See discussion, supra, Part XIII.C.1. Alternatively, if the party intends to read relevant portions  
21 of the discovery responses into evidence, a copy of the discovery responses must be lodged with  
22 the Court no later than **March 15, 2016**. The Court will address objections to discovery  
23 responses as they arise during trial.

24 Even though discovery is closed, all parties are reminded of their continuing obligation to  
25 update their prior discovery responses if they obtain new information or is otherwise made aware  
26 that a prior discovery response is incomplete or incorrect. Fed. R. Civ. P. 26(e)(1).

27 \_\_\_\_\_  
28 <sup>2</sup> Responses to discovery requests include responses to depositions by written questions (Fed. R. Civ. P. 31),  
interrogatories (Fed. R. Civ. P. 33) and requests for admissions (Fed. R. Civ. P. 36).



1           **If a party attempts to admit or use for any purpose evidence that (1) was not**  
2 **previously disclosed during discovery and (2) was not previously filed and exchanged as an**  
3 **exhibit as required under section XIII, C(2), detailed above, the Court will prohibit that**  
4 **party from admitting or using for any purpose that evidence at trial, unless the failure was**  
5 **substantially justified or was harmless. See Fed. R. Civ. P. 37(c)(1).**

6           5.       Deposition Testimony

7           Deposition testimony shall be designated by page and line number, with such designation  
8 to be **filed and served no later than March 22, 2016**. Any counter-designation as to the same  
9 designation (also set out by page and line number) shall be **filed and served no later than**  
10 **March 29, 2016**. The original certified transcript of any deposition identified in a designated or  
11 counter-designation shall be lodged with the clerk's office **no later than March 29, 2016**, if not  
12 previously lodged with the Court.

13           If any party intends to admit relevant portions of deposition testimony into evidence, the  
14 relevant deposition testimony must be pre-marked as an exhibit in the same manner discussed  
15 above. See discussion, supra, Part XIII.C.1. However, any party may request that deposition  
16 testimony offered for any purpose other than impeachment be presented in nontranscript form, if  
17 available. See Fed. R. Civ. P. 32(c).

18           The Court will address objections to deposition testimony as they arise during trial.

19           6.       Duty of the Parties' Counsel

20           The Court respects the jury's time and expects issues that must be presented outside the  
21 jury's presence to be raised such that the jury's service is not unnecessarily protracted. To the  
22 extent possible, the parties shall raise issues that must be presented to the Court outside of the  
23 jury's presence (1) in the morning before the jury sits, (2) during breaks, (3) in the afternoon  
24 after the jury is excused or (4) during any other appropriate time that does not inconvenience the  
25 jury. For example, if evidentiary problems can be anticipated, the parties should raise the issue  
26 with the Court before the jury sits so that there is no delay associated with specially excusing the  
27 jury. Issues raised for the first time while the jury is sitting when the issue could have been  
28 raised earlier will be looked upon with disfavor and counsel may be sanctioned for any fees,

1 costs or other expenses caused by their failure to raise the issue at a more convenient time.

2           7.       Post-Trial Exhibit Retention

3           Pursuant to Local Rule 138(f), the Court will order that custody of all exhibits used,  
4 referenced and/or admitted at trial be returned to the party who initially marked the exhibit,  
5 irrespective of who used, referenced or admitted the exhibit at trial. The parties shall retrieve the  
6 original exhibits from the Courtroom Deputy following the verdict in the case. Joint exhibits  
7 will be returned to Plaintiff unless otherwise agreed to by the parties in writing or on the record.  
8 If a party wishes another method for exhibit retention, then such alternative method must be  
9 raised prior to the return of the exhibits.

10           **D.       Trial Briefs**

11           Trial briefs are not required in this case. However, if the parties chose the file a trial  
12 brief, it shall be filed and served no later than **March 22, 2016**.<sup>3</sup> The form and content of the  
13 trial brief must comply with Local Rule 285. Special attention should be given in the trial brief  
14 to address reasonably anticipated disputes concerning the substantive law, jury instructions  
15 and/or admissibility of evidence. Local Rule 285(a)(3). The parties need not include in the trial  
16 brief any issue that is adequately addressed in a motion in limine or in an opposition brief to a  
17 motion in limine.

18           **E.       Jury Instructions**

19           The parties shall filed proposed jury instructions as provided in Local Rule 163 on or  
20 before than **March 22, 2016**, The parties are only required to file proposed jury instructions  
21 relating to the substantive law underlying this action. All proposed jury instructions shall (1)  
22 indicate the party submitting the instruction (i.e., joint/agreed-on, Plaintiff's or Defendants'), (2)  
23 be numbered sequentially, (3) include a brief title for the instruction describing the subject  
24 matter, (4) include the text of the instruction, and (5) cite the legal authority supporting the  
25 instruction. If the proposed jury instruction is based on the Ninth Circuit Model Jury Instructions,  
26 CACI, BAJI or other source of jury instructions, the proposed jury instruction shall also include  
27 a citation to that specific instruction. All proposed jury instructions shall be e-mailed in Word®

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28 <sup>3</sup> The deadline set for trial briefs set in this order shall supersede the deadline set in Local Rule 285(a).

1 format to [saborders@caed.uscourts.gov](mailto:saborders@caed.uscourts.gov) no later than **March 22, 2016**, Jury Instructions will not  
2 be given or used unless they are so e-mailed to the Court.

3 The Court will not accept a mere list of numbers associated with form instructions from  
4 the Ninth Circuit Model Jury Instructions, CACI, BAJI or other source of jury instructions. The  
5 proposed jury instructions must be in the form and sequence which the parties desire to be given  
6 to the jury. Any blank fields in the form instructions must be filled-in before they are submitted  
7 to the Court. Irrelevant or unnecessary portions of form instructions must be omitted.

8 Ninth Circuit Model Jury Instructions shall be used where the subject of the instruction is  
9 covered by a model instruction. Otherwise CACI or BAJI instructions shall be used where the  
10 subject of the instruction is covered by CACI or BAJI. All instructions shall be short, concise,  
11 understandable, and consist of neutral and accurate statements of the law. Argumentative or  
12 formula instructions will not be considered.

13 If any party proposes a jury instruction that departs from the language used in the Ninth  
14 Circuit Model Jury Instructions, CACI, BAJI or other source of jury instructions, that party shall,  
15 by italics or underlining, highlight the differences in language and must cite the legal authority  
16 supporting the modification.

17 No later than **March 29, 2016**, the parties shall file and serve written objections to any  
18 disputed jury instructions proposed by another party. All objections shall be in writing and (1)  
19 shall set forth the proposed instruction objected to in its entirety, (2) shall specifically set forth  
20 the objectionable matter in the proposed instruction, and (3) shall include a citation to legal  
21 authority to explain the grounds for the objection and why the instruction is improper. A concise  
22 argument concerning the instruction may be included. Where applicable, the objecting party shall  
23 submit an alternative proposed instruction covering the subject or issue of law.

#### 24 **F. Proposed Verdict Form**

25 The Court will prepare the verdict form, which the parties will have the opportunity to  
26 review on the morning of trial. If the parties wish to submit a proposed verdict form, they must  
27 do so on or before **March 22, 2016**. Defense counsel's proposed verdict form shall also be e-  
28 mailed as a Word® attachment to [saborders@caed.uscourts.gov](mailto:saborders@caed.uscourts.gov) no later than **March 22, 2016**.

1           **G.     Proposed Jury Voir Dire**

2           Proposed voir dire questions, if any, shall be filed on or before **March 22, 2016**, pursuant  
3 to Local Rule 162.1(a). The parties each are limited to fifteen (15) minutes of jury voir dire,  
4 unless this Court determines more time is warranted.

5           **H.     Statement of the Case**

6           The parties may serve and file a non-argumentative, brief statement of the case which is  
7 suitable for reading to the jury at the outset of jury selection on or before **March 22, 2016**. The  
8 Court will consider the parties' statements but will draft its own statement. The parties will be  
9 provided with the opportunity to review the Court's prepared statement on the morning of trial.

10           **XIV. ASSESSMENT OF JURY COSTS FOR FAILURE TO TIMELY NOTIFY**  
11           **COURT OF SETTLEMENT**

12           The parties must immediately notify the Court of any agreement reached by the parties  
13 which resolves this litigation in whole or in part. Local Rule 160(a). The parties must advise the  
14 Court of settlement immediately, but must do so no later than 4:30 p.m. (Pacific Time) on  
15 **March 29, 2016**. If, for any reason attributable to counsel or parties, including settlement, the  
16 Court is unable to commence a jury trial as scheduled when a panel of prospective jurors has  
17 reported for voir dire, the Court may assess against counsel or parties responsible all or part of  
18 the cost of the panel. Local Rule 272(b). Jury costs will include attendance fees, per diem,  
19 mileage, and parking. If the parties request a continuance after the jury has been called, the  
20 Court may assess jury costs as a condition for the continuance.

21           **XV. COMPLIANCE WITH THIS ORDER**

22           Strict compliance with this order and its requirements is mandatory. This Court will  
23 strictly enforce the requirements of this pretrial order, especially those pertaining to jury  
24 instructions and verdict forms. Failure to comply with all provisions of this order may be  
25 grounds for the imposition of sanctions, including possible dismissal of this action or entry of  
26 default, on any all counsel as well as on any party who causes non-compliance with this order.  
27 This order shall be modified "only to prevent manifest injustice." Fed. R. Civ. P. 16(e).

28           Moreover, this order supersedes the parties' pretrial statement and controls the conduct of

1 further proceedings irrespective of any purported rights the parties claim to reserve in their  
2 pretrial statement.

3 **XVI. OBJECTIONS TO PRETRIAL ORDER**

4 Any party may file and serve written objections to any of the provisions of this order on  
5 or before **March 1 2016**. Such objections shall specify the requested modifications, corrections,  
6 additions or deletions.

7 **XVII. USE OF ELECTRONIC EQUIPMENT IN COURTROOM**

8 Any party wishing to receive an overview or tutorial of the Court's electronic equipment  
9 must contact the Courtroom Deputy Clerk Mamie Hernandez at (559) 499-5672 or  
10 mhernandez@caed.uscourts.gov at least two (2) weeks before the start of trial in order to  
11 schedule a tutorial session at a time convenient to the Court's Information Technology staff. The  
12 parties will not be provided any training on the day of or during the course of the trial.

13 The electronic equipment and resources available for this trial may differ from the  
14 equipment and resources available in other courtrooms and may even differ from the equipment  
15 and resources available in this courtroom at another time. It is the responsibility of the parties to  
16 familiarize themselves with the equipment and resources available for use in this trial prior to the  
17 commencement of trial. If any party is unfamiliar with the equipment and resources available for  
18 use in this trial, that party may be ordered to proceed without the aid of such equipment and  
19 resources and/or may be sanctioned for any fees, costs or expenses associated with any delay.

20 Depending upon Court available equipment at the time of trial, the Plaintiff may be  
21 provided with an electronic overheard projector at his trial table for purposes of showing  
22 exhibited and admitted exhibits at trial. Accordingly, Plaintiff need not request that he allowed  
23 to use electronic equipment as Plaintiff may be provided with electronic equipment if available.

24 **XVIII. OTHER INFORMATION**

25 Additional information describing this Court's expectations regarding attorney conduct  
26 and decorum during all proceedings before United States Magistrate Judge Stanley A. Boone can  
27 be found at the United States District Court for the Eastern District of California's website  
28 (<http://www.caed.uscourts.gov>) under Judges; United States Magistrate Judge Stanley A. Boone

1 (SAB). In the area entitled “Case Management Procedures,” there are links to “Standard  
2 Information” and “Trial Conduct and Decorum.” All parties and counsel shall comply with the  
3 guidelines set forth therein. However, in the event that there is a conflict between this order and  
4 the information on the Court’s website, this order shall supersede the information on the Court’s  
5 website. Furthermore, additional information can be found on the Court’s link including the  
6 Court’s “Jury Selection Procedures” in civil juries.

7  
8 IT IS SO ORDERED.

9 Dated: February 17, 2016

  
UNITED STATES MAGISTRATE JUDGE

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