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

LOUIS BRANCH,  
  
                    Plaintiff,  
  
          v.  
  
D. UMPHENOUR, L. SZALAI, and J.  
ALVAREZ,  
  
                    Defendants.

Case No. 1:08-cv-01655-SAB (PC)  
  
PRETRIAL ORDER  
  
***Motion in Limine Deadlines:***  
Filing: December 27, 2016  
Response: January 9, 2017  
Hearing: January 17, 2017, at 2:00 p.m.  
in Courtroom 9  
  
***Trial Date:***  
January 30, 2017, at 8:30 a.m. in  
Courtroom 9 (SAB) (2-3 days)

This Court conducted a telephonic pretrial conference on December 5, 2016. Plaintiff Louis Branch appeared pro se, and Christina Gruenberg appeared on behalf of Defendants D. Umphenour, L. Szalai, and J. Alvarez. This action is proceeding against Defendants Umphenour, Szalai, and Alvarez for failure to protect Plaintiff in violation of the Eighth Amendment and against Defendant Umphenour for retaliation in violation of the First Amendment. Pursuant to Federal Rule of Civil Procedure 16(e) and Local Rule 283, the Court issues this final pretrial order.

///

1           **I.        **JURISDICTION AND VENUE****

2           This Court has jurisdiction and venue is proper. This Court has original jurisdiction  
3 under 28 U.S.C. §§ 1331, 1334. Venue is proper because a substantial part of the events or  
4 omissions on which the claim is based occurred in this District.

5           On July 14, 2016, Plaintiff filed a motion to disqualify the undersigned. (ECF No. 216.)  
6 On July 21, 2016, an order issued denying Plaintiff’s request for disqualification finding that  
7 Plaintiff provided no basis for disqualification other than his disagreement with rulings made by  
8 the assigned magistrate judge which does not demonstrate bias against him or favoritism toward  
9 Defendants. (ECF No. 218.)

10          In his pretrial statement, Plaintiff disputes the Court’s jurisdiction contending that he  
11 seeks disqualification of the undersigned for “ ‘judicial usurpation of power’; willful abuses of  
12 judicial discretion; and manifest injustice.” (ECF No. 259 at 1.) Motions to disqualify or recuse  
13 a judge fall under two statutory provisions, 28 U.S.C. § 144 and 28 U.S.C. § 455. Section 144  
14 provides for recusal where a party files a timely and sufficient affidavit averring that the judge  
15 before whom the matter is pending has a personal bias or prejudice either against the party or in  
16 favor of an adverse party, and setting forth the facts and reasons for such belief. See 28 U.S.C. §  
17 144. Similarly, section 455 requires a judge to “disqualify himself in any proceeding in which  
18 his impartiality might reasonably be questioned,” 28 U.S.C. § 455(a), or in other specified  
19 circumstances, 28 U.S.C. §455(b).

20          A judge finding a section 144 motion timely and the affidavits legally sufficient must  
21 proceed no further and another judge must be assigned to hear the matter. 28 U.S.C. § 144;  
22 United States v. Sibla, 624 F.2d 864, 867 (9th Cir. 1980). Where the affidavit is not legally  
23 sufficient, however, the judge at whom the motion is directed may determine the matter. Sibla,  
24 624 F.2d at 868 (holding judge challenged under § 144 properly heard and denied motion where  
25 affidavit not legally sufficient). An affidavit filed pursuant to § 144 “is not legally sufficient  
26 unless it specifically alleges facts that fairly support the contention that the judge exhibits bias or  
27 prejudice directed toward a party that stems from an extrajudicial source.” Id. at 868 (citation  
28 omitted).

1 Under section 455 a motion to recuse must be decided by, the very judge whose  
2 impartiality is being questioned.” Bernard v. Coyne, 31 F.3d 842, 843 (9th Cir. 1994). “Section  
3 455 clearly contemplates that decisions with respect to disqualification should be made by the  
4 judge sitting in the case, and not by another judge.” Id. (quoting United States v. Balistreri, 779  
5 F.2d 1191, 1202 (7th Cir. 1985).

6 Under both recusal statutes, the determination for disqualification is “whether a  
7 reasonable person with knowledge of all the facts would conclude that the judge’s impartiality  
8 might reasonably be questioned.” Pesnell v. Arsenault, 543 F.3d at 1043 (quoting United States  
9 v. Hernandez, 109 F.3d 1450, 14534 (9th Cir. 1997). For instance, a judge “shall” disqualify  
10 himself “[w]here he has a personal bias or prejudice concerning a party. . . .” 28 U.S.C. §  
11 455(b)(1). However, the bias must arise from an extrajudicial source and cannot be based solely  
12 on information gained in the course of the proceedings. United States v. Hernandez, 109 F.3d at  
13 1453 (citing Liteky v. United States, 510 U.S. 540, 554-556 (1994). “Judicial rulings alone  
14 almost never constitute a valid basis for a bias or partiality motion.” In re Focus Media, Inc., 378  
15 F.3d 916, 930 (9th Cir. 2004) (quoting Liteky, 510 U.S. at 555).

16 In this instance, Plaintiff has not provided an affidavit and does not allege that recusal is  
17 required due to bias. Plaintiff seeks recusal based upon his conclusory allegations of “ ‘judicial  
18 usurpation of power’; willful abuses of judicial discretion; and manifest injustice.” The Court  
19 has considered the reasons set forth in section 455 which would require recusal and finds no  
20 basis upon which recusal would be required in this matter. The Court thereby denies Plaintiff’s  
21 motion for recusal.

## 22 II. TRIAL

23 Trial will begin on **January 30, 2017, at 8:30 a.m.** before United States Magistrate  
24 Judge Stanley A. Boone in Courtroom 9 (SAB). The trial will be trial by jury. The parties  
25 estimate the trial will take 2 to 3 days. Trial will consist of a jury of eight jurors with each side  
26 having three peremptory strikes.

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1           **III.    FACTS AND EVIDENTIARY ISSUES**

2           **A.    Undisputed Facts**

3           The following facts are undisputed:

4           1.    Plaintiff is a convicted felon, serving a life sentence.

5           2.    Plaintiff was housed at Avenal State Prison (“ASP”) from May to August 2004.

6           3.    Defendants Umphenour, Szalai, and Alvarez, were all employed at ASP in 2004.<sup>1</sup>

7           4.    On July 11, 2004, Defendants Umphenour, Szalai and Alvarez were working third  
8 watch (2:30 p.m. to 10:30 p.m.) in Housing Unit 250 in Facility II at ASP.

9           5.    At approximately 4:25 p.m., Sergeant Wicks was informed that Plaintiff was  
10 attempting to purchase a weapon from another inmate on the Facility II Yard.

11          6.    Upon Sergeant Wick’s request, Defendant Umphenour paged Plaintiff over the  
12 public address system and asked him to report to the podium.

13          7.    Plaintiff approached the podium with blood running down the side of his face.

14          8.    During a search of the area, Sergeant Wicks found an inmate manufactured  
15 weapon in a trash can located on the “A” side of Housing Unit 250. Sergeant Wicks did not  
16 believe that this weapon was the weapon utilized on Plaintiff because the inmate manufactured  
17 weapon was flat metal stock, whereas the wounds sustained by Plaintiff appeared to have come  
18 from a round object.

19          9.    Plaintiff was hospitalized and eventually placed in the Administrative Segregation  
20 Unit.

21          10.   Sergeant R. Wicks discovered an inmate manufactured weapon capable of  
22 inflicting a mortal wound in a trash can adjacent to the dormitory Plaintiff was housed in.

23           **Plaintiff contends that the following facts are undisputed:<sup>2</sup>**

24          1.    In May 2003, ASP officials and J. Mejia, California Department of Corrections  
25 and Rehabilitation (“CDCR”) Headquarters Classification Services Representative, machinated

26 \_\_\_\_\_  
27 <sup>1</sup> Defendants’ undisputed fact states the year as 2011, however based upon the timing of the event at issue, the Court  
assumes that this is a typographical error.

28 <sup>2</sup> The parties’ undisputed facts which the other party has indicated are in dispute are set forth separately.

1 Plaintiff's placement in Soledad Prison with Plaintiff's documented enemy gang member.

2       2.       Plaintiff, accurately predicted to Soledad Psychologist, B. Gammard how, when  
3 and where Soledad Officials would wantonly expose Plaintiff to a substantial risk of serious  
4 harm from his documented enemy gang member.

5       3.       As Plaintiff predicted, prison officials orchestrated a confrontation between  
6 Plaintiff and his enemy gang member in the Central Infirmary.

7       4.       Plaintiff eschewed a physical altercation.

8       5.       Plaintiff's habeas corpus petition to the Monterey Superior Court resulted in an  
9 order which compelled Plaintiff's November 2003 placement in Folsom Prison.

10       6.       Folsom Captain O. Acuna granted Plaintiff's request for a placement  
11 recommendation to Vacaville or San Quentin.

12       7.       However, Folsom Counselor J. Elison forged Acuna's signature and confederated  
13 with the same J. Mejia from CDCR Headquarters to inappropriately deny Plaintiff's placement in  
14 Vacaville or San Quentin.

15       8.       Plaintiff and his mother filed citizen complaints against Elison's fraudulent  
16 machinations with J. Mejia.

17       9.       Elison arranged for Plaintiff's May 2004 placement at ASP in a clear violation of  
18 the Director's placement protocols.

19       10       In fear for his safety and life at ASP, Plaintiff declined to exit his cell to board the  
20 transportation bus to ASP.

21       11       However, Folsom officials forcibly removed Plaintiff from his cell and  
22 transported him to ASP.

23       12.       ASP's Facility 2 Initial Classification Hearing agreed that Plaintiff's placement at  
24 ASP was inappropriate and referred Plaintiff's cause to the Warden's Classification  
25 Representative for remedial action for the violation of the Director's protocols.

26       13.       In June 2004, at ASP, Plaintiff submitted a sworn Declaration to Warden S.  
27 Powers attesting to have witnessed Officer Dunn assault and batter prisoner Hawkins without  
28 legitimate cause.

1           14.     Several days later, Plaintiff and Defendant Umpbenour had a confrontation.

2           15.     Defendant Umpbenour's answer did not raise an affirmative defense regarding the  
3 undisputed confrontation.

4           16.     Defendant Umpbenour alleged he issued a chronological report (chrono) against  
5 plaintiff for possession and use of tobacco as the reason for the undisputed confrontation.

6           17.     Plaintiff alleged Defendant Umpbenour threatened that Plaintiff would be, "Dealt  
7 with!!" for submitting a "false" declaration to Warden S. Powers.

8           18.     Defendant Umpbenour's alleged chrono has not been produced/disclosed and two  
9 comprehensive searches of Plaintiff's case records by Solano Prison Counselor B. Davis has  
10 failed to discover Defendant Umpbenour's chrono.

11          19.     Immediately after the undisputed confrontation Plaintiff was rehoused six times in  
12 three weeks from Housing Units (HU) and from Facility 2 to Facility 4 and back to Facility 2.

13          20.     Facility captains arranged the transfers and were fully cognizant of Plaintiff's  
14 "case factors".

15          21.     On July 10, 2004, Plaintiff was rehoused from the Facility 2 Gymnasium to HU  
16 250 where Defendants were assigned to supervise.

17          22.     On July 11, 2004, at 1545 hours, Plaintiff admonished the Facility 2 Lieutenant  
18 and Sergeant of experiencing escalating tension from HU 250 inmates and requested to be  
19 rehoused to the gym.

20          23.     The Facility 2 Lieutenant granted Plaintiff's request and notified HU 250 officer,  
21 Defendant Umphenour that Plaintiff would be rehoused to the Facility 2 gym after the 1645  
22 institutional count.

23          24.     On July 11, 2004, at 1615-1620 hours, on the HU 250 main dayroom floor and  
24 during the supervision of Defendants Alvarez, Szalai, and Omphenour, Plaintiff was repeatedly  
25 stabbed, beaten and bludgeoned about the head by HU 250 inmates in an attempted murder.

26          25.     During the attempted murder: electronic alarms were not activated; whistles were  
27 not blown; radios did not transmit an alarm; and no orders were given to the inmate assailants to  
28 desist.

1           26.    The inmate assailants were not apprehended, identified nor held accountable for  
2 their attempted murder of Plaintiff.

3           27.    Defendant Umphenour gathered, inventoried, and packed Plaintiff's personal  
4 property in boxes he sealed with tape.

5           28.    Plaintiff was inappropriately ordered placed in Mule Creek Prison.

6           29.    Mule Creek officials documented that when they unsealed the personal property  
7 Defendant Umphenour had packed and sealed, they discovered Plaintiff's property had been  
8 "sabotaged".

9           30.    Mule Creek Counselor B. Heise obtained the 07/11/2004 incident report log ASP  
10 FA2 04 07 0160 of the attempted murder from ASP.

11          31.    In January 2005 Mule Creek officials machinated an approval for Plaintiff's  
12 return placement to ASP.

13          32.    Office of Internal Affairs Special Agent Laura Woods arrived at Mule Creek and  
14 opened a formal investigation of the 07/11/2004 attempted murder of Plaintiff at ASP.

15          33.    Special Agent Woods caused the approved return placement of Plaintiff at ASP to  
16 be rescinded.

17          34.    On 07/07/2008, Plaintiff filed the 42 USC § 1983 complaint alleging the Avenal  
18 Warden, Chief of Inmate Appeals, Chief of Classification Services, Correctional Officers  
19 Alvarez, Szalai and Umphenour were partisans to a policy & custom of retaliation that violated  
20 Plaintiff's First, Eighth and Fourteenth Amendments of the Federal Constitution.

21          35.    The Court established June 21, 2014 as the cut-off date for the parties to conduct  
22 discovery.

23          36.    However, in August 2014, counsel for Defendants submitted a sworn affidavit  
24 attesting to have "discovered" two 07/11/2004 chronos containing the affirmative defense of  
25 Alvarez and Szalai.

26          37.    Defendants' dilatory affirmative defense chronos claimed that during the  
27 attempted murder of Plaintiff: Defendant Umphenour (sworn summary judgment affidavit) was  
28 patrolling the opposite side of HU 250; Defendant Alvarez was exiting the staff restroom; and

1 Defendant Szalai was in the office preparing the institutional count.

2 38. Defendants' affirmative defenses were not raised in their answers (Docs. 107 &  
3 116).

4 39. Additionally, Defendants' affirmative defense claims were not  
5 contemporaneously documented in accordance with CDCR mandated policy in the Dept.  
6 Operations Manual, Chapter 5, Adult Custody and Security Operations, Article 3. Incident  
7 Report §§51030.1-51030.6.1.

8 40. Further, Defendants Alvarez and Szalai did not sign their dilatory affirmative  
9 defense chronos.

10 41. Moreover, Defendants Alvarez and Szalai fail and refuse to identify the alleged  
11 prison official whose signature is affixed to their dilatory affirmative defense chronos.

12 42. Defendants Alvarez, Szalai, and Umphenour did not disclose the information  
13 contained in their 07/11/2004 affirmative defense chronos before their counsel's alleged  
14 "discovery" of that information in Plaintiff's case records.

15 43. Most importantly, the information contained in Defendants' affirmative defense  
16 claims are absolutely novel within the whole of CDCR operations, procedures and protocols and  
17 have not been previously disclosed to nor corroborated by any CDCR official.

18 44. Defendants' exhaustion of administrative remedies affirmative defense remedies  
19 in their motion for summary judgment is based on fraud, perjury and subornation of perjury.

20 45. At Soledad Prison it was discovered that Plaintiff had been exposed to a  
21 substantial risk of serious harm by the surreptitious placement of his documented enemy gang  
22 member in the prison's general population.

23 46. Plaintiff's enemy was providentially apprehended, housed in segregation and  
24 subsequently placed in another prison.

25 47. Plaintiff has been repeatedly exposed to substantial risks of serious harm by  
26 CDCR Classification Services.

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1           **Defendant contends that the following facts are undisputed:**

2           1.       Around 4:30 p.m., Sergeant Wicks called Defendant Umphenour and informed  
3 him that he was looking for an inmate on Facility II who was attempting to buy a weapon from  
4 another inmate. Defendant Umphenour returned to the officer's podium after receiving the call.

5           2.       Sergeant Wicks instructed Correctional Officer Landeros to handcuff, pat search,  
6 and escort Plaintiff to the Facility II Program Office because he suspected that Plaintiff may have  
7 been involved in a fight.

8           **B.       Disputed Facts**

9           The following facts are disputed:

10          **Plaintiff submits the following facts are disputed:**

11          1.       Premise -.tobacco contraband vs. reprisal threat - for undisputed confrontation  
12 between Defendant Umphenour and Plaintiff.

13          2.       Notice (PC §2079) to Warden re: Plaintiff's safety concerns.

14          3.       Failure to process staff complaint re: Officer Perez.

15          4.       Incident Report re: 2004 Avenal Facility 4 Sex Offender Murder.

16          5.       Cognizance by Defendants for the attempted murder of Plaintiff.

17          6.       Defendants machination of the attempted murder of Plaintiff.

18          7.       Assailants were Defendants' inmate gang member agents.

19          8.       Integrity of Defendants' alibi chronological reports.

20          9.       Lieutenant Marmelejo's land line call informing Defendant Umphenour of  
21 Plaintiff's transfer placement to the gymnasium housing unit upon clearance of the institutional  
22 count.

23          10.       Sergeant Wick's alleged "tight" observation.

24          11.       Pervasive knowledge among the inmate general population of the identity of  
25 Plaintiff's assailants.

26          12.       Defendant Umphenour's expropriation, distribution and "sabotage" of Plaintiff's  
27 personal property.

28          13.       Allegation that Plaintiff attempted to purchase an inmate manufactured weapon.

1 14. Allegation that Plaintiff was attacked for attempting to purchase an inmate  
2 manufactured weapon.

3 15. Sergeant Wick's land line call to Defendant Umphenour admonishing Defendant  
4 Umphenour that Wicks had information of weapon purchase.

5 16. Inappropriate 2004 placement at ASP from Folsom Prison in violation of CDCR  
6 protocols.

7 17. Identity of the alleged prison officials whose signature is affixed to Defendants  
8 Alvarez and Szalai's July 11, 2004 alibi chronological reports.

9 **Defendant submits the following facts are disputed:**

10 1. Whether Defendant Umphenour was aware of any declaration that Plaintiff  
11 allegedly submitted in support of another inmate's grievance.

12 2. Whether Defendant Umphenour called Plaintiff a "baby rapist" or a "snitch."<sup>3</sup>

13 3. Whether Plaintiff was assaulted in full view of Defendants, and whether  
14 Defendants failed to intervene.

15 4. Whether Defendants were aware of the assault on Plaintiff before Sergeant Wicks  
16 instructed Defendant Umphenour to summon Plaintiff to the officer's podium using the public  
17 address system.

18 5. What injuries Plaintiff sustained from the incident, if any.

19 **C. Disputed Evidentiary Issues**

20 The following evidentiary issues are disputed:

21 **Plaintiff submits the following disputed evidentiary issues:**

22 1. Defendants' testimony to any alleged factual information and/or evidence not  
23 recorded in the officially mandated crime/incident report - motion in limine.

24 2. Holographic display of the crime scene located in ASP Facility 2, Housing Unit  
25 250's Main Dayroom Floor.

26 \_\_\_\_\_  
27 <sup>3</sup> During the pretrial conference, Plaintiff stipulated that he has never alleged that Defendant Umphenour made such  
28 statements. Plaintiff expressed concern that he would suffer prejudice should Defendants attempt to admit such  
statements during the course of the trial. To the extent that Plaintiff seeks to preclude such statements on the basis  
of undue prejudice, this would be properly raised in a motion in limine.

1 3. Plaintiff's criminal history - motion in limine.

2 4. Plaintiff's disciplinary history - motion in limine.

3 5. Defendants' exhaustion of administrative remedies exhibits in support of their 138  
4 motion for summary judgment is prima facie evidence of spoliation, fraud, perjury, and  
5 subornation of perjury.

6 **Defendant submits the following disputed evidentiary issues:**

7 Currently, Defendants do not know precisely which evidence Plaintiff intends to rely on  
8 at trial because he has not yet filed his Pretrial Statement.<sup>4</sup> Defendants thus reserve the right to  
9 object to Plaintiff's evidence following receipt of his exhibit list and/or at trial.

10 **IV. SPECIAL FACTUAL INFORMATION**

11 Plaintiff submits the following as special factual information:

12 Date, place and general nature of the incident

13 See Undisputed Facts - 4:21-28; 5:1-7.

14 See Disputed Factual Issues - 7:1-28; 7A:1--3.

15 Particular acts, omissions or conditions - basis for liability

16 See Above

17 Statute, Ordinance or Regulation Violated

18 See Undisputed Facts - Pages 2 through 6A.

19 See Disputed Evidentiary Issues – “a.” & “e.”

20 Government Code

21 § 19572 (d) Inexcusable Neglect of Duty, (f) Dishonesty,

22 (t) Failure of Good Behavior

23 Penal Code

24 §115 Offering False or Forged Instruments for Filing

25 §118 False Affidavits as to Affiant's Testimony

26 \_\_\_\_\_  
27 <sup>4</sup> During the pretrial conference, Plaintiff expressed concern regarding a statement in Defendants' pretrial statement  
28 that Defendants had not received his pretrial statement. Defendants asserted that they have now received Plaintiff's  
pretrial statement. The Court notes that the pretrial statement was docketed on the ECF system on November 29,  
2016 as having been received on November 28, 2016.

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- §118 Perjury
- §127 Subornation of Perjury
- §132 Offering False Evidence
- §134 Preparing False Evidence
- §139 Retaliatory Threats ·
- §140 Use of Retaliatory Force
- §146 Seizure of Property
- §147 Willful Inhumanity and Oppression of Prisoner

Department Operations Manual

- §51030.4.1 Incident/Crime Report

Federal Rules of Civil Procedure

- 8(c) Claims of Privilege
- 26(b)(5) Discovery Responses
- 26(g) Discovery Responses
- 33(b)(4) Interrogatory Answers and Responses
- 37(a)(3) Evasive Answer or Responses
- 37(c)(1) False or Misleading Disclosure
- 37(c)(2) Refusal to Admit
- 56( e) Use of Affidavits
- 56(g) “Bad Faith” Affidavits

Federal Rules of Evidence

- 802 Hearsay Rule
- 803(6)(7)(8) Hearsay Without Exception
- 901(a) Authentication
- 902(11) Self-Authentication

Plaintiff's Age: 70 years

Injuries sustained: Stabbed, Beaten, Bludgeoned, Emotional, Mental and Physical Pain

Prior conditioned worsened: Depression and Emotional Pain

1 Future Medical: Mental Health Treatment and Consultation

2 Property Damage: \$600 plus

3 General Damages: Compensatory

4 Punitive Damages: Yes

5 **V. RELIEF SOUGHT**

6 Plaintiff is seeking damages for discovery misconduct sanctions; compensation for  
7 litigation costs and labor; damages for physical, emotional and mental pain and anguish;  
8 damages for “reprehensible” conduct of recklessness, malice and deceit; and property damage.

9 Defendants contend that Plaintiff is not an attorney, and is therefore not entitled to  
10 attorney’s fees. As Plaintiff is not entitled to attorney’s fees under 42 U.S.C. §1988, and  
11 Defendants as government employees are not entitled to fees either, attorney’s fees are not at  
12 issue here.

13 **VI. POINTS OF LAW<sup>5</sup>**

14 **A. Liability Under the 42 U.S.C. § 1983**

15 “Section 1983 creates a private right of action against individuals who, acting under color  
16 of state law, violate federal constitutional or statutory rights.” Tatum v. Moody, 768 F.3d 806,  
17 814 (9th Cir. 2014), cert. denied, 135 S. Ct. 2312 (2015). “Section 1983 is not itself a source of  
18 substantive rights, but merely provides a method for vindicating federal rights elsewhere  
19 conferred.” Tatum, 768 F.3d at 814 (citations omitted).

20 Under section 1983, a plaintiff must prove that (1) each defendant acted under color of  
21 state law and (2) each defendant deprived him of rights secured by the Constitution or federal  
22 law. Long v. County of Los Angeles, 442 F.3d 1178, 1185 (9th Cir. 2006). A person “subjects”  
23 another to the deprivation of a constitutional right within the meaning of the statute if he does an  
24 affirmative act, participates in another’s affirmative acts, or fails to perform an act which he is  
25 legally required to do, that causes the claimed deprivation. Leer v. Murphy, 844 F.2d 628, 633  
26 (9th Cir. 1988). There is no respondeat superior liability under section 1983, and therefore, each

27 \_\_\_\_\_  
28 <sup>5</sup> Plaintiff objects to Defendants’ points of law. As this is an action in which the Plaintiff is proceeding pro se the Court provides the points of law.

1 defendant is only liable for his or her own misconduct. Ashcroft v. Iqbal, 556 U.S. 662, 677  
2 (2009). Plaintiff must demonstrate that each defendant personally participated in the deprivation  
3 of his rights. Jones v. Williams, 297 F.3d 930, 934 (9th Cir. 2002).

4 **B. Failure to Protect in Violation of the Eighth Amendment**

5 The treatment a prisoner receives in prison and the conditions under which the prisoner is  
6 confined are subject to scrutiny under the Eighth Amendment, which prohibits cruel and unusual  
7 punishment. Morgan v. Morgensen, 465 F.3d 1041, 1045 (9th Cir. 2006) (citing Farmer v.  
8 Brennan, 511 U.S. 825, 847 (1994) and Rhodes v. Chapman, 452 U.S. 337, 347 (1981))  
9 (quotation marks omitted). The Eighth Amendment requires prison officials “[to] take  
10 reasonable measures to guarantee the safety of the inmates.” Farmer, 511 U.S. at 832 (internal  
11 quotation marks omitted). This includes the duty to protect inmates from violence at the hands  
12 of other prisoners. Castro v. Cty. of Los Angeles, 833 F.3d 1060, 1067 (9th Cir. 2016).

13 However, not every injury suffered by an inmate at the hands of another results in a  
14 prison official’s liability for violation of the Eighth Amendment. Clem v. Lomeli, 566 F.3d  
15 1177, 1181 (9th Cir. 2009). “The failure of prison officials to protect inmates from attacks by  
16 other inmates may rise to the level of an Eighth Amendment violation when: (1) the deprivation  
17 alleged is ‘objectively, sufficiently serious’ and (2) the prison officials had a ‘sufficiently  
18 culpable state of mind,’ acting with deliberate indifference.” Hearns v. Terhune, 413 F.3d 1036,  
19 1040 (9th Cir. 2005). “Deliberate indifference occurs when ‘the official acted or failed to act  
20 despite his knowledge of a substantial risk of serious harm.’ ” Solis v. Cty. of Los Angeles, 514  
21 F.3d 946, 957 (9th Cir. 2008) (quoting Farmer, 511 U.S. at 841). “Deliberate indifference entails  
22 something more than mere negligence,” but it is “also clear that it is satisfied by something less  
23 than acts or omissions for the very purpose of causing harm or with knowledge that harm will  
24 result.” Farmer, 511 U.S. at 835.

25 **C. Retaliation in Violation of the First Amendment**

26 A viable claim of First Amendment retaliation in the prison context requires evidence  
27 that the prison official took some adverse action against an inmate because of that prisoner’s  
28 protected conduct, that such action would chill a person of ordinary firmness from future First

1 Amendment activities, and that the action did not reasonably advance a legitimate correctional  
2 goal. Rhodes v. Robinson, 408 F.3d 559, 567-69 (9th Cir. 2004); Watison v. Carter, 668 F.3d  
3 1108, 1114 (9th Cir. 2012). “A retaliation claim may assert an injury no more tangible than a  
4 chilling effect on First Amendment rights.” Brodheim v. Cry, 584 F.3d 1262, 1269-70 (9th Cir.  
5 2009) (citations omitted).

6 In order to prevail on his retaliation claim, a plaintiff must prove that his protected  
7 conduct was “the ‘substantial’ or ‘motivating’ factor behind the defendant’s conduct. Brodheim,  
8 584 F.3d at 1271 (quoting Soranno’s Gasco, Inc. v. Morgan, 874 F.2d 1310, 1314 (9th Cir.  
9 1989)); see also Hartman v. Moore, 547 U.S. 250, 259 (2006) (the plaintiff must show a causal  
10 connection between the defendant’s retaliatory animus and the subsequent injury in any  
11 retaliation action). The plaintiff also bears the burden of proving the absence of legitimate  
12 correctional goals for the conduct of which he complains. Pratt v. Rowland, 65 F.3d 802, 806  
13 (9th Cir. 1995).

#### 14 **D. Punitive Damages**

15 In order to recover punitive damages, the plaintiff has the burden of proving what, if any,  
16 punitive damages should be awarded by a preponderance of the evidence. NINTH CIRCUIT  
17 MODEL CIVIL JURY INSTRUCTIONS § 5.5 (2008). The jury must find that the defendants’ conduct  
18 was “motivated by evil motive or intent, or . . . involves reckless or callous indifference to the  
19 federally protected rights of others.” Smith v. Wade, 461 U.S. 30, 56 (1986).

#### 20 **VII. STIPULATIONS**

21 Defendants do not anticipate any stipulations at this time but will attempt to meet and  
22 confer with Plaintiff regarding potential stipulations.

#### 23 **VIII. AMENDMENTS/DISMISSALS**

24 Plaintiff seeks to file a fourth amended complaint. On October 5, 2016, an order issued  
25 denying Plaintiff’s request to file an amended pleading. To the extent that Plaintiff is seeking  
26 reconsideration of that order, under Rule 60(b) of the Federal Rules of Civil Procedure, a district  
27 court may grant relief from its previous orders in the following circumstances: “(1) mistake,  
28 inadvertence, surprise, or excusable neglect; . . . or [¶] (6) any other reason that justifies relief.”

1 “A motion for reconsideration should not be granted, absent highly unusual circumstances,  
2 unless the district court is presented with newly discovered evidence, committed clear error, or if  
3 there is an intervening change in the controlling law.” Marlyn Nutraceuticals, Inc. v. Mucos  
4 Pharma GmbH & Co., 571 F.3d 873, 880 (9th Cir.2009) (internal quotation marks and citations  
5 omitted). Moreover, “[a] party seeking reconsideration must show more than a disagreement  
6 with the Court's decision, and recapitulation. . .” of that which was already considered by the  
7 Court in rendering its decision. U.S. v. Westlands Water Dist., 134 F.Supp.2d 1111, 1131  
8 (E.D.Cal.2001) (internal quotation marks and citation omitted).

9 Further, requests for reconsideration are also governed by Local Rule 230(j) which states:

10 Whenever any motion has been granted or denied in whole or in part, and a  
11 subsequent motion for reconsideration is made upon the same or any alleged  
12 different set of facts, counsel shall present to the Judge or Magistrate Judge to  
13 whom such subsequent motion is made an affidavit or brief, as appropriate,  
14 setting forth the material facts and circumstances surrounding each motion for  
15 which reconsideration is sought, including:

- 16 (1) when and to what Judge or Magistrate Judge the prior motion was made;
- 17 (2) what ruling, decision, or order was made thereon;
- 18 (3) what new or different facts or circumstances are claimed to exist which did not  
19 exist or were not shown upon such prior motion, or what other grounds exist for  
20 the motion; and
- 21 (4) why the facts or circumstances were not shown at the time of the prior motion.

22 Plaintiff has set forth no grounds for the court to reconsider the order denying his motion  
23 to file an amended complaint. Accordingly, Plaintiff's motion to file an amended complaint is  
24 denied.

25 No amendments are requested by Defendants.

#### 26 **IX. SETTLEMENT NEGOTIATIONS**

27 There have been no settlement negotiations. Plaintiff has failed to make a settlement  
28 demand, and the mandatory settlement conference was vacated after Plaintiff stated that he  
refused to attend the mandatory settlement conference in person.

Plaintiff objects to this statement on the ground that the settlement judge vacated the  
settlement conference because it refused to conduct the conference in accordance with the Civil  
Rights of Institutionalized Persons Act; and also Defendants did not make a settlement offer.

///



1           **X.     AGREED STATEMENT**

2           Presentation of all or part of this action upon an agreed statement of facts is unlikely,  
3 given the factual disputes between the parties.

4           **XI.    SEPARATE TRIAL OF ISSUES**

5           Defendants request to bifurcate the issue of punitive damages, in order to avoid the  
6 unnecessary and/or premature admission of evidence regarding Defendants’ net worth.  
7 Additionally, there is only one incident at issue, so no other separate trial of issues is  
8 recommended.

9           As is this Court’s standard practice, the Court will bifurcate the issue of punitive  
10 damages. If the jury finds that any defendant is liable for punitive damages, the Court will  
11 conduct a second phase of trial on the amount of punitive damages.

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

13           Plaintiff requests appointment of experts. The district court has the discretion to appoint  
14 an expert pursuant to Rule 706(a) of the Federal Rules of Evidence, which reads, in part, “[t]he  
15 court may on its own motion or on the motion of any party enter an order to show cause why  
16 expert witnesses should not be appointed. . . .” Fed. R. Evid. 706(a); Walker v. American Home  
17 Shield Long Term Disability Plan, 180 F.3d 1065, 1071 (9th Cir. 1999). Rule 706 also confers  
18 on the court the discretion to apportion costs in the manner directed by the court, including the  
19 apportionment of costs to one side. Fed. R. Evid. 706; Ford ex rel. Ford v. Long Beach Unified  
20 School Dist., 291 F.3d 1086, 1090 (9th Cir. 2002); Walker, 180 F.3d at 1071.

21           Expert testimony is governed by Rule 702 of the Federal Rules of Evidence which  
22 provides that an expert witness may testify if “the expert’s scientific, technical, or other  
23 specialized knowledge will help the trier of fact to understand the evidence or to determine a fact  
24 in issue.” Fed. R. Evid. 702(a). In this action, the trier of fact is being asked to determine if the  
25 Defendants failed to protect Plaintiff from other inmates and if Defendant Umphenour retaliated  
26 against Plaintiff. As evidenced from the pretrial statements of the parties, the factual issues to be  
27 decided in this action will largely require credibility findings based on the testimony of the  
28 individual witnesses. Given the claims that are proceeding to trial in this action, the Court does

1 not find, and Plaintiff has not identified, any evidence or fact in issue for which an expert  
2 opinion would assist the jury in determining. Accordingly, Plaintiff's request for appointment of  
3 an expert witness is denied.

4 Defendants do not believe limitation of witnesses is needed.

### 5 **XIII. PRE TRIAL FILING DEADLINES**

#### 6 **A. Motions In Limine and Hearing:**

7 Any party may file a motion in limine, which is a procedural mechanism to limit in  
8 advance testimony or evidence in a particular area. United States v. Heller, 551 F.3d 1108, 1111  
9 (9th Cir. 2009). In the case of a jury trial, the Court's ruling gives Plaintiff and Defendants'  
10 counsel advance notice of the scope of certain evidence so that admissibility is settled before  
11 attempted use of the evidence before the jury. Id. at 1111-1112. Although the Federal Rules do  
12 not explicitly provide for the filing of motions in limine, the Court has the inherent power to hear  
13 and decide such motions as a function of its duty to expeditiously manage trials by eliminating  
14 evidence that is clearly inadmissible for any purpose. Luce v. United States, 469 U.S. 38, 41 n.4  
15 (1984).

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

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

1 shall file one opposition in response addressing each motion in limine issue in a separate section.

2 As set forth in the Trial Scheduling Order (ECF No. 215), the deadline for service and  
3 filing of motions in limine is **December 27, 2016**. The deadline for service and filing of an  
4 opposition, if any, is **January 9, 2017**. A telephonic motions in limine hearing will be held on  
5 **January 17, 2017, at 2:00 p.m.** in Courtroom 9, before the undersigned. Counsel for  
6 Defendants is directed to arrange for telephone contact with Plaintiff and to contact the  
7 Courtroom Deputy, Mamie Hernandez, at (559) 499-5672, prior to the hearing date, to receive  
8 instructions regarding the conference call. The parties are directed to the Court previous order  
9 regarding the format and scope of the motion in limine and such motion and opposition shall  
10 conform to those requirements.

11 **B. Trial Witnesses:**

12 No later than **January 13, 2017**, each party shall file and serve a final witness list,  
13 including the name of each witness and omitting witnesses listed in the joint pretrial statement  
14 which the parties no longer intend to call. **Only witnesses who are listed in this pretrial order**  
15 **may appear on the final witness list.** **The parties may not call any witness that is not on the**  
16 **final witness list unless (1) it is solely for impeachment or rebuttal purposes, (2) the parties’**  
17 **stipulate, (3) additional witnesses are required in light of the Court’s ruling on a motion in**  
18 **limine, or (4) it is necessary to prevent “manifest injustice.”** Fed. R. Civ. P. 16(e); Local  
19 Rule 281(b)(10).

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

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

25 1. **Plaintiff Anticipates Calling the Following Witnesses:**<sup>6</sup>

26 <sup>6</sup> The Court does not require Plaintiff to subpoena the defendants to call them as witnesses during his case in chief.  
27 Defendants are required to appear during the trial to potentially be called as witnesses in this action.

28 During the December 5, 2016 pretrial conference, Plaintiff raised the issue of his inability to call witnesses  
because he was unable to pay witness fees to bring his witnesses to the trial. The Court notes that Plaintiff was

- 1 a. Plaintiff Louis Branch
- 2 b. Inmate Hawkins, P 93276<sup>7</sup>
- 3 c. Inmate Torbor, K 48746
- 4 d. Correctional Lieutenant Marmolejo
- 5 e. Correctional Sergeant Wicks
- 6 f. Correctional Sergeant Ecklin
- 7 g. Warden Powers
- 8 h. Internal Affairs Special Agent Woods
- 9 i. Correctional Officer Dunn
- 10 j. Correctional Captain Fuentes
- 11 k. Correctional Captain Jones
- 12 l. Inmate Appeals Chief Grannis
- 13 m. Attorney Carbone
- 14 n. Inspector General Barton
- 15 o. Thompson - Expert
- 16 p. Piller - Expert
- 17 q. Hickman - Expert.

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18  
19 provided with deadlines to file motions for the attendance of incarcerated and non-incarcerated witnesses in the trial  
20 scheduling order issued June 2, 2016. Plaintiff was required to file a motion for the attendance of incarcerated  
21 witnesses on or before October 10, 2016. (ECF No. 215 at 6-7.) The order informed Plaintiff that he needed to file  
22 a motion identifying the incarcerated witness and the motion must be accompanied by a declaration showing that the  
23 requested witness has actual knowledge of facts relevant in this action. Plaintiff did not file a motion identifying  
24 witnesses or including the required showing of knowledge of relevant information.

25 Further, Plaintiff was provided with the procedure to procure unincarcerated witnesses who refuse to testify  
26 voluntarily. A motion was required to be filed by December 5, 2015. Plaintiff did not file a timely motion to obtain  
27 the attendance of unincarcerated witnesses. Plaintiff asserted at the pretrial hearing that rather than filing a motion  
28 to obtain witnesses he filed a request for appointment of counsel. To the extent that Plaintiff's current request is  
construed as a motion for waiver of the requirement that Plaintiff pay witness fees, the in forma pauperis statute, 28  
U.S.C. § 1915, does not waive payment of fees or expenses for witnesses. Dixon v. Ylst, 990 F.2d 478, 480 (9th  
Cir. 1993) (citing Tedder v. Odel, 890 F.2d 210, 211-12 (9th Cir.1989)). Plaintiff is not entitled to waiver of the  
witness fees or expenses in this action. Further, Plaintiff has not submitted a motion for attendance of  
unincarcerated witnesses, nor has he demonstrated that any of his requested witnesses have knowledge relevant in  
this action. Plaintiff's request to waive the witness fee requirement is denied.

<sup>7</sup> Plaintiff did not submit a motion for the attendance of incarcerated witnesses requesting the attendance of  
incarcerated witnesses at the trial of this matter.

- 1 r. Hagar – Expert (Special Master)
- 2 s. Hurdle –Expert (Ombudsman)
- 3 2. Defendants Anticipate Calling the Following Witnesses:
- 4 a. Defendant D. Umphenour  
5 Represented by counsel
- 6 b. Defendant L. Szalai  
7 Represented by counsel
- 8 c. Defendant J. Alvarez  
9 Represented by counsel
- 10 d. Sergeant R. Wicks  
11 Avenal State Prison  
12 #1 Kings Way  
13 Avenal, CA 93204  
14 (559) 386-0587
- 15 e. Lieutenant M. Marmolejo  
16 Avenal State Prison  
17 #1 Kings Way  
18 Avenal, CA 93204  
19 (559) 386-0587
- 20 f. Correctional Officer R. Landeros  
21 Avenal State Prison  
22 #1 Kings Way  
23 Avenal, CA 93204  
24 (559) 386-0587
- 25 g. MTA R. Giebrecht  
26 Avenal State Prison  
27 #1 Kings Way  
28 Avenal, CA 93204  
(559) 386-0587
- h. Custodian of Records  
Avenal Valley State Prison  
#1 Kings Way  
Avenal, CA 93204  
(559) 386-0587

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

1           **C. Exhibits**

2           As noted below, no later than **December 12, 2016**, the parties shall exchange their final  
3 exhibit list and pre-marked exhibits.

4           1.     Pre-Marked Exhibits:

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

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

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

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

28     ///

1           2.     Exchange and Filing of Exhibits List and Exhibits

2           No later than **December 12, 2016**, the parties shall exchange their proposed exhibits.  
3 Because Plaintiff is incarcerated, he shall submit his exhibits to the Litigation Coordinator at the  
4 Institution where he is incarcerated, on or before the above-referenced deadline. The exhibits  
5 exchanged shall be pre-marked by each party and correctly exhibited in the format described in  
6 Part XIII.C.1, above.

7           Defendants are required to submit trial exhibits for both parties in binders. As noted  
8 above, Defendants shall submit **three (3) complete, legible and identical sets of exhibits in**  
9 **binders** on or about **January 9, 2017**. Within the binders, the pre-marked exhibits must be  
10 separately tabbed and assembled in sequential order. The three complete binders shall be  
11 delivered to Courtroom Clerk Mamie Hernandez for use (1) by the Court, (2) at the witness stand  
12 for the witnesses, and 3) for the plaintiff at trial.<sup>8</sup>

13           3.     Exhibits

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

19           **a.     Plaintiff’s Exhibits**

- 20           1.     11/26/2003 Inspector General Memo  
21           2.     1/15/2003 Complaint #00160  
22           3.     4/19/2003 Vendetta Memo-ASP Warden  
23           4.     4/24/2003 Vendetta Memo-FBI  
24           5.     4/15/2003 CSR Action  
25           6.     7/14/2003 Chrono  
26           7.     8/12/2003 Court Order

27 \_\_\_\_\_  
28 <sup>8</sup> The Court notes this is a change from the June 2, 2016 trial scheduling order which only required two sets of exhibits.

- 1 8. 11/14/2003 CSR Action
- 2 9. 3/15/2004 R. Branch Complaint
- 3 10. 3/24/2004 Complaint Receipt
- 4 11. 4/18/2004 Complaint Disposition
- 5 12. 4/12/2004 Mission Change Memo - Conversion
- 6 13. 4/15/2004 C. Carbone, Esq. Memo
- 7 14. 4/16/2004 CSR Action
- 8 15. 4/21/2004 Notice of Lost Appeal
- 9 16. 5/19/2004 ASP Initial Classification Chrono
- 10 17. 5/27/2004 Response re: C. Carbone
- 11 18. 5/26/2004 Allegation Response
- 12 19. 6/16/2004 Warden Declaration
- 13 20. 6/20/2004 Warden Declaration
- 14 21. 6/22/2004 Transfer Chrono
- 15 22. 7/02/2004 Transfer Chrono
- 16 23. 7/11/2004 Incident Report
- 17 24. 51030.4.1 DOM Incident Report
- 18 25. 8/04/2004 Complaint #02265
- 19 26. 8/6/2004 CSR Action
- 20 27. 8/18/2004 Property Appeal #02125
- 21 28. 10/13/2004 Hardship Dr. Letter
- 22 29. 1/21/2005 CSR Action
- 23 30. 2/7/2005 OIA Investigation
- 24 31. 2/8/2005 CSR Action
- 25 32. 7/19/07 Emergency Appeal #03042
- 26 33. 11/16/07 Safety Memo
- 27 34. 11/27/07 Safety Concerns Memo
- 28 35. 8/1/08 News Article - Policy & Custom



- 1 36. 8/8/08 News Article Code of Silence
- 2 37. 9/29/10 Surreptitious Enemy Placement
- 3 38. 10/2/15 Chrono Search
- 4 39. 12/17/2015 News Article

5 **b. Defendant's Exhibits**

- 6 1. Photographs of "A" side of Housing Unit 250 in Facility II at Avenal State Prison
- 7 2. Diagram of Housing Unit 250 in Facility II at Avenal State Prison
- 8 3. Photographs of Plaintiff from July 11, 2004
- 9 4. Plaintiff's CDC 7219 Medical Report from July 11, 2004
- 10 5. Photographs of inmate manufactured weapon found on July 11, 2004
- 11 6. Plaintiff's Inmate Appeal's Tracking System printouts
- 12 7. Plaintiff's Appeal No. ASP-M-04-02265 (and responses)
- 13 8. Plaintiff's Appeal No. ASP-M-04-01272 (and responses)

14 If the parties intend to use copies of exhibits or evidence at trial, those copies must be  
15 legible. The Court may, on its own motion, exclude illegible copies from evidence.

16 4. Responses to Discovery Requests

17 The parties may admit responses to discovery requests<sup>9</sup> into evidence. The parties shall  
18 file and serve a list of all responses to discovery requests intended to be used at trial no later than  
19 **December 12, 2016**. The list shall identify the responses to discovery requests by title and set  
20 number.

21 If a party seeks to admit a physical copy of the discovery responses into evidence at trial,  
22 the discovery responses must be pre-marked as an exhibit in the same manner discussed above.  
23 See discussion, *supra*, Part XIII.C.1. Alternatively, if the party intends to read relevant portions  
24 of the discovery responses into evidence, a copy of the discovery responses must be lodged with  
25 the Court no later than **January 23, 2017**. The Court will address objections to discovery  
26 responses as they arise during trial.

27 \_\_\_\_\_  
28 <sup>9</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 Even though discovery is closed, all parties are reminded of their continuing obligation to  
2 update their prior discovery responses if they obtain new information or is otherwise made aware  
3 that a prior discovery response is incomplete or incorrect. Fed. R. Civ. P. 26(e)(1).

4 **If a party attempts to admit or use for any purpose evidence that (1) was not**  
5 **previously disclosed during discovery and (2) should have been disclosed as an initial**  
6 **disclosure under Rule 26(a) or as a supplemental disclosure under Rule 26(e), the Court**  
7 **will prohibit that party from admitting or using for any purpose that evidence at trial,**  
8 **unless the failure was substantially justified or was harmless. See Fed. R. Civ. P. 37(c)(1).**

9 5. Deposition Testimony

10 Deposition testimony shall be designated by page and line number, with such designation  
11 to be **filed and served no later than December 27, 2016**. Any counter-designation as to the  
12 same designation (also set out by page and line number) shall be **filed and served no later than**  
13 **January 17, 2017**. The original certified transcript of any deposition identified in a designated  
14 or counter-designation shall be lodged with the clerk,s office **no later than December 27, 2016**,  
15 if not previously lodged with the Court.

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

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

22 6. Duty of the Parties' Counsel

23 The Court respects the jury's time and expects issues that must be presented outside the  
24 jury's presence to be raised such that the jury's service is not unnecessarily protracted. To the  
25 extent possible, the parties shall raise issues that must be presented to the Court outside of the  
26 jury's presence (1) in the morning before the jury sits, (2) during breaks, (3) in the afternoon  
27 after the jury is excused or (4) during any other appropriate time that does not inconvenience the  
28 jury. For example, if evidentiary problems can be anticipated, the parties should raise the issue

1 with the Court before the jury sits so that there is no delay associated with specially excusing the  
2 jury. Issues raised for the first time while the jury is sitting when the issue could have been  
3 raised earlier will be looked upon with disfavor and counsel may be sanctioned for any fees,  
4 costs or other expenses caused by their failure to raise the issue at a more convenient time.

5       7.     Post-Trial Exhibit Retention

6       Pursuant to Local Rule 138(f), the Court will order that custody of all exhibits be returned  
7 to the defendants' counsel after completion of the trial. The defendants' counsel shall retrieve  
8 the original exhibits from the courtroom deputy following the verdict in the case. The  
9 defendants' counsel shall retain possession of and keep safe all exhibits until final judgment and  
10 all appeals are exhausted or the time for filing an appeal has passed.

11       **D.     Trial Briefs**

12       Trial briefs are not required in this case.<sup>10</sup> However, if the parties chose to file a trial  
13 brief, it shall be filed and served no later than **January 23, 2017**. The form and content of the  
14 trial brief must comply with Local Rule 285. Special attention should be given in the trial brief  
15 to address reasonably anticipated disputes concerning the substantive law, jury instructions  
16 and/or admissibility of evidence. Local Rule 285(a)(3). The parties need not include in the trial  
17 brief any issue that is adequately addressed in a motion in limine or in an opposition brief to a  
18 motion in limine.

19       **E.     Jury Instructions**

20       The parties shall file proposed jury instructions as provided in Local Rule 163 on or  
21 before than **January 13, 2017**. The parties are only required to file proposed jury instructions  
22 relating to the substantive law underlying this action. All proposed jury instructions shall (1)  
23 indicate the party submitting the instruction (i.e., joint/agreed-on, Plaintiff's or Defendant's), (2)  
24 be numbered sequentially, (3) include a brief title for the instruction describing the subject  
25 matter, (4) include the text of the instruction, and (5) cite the legal authority supporting the  
26 instruction. If the proposed jury instruction is based on the Ninth Circuit Model Jury Instructions,  
27

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28 <sup>10</sup> The deadline set for trial briefs set in this order shall supersede the deadline set in Local Rule 285(a).

1 CACI, BAJI or other source of jury instructions, the proposed jury instruction shall also include  
2 a citation to that specific instruction. All proposed jury instructions shall be e-mailed in Word®  
3 format to [saborders@caed.uscourts.gov](mailto:saborders@caed.uscourts.gov) no later than **January 13, 2017**. Jury Instructions will  
4 not be given or used unless they are so e-mailed to the Court.

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

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

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

19 No later than **January 23, 2017**, the parties shall file and serve written objections to any  
20 disputed jury instructions proposed by another party. All objections shall be in writing and (1)  
21 shall set forth the proposed instruction objected to in its entirety, (2) shall specifically set forth  
22 the objectionable matter in the proposed instruction, and (3) shall include a citation to legal  
23 authority to explain the grounds for the objection and why the instruction is improper. A concise  
24 argument concerning the instruction may be included. Where applicable, the objecting party shall  
25 submit an alternative proposed instruction covering the subject or issue of law.

#### 26 **F. Proposed Verdict Form**

27 The Court will prepare the verdict form, which the parties will have the opportunity to  
28 review on the morning of trial. If the parties wish to submit a proposed verdict form, they must

1 do so on or before **January 13, 2017**. Defense counsel's proposed verdict form shall also be e-  
2 mailed as a Word® attachment to saborders@caed.uscourts.gov no later than **January 13, 2017**.

3 **G. Proposed Jury Voir Dire**

4 Proposed voir dire questions, if any, shall be filed on or before **January 23, 2017**,  
5 pursuant to Local Rule 162.1(a). The parties each are limited to fifteen (15) minutes of jury voir  
6 dire, unless this Court determines more time is warranted.

7 **H. Statement of the Case**

8 The parties may serve and file a non-argumentative, brief statement of the case which is  
9 suitable for reading to the jury at the outset of jury selection on or before **January 23, 2017**. The  
10 Court will consider the parties' statements but will draft its own statement. The parties will be  
11 provided with the opportunity to review the Court's prepared statement on the morning of trial.

12 **XIV. ASSESSMENT OF JURY COSTS FOR FAILURE TO TIMELY NOTIFY**  
13 **COURT OF SETTLEMENT**

14 The parties must immediately notify the Court of any agreement reached by the parties  
15 which resolves this litigation in whole or in part. Local Rule 160(a). The parties must advise the  
16 Court of settlement immediately, but must do so no later than 4:30 p.m. (Pacific Time) on  
17 **January 27, 2017**. If, for any reason attributable to counsel or parties, including settlement, the  
18 Court is unable to commence a jury trial as scheduled when a panel of prospective jurors has  
19 reported for voir dire, the Court may assess against counsel or parties responsible all or part of  
20 the cost of the panel. Local Rule 272(b). Jury costs will include attendance fees, per diem,  
21 mileage, and parking. If the parties request a continuance after the jury has been called, the  
22 Court may assess jury costs as a condition for the continuance.

23 **XV. COMPLIANCE WITH THIS ORDER**

24 Strict compliance with this order and its requirements is mandatory. This Court will  
25 strictly enforce the requirements of this pretrial order, especially those pertaining to jury  
26 instructions and verdict forms. Failure to comply with all provisions of this order may be  
27 grounds for the imposition of sanctions, including possible dismissal of this action or entry of  
28 default, on any all counsel as well as on any party who causes non-compliance with this order.

1 This order shall be modified “only to prevent manifest injustice.” Fed. R. Civ. P. 16(e).

2 Moreover, this order supersedes the parties’ pretrial statement and controls the conduct of  
3 further proceedings irrespective of any purported rights the parties claim to reserve in their  
4 pretrial statement.

5 **XVI. USE OF ELECTRONIC EQUIPMENT IN COURTROOM**

6 Any party wishing to receive an overview or tutorial of the Court’s electronic equipment  
7 must contact the Courtroom Deputy Clerk Mamie Hernandez at (559) 499-5672 or  
8 mhernandez@caed.uscourts.gov at least two (2) weeks before the start of trial in order to  
9 schedule a tutorial session at a time convenient to the Court’s Information Technology staff. The  
10 parties need to coordinate so everyone who is interested can attend the IT conference, the Court  
11 will hold only one conference per case. The parties shall confer and advise the Courtroom  
12 Deputy Clerk Mamie Hernandez of the date and time that has been agreed upon. The parties will  
13 not be provided any training on the day of or during the course of the trial.

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

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

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1           **XVII. OBJECTIONS TO PRETRIAL ORDER**

2           Any party may file and serve written objections to any of the provisions of this order on  
3 or before **December 20, 2016**. Such objections shall specify the requested modifications,  
4 corrections, additions or deletions.

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6 IT IS SO ORDERED.

7 Dated: **December 7, 2016**

  
UNITED STATES MAGISTRATE JUDGE

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