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8 **UNITED STATES DISTRICT COURT**
9 **EASTERN DISTRICT OF CALIFORNIA**
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11 SAMMY ZAMARO,) Case No.: 1:09-cv-00580-BAM PC
12 Plaintiff,)
13 v.) ORDER DENYING PLAINTIFF’S MOTION FOR
14 G. MOONGA, et al.,) CONSIDERATION REGARDING
15 Defendants.) UNINCARCERATED WITNESSES LISTED IN
16) PLAINTIFF’S PRETRIAL STATEMENT
17) (ECF No. 95)
18) ORDER DENYING PLAINTIFF’S REQUEST TO
19) THIS COURT THAT IT CONSIDER USING ITS
20) DISCRETION BY CALLING AND
21) INTERROGATION OF WITNESSES
22) (ECF No. 97)
23) ORDER DENYING IN PART PLAINTIFF’S
24) MOTIONS FOR ATTENDANCE OF
25) UNINCARCERATED WITNESSES
26) (ECF Nos. 98, 99)
27) DEADLINE TO SUBMIT WITNESS FEES:
28) January 29, 2014

25 Plaintiff Sammy Zamaro (“Plaintiff”) is a state prisoner proceeding pro se and in forma
26 pauperis in this civil rights action pursuant to [42 U.S.C. § 1983](#). This action is currently proceeding on
27 Plaintiff’s complaint, filed February 12, 2009, against Defendants Moonga and Akanno for deliberate
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1 indifference to Plaintiff's serious medical needs in violation of the Eighth Amendment. A telephonic
2 trial confirmation hearing is set for January 29, 2014, and a jury trial is set for March 3, 2014. A
3 settlement conference is scheduled on February 13, 2014, before the Honorable Craig M. Kellison.

4 On November 22, 2013, Plaintiff filed the following motions related to unincarcerated
5 witnesses: (1) Motion for Consideration Regarding Unincarcerated Witnesses Listed in Plaintiff's
6 Pretrial Statements; (2) Request to this Court that it Consider Using its Discretion by Calling and
7 Interrogation of Witnesses By Court; (3) Motion for the Attendance of Unincarcerated Witnesses RN
8 Campos, Sgt. Juarez, Correctional Officer Martinez, Correctional Officer Swansey, and Correctional
9 Officer Brian; (4) Motion for the Attendance of Unincarcerated Witnesses Defendants Moonga,
10 Akanno, Nurse Bedi and Dr. Martinez. Defendants did not file any opposition and the motions are
11 deemed submitted. Local Rule 230(l).

12 **A. Motion for Consideration Regarding Unincarcerated Witnesses Listed in Plaintiff's**
13 **Pretrial Statements**

14 Plaintiff has listed Registered Nurse Campos, Correctional Officer Swansey, Correctional
15 Officer Sgt. Juarez, Correctional Officer Martinez and Correctional Officer Brian as potential trial
16 witnesses. Plaintiff reports that he is currently in solitary confinement at Pelican Bay State Prison and
17 is severely limited in his ability to conduct any investigation to obtain needed declarations and to
18 conduct the depositions of these proposed witnesses. As a result, Plaintiff is unable to determine
19 whether or not these listed witnesses are willing to voluntarily testify or refuse to testify. Plaintiff
20 therefore requests that the Court issue an order instructing the institution where he is housed and the
21 institution of employment of the listed unincarcerated witnesses to establish a line of communication
22 so that Plaintiff may obtain written or verbal testimony or deposition from the unincarcerated
23 witnesses and establish whether or not each unincarcerated witness will be willing to voluntarily
24 testify.

25 Plaintiff's motion shall be denied. Plaintiff may not pursue non-party testimony by way of
26 written or oral deposition because discovery in this matter has been closed since July 6, 2012. The
27 Court also will not issue an order requiring the non-parties to communicate directly with Plaintiff or
28 requiring their employers to make them available for such communications. As Plaintiff has not been

1 in contact with these proposed witnesses, he should presume that they are unwilling to testify
2 voluntarily on his behalf.

3 **B. Request to this Court that it Consider Using its Discretion by Calling and**
4 **Interrogation of Witnesses By Court**

5 Plaintiff also requests that the Court waive the need for Plaintiff to pay the \$40.00 subpoena
6 fee and calculated travel expenses for each unincarcerated witness. Plaintiff asks the Court to exercise
7 its discretion by calling and interrogating these witnesses pursuant to Federal Rule of Evidence 614.

8 Plaintiff's request shall be denied. As explained to Plaintiff in the Second Scheduling Order,
9 no statute authorizes the use of public funds for payment of a witness's travel expenses and daily
10 witness fees. Accordingly, Plaintiff must tender the witness fees and travel expenses, even if he is
11 proceeding in forma pauperis. Absent the payment of fees and issuance of subpoenas, the Court will
12 not call Plaintiff's witnesses to testify at trial. Fed. R. Evid. 614(a).

13 **C. Motion for the Attendance of Unincarcerated Witnesses RN Campos, Sgt. Juarez,**
14 **Correctional Officer Martinez, Correctional Officer Swansey, and Correctional**
15 **Officer Brian**

16 As noted above, Plaintiff requests the attendance of the following unincarcerated witnesses at
17 trial: (1) RN Campos; (2) Sgt. Juarez; (3) Correctional Officer Martinez; (4) Correctional Officer
18 Swansey; and (5) Correctional Officer Brian. Plaintiff declares under penalty of perjury that these
19 individuals have personal knowledge of, and were eyewitnesses to, the events described in his
20 complaint. (ECF No. 98, pp. 2, 4, 6, 8, 10.)

21 Plaintiff's motion shall be granted. If Plaintiff wishes to have RN Campos, Sgt. Juarez,
22 Correctional Officer Martinez, Correctional Officer Swansey, and Correctional Officer Brian served
23 with summonses to testify at trial, Plaintiff must submit a money order, for *each* witness, made out to
24 that witness in the amount of \$131.76.¹

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27 ¹ The amount for each of these witnesses is based on the daily witness fee of \$40.00, plus \$91.76 for round-trip
28 mileage for one day. 28 U.S.C § 1821. Plaintiff reports that each of these witnesses is located at Kern Valley State Prison. It is 162.4 miles, round trip, from Kern Valley State Prison to the courthouse, and the current mileage reimbursement rate is \$0.565 per mile.

D. Motion for the Attendance of Unincarcerated Witnesses Defendants Moonga, Akanno, Nurse Bedi and Dr. Martinez.

Plaintiff requests the attendance of Defendants Moonga and Akanno at trial. (ECF No. 99.) Plaintiff's request is unnecessary. Absent extenuating circumstances, Defendants Moonga and Akanno shall be present and available to testify at trial if called as witnesses. Therefore, a subpoena directing their attendance at trial shall not be issued and Plaintiff's request for such order shall be denied.

Plaintiff also moves for the attendance of "Defendant Bedi" and "Defendant Martinez" at trial. Nurse Bedi and Dr. Martinez are no longer defendants in this action. Therefore, if Plaintiff wishes to have Nurse Bedi and Dr. Martinez served with summonses to testify at trial, Plaintiff must submit a money order made out to Nurse Bedi in the amount of \$131.76, and a money order made out to Dr. Martinez in the amount of \$163.17 by January 29, 2014.²

Based on the above, IT IS HEREBY ORDERED as follows:

1. Plaintiff's motion for consideration regarding unincarcerated witnesses listed in Plaintiff's pretrial statement is DENIED.
2. Plaintiff's request to this Court that it consider using its discretion by calling and interrogation of witnesses by the Court is DENIED.
3. Plaintiff's motion for the attendance of unincarcerated witnesses RN Campos, Sgt. Juarez, Correctional Officer Martinez, Correctional Officer Swansey, and Correctional Officer Brian is GRANTED;
4. To have RN Campos, Sgt. Juarez, Correctional Officer Martinez, Correctional Officer Swansey, and Correctional Officer Brian served with summonses to testify at trial, Plaintiff

² The amount for Nurse Bedi is based on the daily witness fee of \$40.00, plus \$91.76 for round-trip mileage for one day. 28 U.S.C § 1821. Nurse Bedi is located at Kern Valley State Prison. It is 162.4 miles, round trip, from Kern Valley State Prison to the courthouse, and the current mileage reimbursement rate is \$0.565 per mile.

The amount for Dr. Martinez is based on the daily witness fee of \$40.00, plus \$123.17 for round trip mileage for one day. Dr. Martinez is located at CHW Central California Mercy Hospital. It is 218 miles, round trip, from CHW Central California Mercy Hospital to the courthouse, and the current mileage reimbursement rate is \$0.565 per mile.

1 must submit a money order made out to each witness in the amount of \$131.76 by January
2 29, 2014;

3 5. Plaintiff's motion for the attendance of Defendants Moonga and Akanno is DENIED as
4 unnecessary;

5 6. Plaintiff's motion for the attendance of Nurse Bedi and Dr. Martinez is GRANTED;

6 7. To have Nurse Bedi served with a summons to testify at trial, Plaintiff must submit a
7 money order made out to that witness in the amount of \$131.76 by January 29, 2014;

8 8. To have Dr. Martinez served with a summons to testify at trial, Plaintiff must submit a
9 money order made out to that witness in the amount of \$163.17 by January 29, 2014; and

10 9. The Court cannot accept cash and the money order may not be made out to the Court. The
11 money order must be made out in the witness's name.

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13 IT IS SO ORDERED.

14 Dated: January 13, 2014

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