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

JIMMY MCDONALD,  
Plaintiff,

v.

CANO, CLARK, RODRIGUEZ,  
and ROBERTS,  
Defendants.

Case No. 1:09-cv-00730-SKO PC

**AMENDED PRETRIAL ORDER**

**Jury Trial:** September 17, 2013, at 8:30 a.m.  
in Courtroom 7 (SKO)

Plaintiff Jimmy McDonald, a state prisoner proceeding pro se and in forma pauperis, filed this civil rights action pursuant to 42 U.S.C. § 1983 on April 24, 2009. This action for damages is proceeding against Defendants Cano, Clark, Rodriguez, and Roberts for acting with deliberate indifference to a substantial risk of harm to Plaintiff's health and/or safety, in violation of the Eighth Amendment of the United States Constitution. Plaintiff's claim arises out of Defendants' alleged failure to accommodate his medical need for a lower bunk at Pleasant Valley State Prison (PVSP) between April and August 2006.<sup>1</sup>

**I. Jurisdiction and Venue**

The Court has subject matter jurisdiction over this federal civil rights action. 28 U.S.C. § 1331. Venue is proper because the conduct allegedly occurred in this judicial district.

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<sup>1</sup> On February 3, 2011, Defendants Yates and Igbinsosa and Plaintiff's claims for equitable relief were dismissed from the action at the screening stage for failure to state a claim. 28 U.S.C. § 1915A. (Doc. 16.)

1 **II. Jury Trial**

2 All parties seek a trial by jury. Fed. R. Civ. P. 38(b).

3 **III. Facts**

4 **A. Undisputed Facts**

5 1. Plaintiff is a prisoner in the custody of the California Department of Corrections and  
6 Rehabilitation (CDCR) and is serving a ten-year sentence for his 2004 felony conviction.

7 2. Plaintiff was incarcerated at PVSP from April 2005 to September 2012.

8 3. Upon his arrival at PVSP, Plaintiff received an “intake informational chrono” for a low  
9 bunk/low tier housing assignment because of his medical condition.

10 4. On March 10, 2006, Dr. Ferro issued a Comprehensive Accommodation Chrono (CDC  
11 7410) for Plaintiff that did not indicate that he required a low-bunk assignment.

12 5. On June 21, 2006, Plaintiff was moved to an upper bunk in cell 131 in Building 2 on  
13 Facility A at PVSP.

14 6. Defendants Cano and Roberts were the second-watch housing officers in Building 2;  
15 Defendant Rodriguez was one of the third-watch housing officers in the building; and Defendant  
16 Clark was a second-watch relief officer, who covered Cano’s or Roberts’s shift on their days off.

17 7. At all times relevant, Defendants were acting under color of state law.

18 8. On August 9, 2006, Nurse Practitioner Coleman issued an updated CDC 7410 for Plaintiff  
19 that did not indicate that he required a low-bunk assignment.

20 9. On September 3, 2006, at approximately 5:20 p.m., Plaintiff fell off his top bunk and was  
21 taken to an outside medical facility for treatment.

22 10. Plaintiff sustained rib fractures and a cervical-spine fracture.

23 11. On September 7, 2006, medical staff issued a comprehensive-accommodation chrono for  
24 Plaintiff to receive a permanent low-bunk, low-tier assignment.

25 12. None of the Defendants had access to Plaintiff’s medical records and did not know what  
26 medical conditions he had.

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1           **B.       Disputed Facts**

- 2 1.       Did Plaintiff inform Defendants of his seizure disorder or need for low-bunk assignment,  
3 which they ignored?
- 4 2.       Did Plaintiff have an accommodation chrono for a low-bunk assignment of which  
5 Defendants were aware before his fall?
- 6 3.       Did Defendants have the authority to move an inmate from his assigned bunk or cell?
- 7 4.       The extent and severity of Plaintiff's injuries.

8           **C.       Disputed Evidentiary Issues**<sup>2</sup>

- 9 1.       Defendants object to Plaintiff testifying about the diagnosis and prognosis of his injuries  
10 and the cause of any medical condition of which he complained or continues to complain on the  
11 ground that Plaintiff is not qualified to give testimony about the cause and effect, diagnosis, or  
12 prognosis of his medical conditions.
- 13 2.       Defendants intend to file motions in limine to preclude Plaintiff from testifying, eliciting  
14 testimony, or introducing evidence of the following matters:
- 15           (a)     dismissed Defendants or claims;
- 16           (b)     unrelated events and individuals, including Plaintiff's purported lack of proper  
17 medical care for his injuries;
- 18           (c)     Defendants' involvement in other lawsuits or incidents alleging excessive force or  
19 deliberate indifference to the health or safety of inmates;
- 20           (d)     offers to compromise; and
- 21           (e)     CDCR's indemnification of an adverse judgment.
- 22 3.       Defendants will file a motion in limine to exclude or limit the testimony of the inmate  
23 witnesses Plaintiff intends to call.
- 24 4.       Defendants will also file a motion in limine to permit them to introduce evidence of  
25 Plaintiff's and any incarcerated witness's felony conviction or sentence for impeachment  
26 purposes.
- 27 5.       Defendants anticipate objecting to various exhibits Plaintiff intends to use at trial.

28 \_\_\_\_\_  
<sup>2</sup> Evidentiary objections may be raised in a timely motion in limine, addressed in section XVIII, or at trial.

1 6. Plaintiff identifies the extent of his injuries as the source of a likely evidentiary dispute.

2 **D. Special Factual Information**

3 None.

4 **IV. Relief Sought**

5 This action is limited to monetary damages. In his complaint, Plaintiff seeks \$250,000.00  
6 in compensatory damages from each Defendant.

7 Defendants seek judgment and an award of costs.

8 **V. Points of Law**

9 **A. Section 1983**

10 The Civil Rights Act under which this action was filed provides:

11 Every person who, under color of [state law] . . . subjects, or causes to be subjected,  
12 any citizen of the United States . . . to the deprivation of any rights, privileges, or  
13 immunities secured by the Constitution . . . shall be liable to the party injured in an  
action at law, suit in equity, or other proper proceeding for redress.

14 42 U.S.C. § 1983.

15 Section 1983 provides a cause of action for the violation of Plaintiff's constitutional by  
16 persons acting under color of state law. *Nurre v. Whitehead*, 580 F.3d 1087, 1092 (9th Cir 2009);  
17 *Long v. County of Los Angeles*, 442 F.3d 1178, 1185 (9th Cir. 2006); *Jones v. Williams*, 297 F.3d  
18 930, 934 (9th Cir. 2002). To prevail on his claim, Plaintiff must demonstrate a link between  
19 actions or omissions of Defendants and the violation of his Eighth Amendment rights; there is no  
20 *respondeat superior* liability under section 1983. *Ashcroft v. Iqbal*, 556 U.S. 662, 676-77, 129  
21 S.Ct. 1937 (2009); *Simmons v. Navajo County, Ariz.*, 609 F.3d 1011, 1020-21 (9th Cir. 2010);  
22 *Ewing v. City of Stockton*, 588 F.3d 1218, 1235 (9th Cir. 2009); *Jones*, 297 F.3d at 934.

23 **B. Eighth Amendment Claims**

24 The Eighth Amendment's prohibition against cruel and unusual punishment protects  
25 prisoners not only from inhumane methods of punishment but also from inhumane conditions of  
26 confinement. *Morgan v. Morgensen*, 465 F.3d 1041, 1045 (9th Cir. 2006) (citing *Farmer v.*  
27 *Brennan*, 511 U.S. 825, 847, 114 S.Ct. 1970 (1994) and *Rhodes v. Chapman*, 452 U.S. 337, 347,  
28 101 S.Ct. 2392 (1981)) (quotation marks omitted). While conditions of confinement may be, and

1 often are, restrictive and harsh, they must not involve the wanton and unnecessary infliction of  
2 pain. *Morgan*, 465 F.3d at 1045 (citing *Rhodes*, 452 U.S. at 347) (quotation marks omitted).

3 Prison officials have a duty to ensure that prisoners are provided adequate shelter, food,  
4 clothing, sanitation, medical care, and personal safety, *Johnson v. Lewis*, 217 F.3d 726, 731 (9th  
5 Cir. 2000) (quotation marks and citations omitted), but not every injury that a prisoner sustains  
6 while in prison represents a constitutional violation, *Morgan*, 465 F.3d at 1045 (quotation marks  
7 omitted). To maintain an Eighth Amendment claim, inmates must show deliberate indifference to  
8 a substantial risk of harm to their health or safety. *E.g.*, *Farmer*, 511 U.S. at 847; *Thomas*, 611  
9 F.3d at 1151-52; *Foster v. Runnels*, 554 F.3d 807, 812-14 (9th Cir. 2009); *Morgan*, 465 F.3d at  
10 1045; *Johnson*, 217 F.3d at 731; *Frost v. Agnos*, 152 F.3d 1124, 1128 (9th Cir. 1998). Deliberate  
11 indifference is shown where a prison official “knows that inmates face a substantial risk of serious  
12 harm and disregards that risk by failing to take reasonable measures to abate it.” *Farmer*, 511  
13 U.S. at 847. Prison officials’ duty under the Eighth Amendment is to ensure reasonable safety,  
14 and prison officials may be found free from liability if they responded reasonably to the risk, even  
15 if the harm ultimately was not averted. *Farmer*, 511 U.S. at 847 (quotation marks and citations  
16 omitted).

17 **C. Qualified Immunity**

18 Qualified immunity shields government officials from civil damages unless their conduct  
19 violates “clearly established statutory or constitutional rights of which a reasonable person would  
20 have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727 (1982). “Qualified  
21 immunity balances two important interests - the need to hold public officials accountable when  
22 they exercise power irresponsibly and the need to shield officials from harassment, distraction, and  
23 liability when they perform their duties reasonably,” *Pearson v. Callahan*, 555 U.S. 223, 231, 129  
24 S.Ct. 808 (2009), and it protects “all but the plainly incompetent or those who knowingly violate  
25 the law,” *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092 (1986).

26 In resolving a claim of qualified immunity, courts must determine whether, taken in the  
27 light most favorable to the plaintiff, the defendant’s conduct violated a constitutional right, and if  
28 so, whether the right was clearly established. *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151

1 (2001); *Mueller v. Aufer*, 576 F.3d 979, 993 (9th Cir. 2009). While often beneficial to address in  
2 that order, courts have discretion to address the two-step inquiry in the order they deem most  
3 suitable under the circumstances. *Pearson*, 555 U.S. at 236 (overruling holding in *Saucier* that the  
4 two-step inquiry must be conducted in that order, and the second step is reached only if the court  
5 first finds a constitutional violation); *Mueller*, 576 F.3d at 993-94.

6 **D. Punitive Damages**

7 Plaintiff has the burden of proving what, if any, punitive damages should be awarded by a  
8 preponderance of the evidence. NINTH CIRCUIT MODEL CIVIL JURY INSTRUCTIONS § 5.5  
9 (2008). The jury must find that Defendants’ conduct was “motivated by evil motive or intent, or .  
10 . . involves reckless or callous indifference to the federally protected rights of others.” *Smith v.*  
11 *Wade*, 461 U.S. 30, 56, 103 S.Ct. 1625 (1986). Acts or omissions which are malicious, wanton, or  
12 oppressive support an award of punitive damages. *Dang v. Cross*, 422 F.3d 800, 807-08 (9th Cir.  
13 2005).

14 **E. Federal Rules of Evidence**

15 Federal Rules of Evidence 608 and 609 provide that evidence of a witness’s prior felony  
16 conviction or instance of conduct demonstrating a propensity to lie may be used to impeach that  
17 witness’s testimony. Federal Rule of Evidence 404(b) provides that evidence of prior crimes,  
18 wrongs, or acts cannot be used to prove the character of the person in order to show conduct in  
19 conformity with that character trait. Such prior acts may be admissible for other purposes only,  
20 such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of  
21 mistake or accident. *Id.*

22 **VI. Abandoned Issues**

23 None.

24 **VII. Witnesses**

25 **The following is a list of witnesses that the parties expect to call at trial, including**  
26 **rebuttal and impeachment witnesses. NO WITNESS, OTHER THAN THOSE LISTED IN**  
27 **THIS SECTION, MAY BE CALLED AT TRIAL UNLESS THE PARTIES STIPULATE**

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1 **OR UPON A SHOWING THAT THIS ORDER SHOULD BE MODIFIED TO PREVENT**  
2 **“MANIFEST INJUSTICE.” Fed. R. Civ. P. 16(e); Local Rule 281(b)(10).**

3 **A. Plaintiff’s Witness List**

- 4 1. Plaintiff Jimmy McDonald
- 5 2. Inmate Charles Rickard, #H-46257
- 6 3. Inmate Daniel Laury, #K-90424
- 7 4. Inmate Chance Harden, #H-30661
- 8 5. Inmate Armando Rico, #D-83084<sup>3</sup>
- 9 6. Sgt. B DeFrance<sup>4</sup>

10 **B. Defendants’ Witness List**<sup>5</sup>

- 11 1. Jimmy McDonald, Plaintiff
- 12 2. A. Cano, Defendant
- 13 3. G. Clark, Defendant
- 14 4. H. Roberts, Defendant
- 15 5. R. Rodriguez, Defendant
- 16 6. K. Ruth, Correctional Officer at PVSP
- 17 7. B. DeFrance, Sergeant at PVSP
- 18 8. R. Ferro, Physician at PVSP
- 19 9. D. Coleman, Nurse Practitioner at PVSP

20  
21 <sup>3</sup> Plaintiff’s motion for the attendance of incarcerated witnesses Rickard, Laury, and Harden was granted, but  
22 Plaintiff’s motion for the attendance of inmate Rico was denied on the ground that he could not be identified and  
located within the CDCR system. (Doc. 153.)

23 <sup>4</sup> While Plaintiff states his desire to have Sgt. DeFrance served with a subpoena to appear at trial, Plaintiff did not  
24 comply with the scheduling order, which required Plaintiff to notify the Court on or before March 1, 2013, of any  
witnesses he sought to have served with subpoenas. (Doc. 116, Pretrial Stmt., 3:2-4; Doc. 107, 2<sup>nd</sup> Sched. Order, 4:3-  
25 22.) The Court also notes that Plaintiff has at no time represented he is willing and able to compensate unincarcerated  
witnesses who refuse to testify voluntarily. The scheduling order notified Plaintiff of the requirement that  
unincarcerated witnesses who refused to testify voluntarily be paid \$40.00 per day plus travel expenses.

26 Sgt. DeFrance is on Defendants’ witnesses list, however. While Defendants are not required to call Sgt.  
DeFrance to testify, if he appears at trial to testify, Plaintiff may also call him as a witness.

27 <sup>5</sup> Defendants are not required to call all of the witnesses they listed. However, witnesses the defense plans to call shall  
28 be present on September 17, 2013, by 1:30 p.m. and shall be available for Plaintiff to call for direct examination.

- 1 10. P. Benyamin, Physician at PVSP
- 2 11. Appeals Coordinator at PVSP
- 3 12. Litigation Coordinator at PVSP
- 4 13. Person Most Knowledgeable at PVSP concerning the process and requirements for CDC
- 5 7410 accommodation chronos
- 6 14. Custodian(s) of Records for Plaintiff's central file and medical records with CDCR<sup>6</sup>

7 **VIII. Exhibits**

8 **The following is a list of documents or other exhibits that the parties expect to offer at**  
9 **trial. NO EXHIBIT, OTHER THAN THOSE LISTED IN THIS SECTION, MAY BE**  
10 **ADMITTED UNLESS THE PARTIES STIPULATE OR UPON A SHOWING THAT THIS**  
11 **ORDER SHOULD BE MODIFIED TO PREVENT "MANIFEST INJUSTICE." Fed. R.**  
12 **Civ. P. 16(e); Local Rule 281(b)(11).**

13 **A. Plaintiff's Exhibits**

- 14 1. Intake Informational Chrono form, dated April 21, 2005
- 15 2. General Chrono form (CDC 128-B), dated August 21, 2005
- 16 3. Medical Record from Stanford Hospital & Clinics-Emergency Dept., dated September 4,
- 17 2006
- 18 4. Declaration of Carlos Cervantes, dated September 3, 2006
- 19 5. Declaration of Charles Rickard, dated September 3, 2006
- 20 6. Declaration of Plaintiff Jimmy McDonald, dated September 3, 2006
- 21 7. Declaration of R. Rodriguez, dated July 6, 2012
- 22 8. Drawing by Plaintiff Jimmy McDonald of Plaintiff's vertebrae after x-rays were taken on
- 23 June 15, 2011
- 24 9. Report by James Carter Thomas, MD, APC, dated June 4, 2008
- 25 10. Report by James Carter Thomas, MD, APC, dated June 17, 2011

26 \_\_\_\_\_  
27 <sup>6</sup> Defendants seek to have the custodians of record authenticate documents by written declaration to avoid undue  
28 expense and in the absence of any dispute over the authenticity of the documents to be presented. Defendants' request  
is granted in light of their willingness to stipulate to the authenticity of any unaltered records from Plaintiff's central  
and medical files maintained by CDCR and any CDCR records generated and maintained in the regular course of  
business. (The documents may still be objected to on other grounds.)

- 1 11. Coalinga Regional Medical Center radiology report, CT lumbosacral spine/CT  
2 reconstructions, dated April 29, 2012
- 3 12. Coalinga Regional Medical Center radiology report, CT cervical spine with  
4 reconstructions, dated April 29, 2012
- 5 13. Central California Emergency Services Agency report, dated September 4, 2006
- 6 14. University Medical Center, Department of Medical Imaging report, dated September 27,  
7 2006
- 8 15. Health Care Services Physician Request for Services form (CDCR 7243), dated December  
9 6, 2006
- 10 16. Initial Pain Assessment Patient Completion form (CDCR 7471), dated July 22, 2011
- 11 17. Chronic Pain Provider-Patient Agreement/Informed Consent for Opioid Pain Medication  
12 form (CDCR 7474), dated July 22, 2011
- 13 18. Medication Reconciliation form, active and inactive medications as of February 4, 2011,  
14 signed and dated February 7, 2011
- 15 19. Medication Reconciliation form, active and inactive medications as of June 24, 2010,  
16 signed and dated June 26, 2010
- 17 20. Medication Reconciliation form, active and inactive medications as of September 1, 2010,  
18 signed and dated September 7, 2010
- 19 21. Medication Reconciliation form, inactive medications as of May 27, 2010, signed and  
20 dated May 28, 2010

21 **B. Defendants' Exhibits**

- 22 1. Inmate/Parolee Appeal Form (CDC 602) Log No. PVSP-06-2953 (all levels)
- 23 2. Plaintiff's Inmate/Parolee Appeals History-Tracking System Level I & II from PVSP
- 24 3. Intake Informational Chrono, dated April 21, 2005
- 25 4. Comprehensive Accommodation Chrono (CDC 7410), dated March 10, 2006
- 26 5. Comprehensive Accommodation Chrono (CDC 7410), dated August 9, 2006
- 27 6. Comprehensive Accommodation Chrono (CDC 7410), dated September 7, 2006
- 28 7. IPTS022A—Bed Assignments for Plaintiff (computerized printout) (4 pgs)

- 1 8. Plaintiff's Relevant Medical Records:
- 2 a. Outpatient Interdisciplinary Progress Notes, dated March 10, 2006
- 3 b. Physician's Orders, dated March 10, 2006
- 4 c. Outpatient Interdisciplinary Progress Notes, dated August 9, 2006
- 5 d. Physician's Orders, dated August 9, 2006
- 6 e. Encounter Form: Loss of Consciousness, dated September 3, 2006 (2 pgs)
- 7 f. Health Care Services Physician Request for Services, dated September 3, 2006
- 8 g. Progress Notes, dated September 4, 2006
- 9 h. Health Care Services Request Form, dated September 5, 2006
- 10 i. Encounter Form: Musculoskeletal Complaint (Non-Traumatic), dated September 7,
- 11 2006
- 12 j. Physician's Orders, dated September 7, 2006
- 13 9. Chapter 23 Comprehensive Accommodation Chrono (Jan. 2006) from Volume 4 of CDCR
- 14 Division of Correctional Health Care Services' Inmate Medical Services Policies & Procedures
- 15 manual (4 pgs)
- 16 10. CDCR Department Operations Manual § 52020.5.4-GA 154, Inmate Transfer Form
- 17 11. Abstract Judgment for Plaintiff's committed offense, dated July 16, 2004
- 18 12. Declaration of Custodian of Records of Plaintiff's central file records with CDCR
- 19 13. Declaration of Custodian of Records of Plaintiff's medical file records with CDCR

20 **IX. Discovery Documents to be Used at Trial**

21 Defendants intend to use (1) Response to Interrogatory 1 and 2 to Roberts's first set of

22 interrogatories and (2) Response to Interrogatory 1, 2, and 9 to Clark's first set of interrogatories.

23 Defendants may use, for impeachment purposes, Plaintiff's deposition testimony, taken on

24 April 6, 2012, and his remaining responses to discovery.

25 Plaintiff does not identify any specific discovery documents to be used at trial.

26 **X. Further Discovery or Motions**

27 None.

28 ///

1 While Plaintiff continues to seek modification of the scheduling order to conduct further  
2 discovery, the Court previously ruled numerous time that discovery will remain closed and  
3 Plaintiff's motions for reconsideration on that issue were denied. (Docs. 59, 80, 103, 121.) Thus,  
4 Plaintiff's requests for further discovery and/or to compel the production of documents, set forth  
5 in his pretrial statement, are denied. Fed. R. Civ. P. 16(b)(4); *Zivkovic v. Southern California*  
6 *Edison Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002).

7 **XI. Stipulations**

8 Defendants are willing to stipulate to the authenticity of any unaltered records from  
9 Plaintiff's central and medical files maintained by CDCR and any CDCR records generated and  
10 maintained in the regular course of business.

11 Defendants also do not dispute that they were acting under color of state law at the time of  
12 the relevant events.

13 **XII. Amendments/Dismissals**

14 Defendants' request to amend the caption of this action to reflect the names of only the  
15 remaining defendants is granted.

16 **XIII. Settlement Negotiations**

17 The parties participated in a settlement conference before U.S. Magistrate Judge Stanley A.  
18 Boone on June 12, 2013, but the case did not settle.

19 **XIV. Agreed Statement**

20 None.

21 **XV. Separate Trial of Issues**

22 The punitive damages phase, if any, will be bifurcated.

23 **XVI. Impartial Experts – Limitation of Experts**

24 Plaintiff seeks the appointment of a medical expert witness to testify regarding the extent  
25 and severity of Plaintiff's injuries.

26 While the Court has the discretion to appoint an expert and to apportion costs, including  
27 the apportionment of costs to one side, Fed. R. Evid. 706; *Ford ex rel. Ford v. Long Beach Unified*  
28 *School Dist.*, 291 F.3d 1086, 1090 (9th Cir. 2002); *Walker v. American Home Shield Long Term*

1 *Disability Plan*, 180 F.3d 1065, 1071 (9th Cir. 1999), where the cost would likely be apportioned  
2 to the government, the Court should exercise caution. The Court’s docket is comprised of an  
3 overwhelming number of civil rights cases filed by prisoners proceeding pro se and in forma  
4 pauperis, and the facts of this case are no more extraordinary and the legal issues involved no  
5 more complex than those found in the majority of the cases now pending before the Court. *Wilds*  
6 *v. Gines*, No. C 08-03348 CW (PR), 2011 WL 737616, at \*4 (N.D. Cal. Feb. 23, 2011); *Honeycutt*  
7 *v. Snider*, No. 3:11-cv-00393-RJC (WGC), 2011 WL 6301429, at \*1 (D. Nev. Dec. 16, 2011)  
8 (“The appointment of experts in deliberate indifference cases is rare, and such requests should be  
9 granted sparingly, particularly given the large volume of cases in which indigent prisoners allege  
10 claims under the Eighth Amendment related to medical care, and the substantial expense  
11 defendants may have to bear if courts were to appoint experts in such cases.”)

12 Furthermore, Rule 706 is not a means to avoid the in forma pauperis statute and its  
13 prohibition against using public funds to pay for the expenses of witnesses, *Manriquez v. Huchins*,  
14 No. 1:09-cv-00456-LJO-BAM PC, 2012 WL 5880431, at \*12 (E.D. Cal. Nov. 21, 2012)  
15 (quotation marks and citations omitted), nor does Rule 706 contemplate court appointment and  
16 compensation of an expert witness as an advocate for Plaintiff, *Faletogo v. Moya*, No. 12cv631  
17 GPC (WMC), 2013 WL 524037, at \*2 (S.D. Cal. Feb. 23, 2013) (quotation marks omitted). The  
18 appointment of an expert witness under Rule 706 is intended to benefit the trier of fact, not a  
19 particular litigant, and here, the medical issue is not of such complexity that the Court requires the  
20 assistance of a neutral expert at trial. *Faletogo*, 2013 WL 524037, at \*2; *Bontemps v. Lee*, No.  
21 2:12-cv-0771 KJN P, 2013 WL 417790, at \*3-4 (E.D. Cal. Jan. 31, 2013); *Honeycutt*, 2011 WL  
22 6301429, at \*1; *Wilds*, 2011 WL 737616, at \*4; *Gamez v. Gonzalez*, No. 08cv1113 MJL (PCL),  
23 2010 WL 2228427, at \*1 (E.D. Cal. Jun. 3, 2010). Therefore, Plaintiff’s motion for the  
24 appointment of a medical expert witness is denied.

25 **XVII. Attorney’s Fees**

26 Plaintiff is proceeding pro se and is not entitled to attorney’s fees. Defendants do not  
27 anticipate seeking attorney’s fees if they prevail.

28 ///

1 **XVIII. Further Trial Preparation**

2 **A. Motions In Limine**

3 **1. Briefing Schedule**

4 Any party may file a motion in limine, which is a procedural mechanism to limit in  
5 advance testimony or evidence in a particular area. *United States v. Heller*, 551 F.3d 1108, 1111  
6 (9th Cir. 2009) (quotation marks omitted). In the case of a jury trial, the Court’s ruling gives  
7 Plaintiff and Defendants’ counsel advance notice of the scope of certain evidence so that  
8 admissibility is settled before attempted use of the evidence before the jury. *Id.* at 1111-12  
9 (quotation marks omitted).

10 Any motions in limine must be served on the other party, and filed with the Court, by  
11 **August 19, 2013**. Any motion in limine must clearly identify the nature of the evidence that the  
12 moving party seeks to prohibit the other side from offering at trial.

13 Any opposition to a motion in limine must be served on the other party, and filed with the  
14 Court, by **September 9, 2013**.

15 If any party files a motion in limine, the Court may set a telephonic motions in limine  
16 hearing if it deems one necessary. If a hearing is set, counsel for Defendants is required to arrange  
17 for the participation of Plaintiff in the telephonic hearing and to initiate the telephonic hearing at  
18 **(559) 499-5790**. If a hearing is not set, the Court will address motions via written order or on the  
19 morning of trial.

20 **Whether or not a party files a motion in limine, that party may still object to the**  
21 **introduction of evidence during the trial.**

22 **2. Other**

23 The parties are relieved of their obligation under Local Rule 285 to file trial briefs. If the  
24 parties wish to submit a trial brief, they must do so on or before **September 10, 2013**. The Court  
25 will prepare the verdict form, which the parties will have the opportunity to review on the morning  
26 of trial. If the parties wish to submit a proposed verdict form, they must do so on or before  
27 **September 10, 2013**.

28 ///

1 The Court will prepare the jury instructions, which the parties will have the opportunity to  
2 review on the morning of trial. Defendants shall file proposed jury instructions as provided in  
3 Local Rule 163 on or before **September 10, 2013**. If Plaintiff wishes to file proposed jury  
4 instructions, he must do so on or before **September 10, 2013**.

5 In selecting proposed instructions, the parties shall use Ninth Circuit Model Civil Jury  
6 Instructions to the extent possible. All jury instructions must be submitted in duplicate: One set  
7 will indicate which party proposes the instruction, with each instruction numbered or lettered, and  
8 containing citation of supporting authority, and the customary legend, i.e., “Given, Given as  
9 Modified, or Refused,” showing the Court’s action, with regard to each instruction. One set will  
10 be an exact duplicate of the first, except it will not contain any identification of the party offering  
11 the instruction or supporting authority or the customary legend of the Court's disposition.  
12 Defendants shall provide the Court with a copy of their proposed jury instructions via e-mail at:  
13 [skoorders@caed.uscourts.gov](mailto:skoorders@caed.uscourts.gov).

14 Proposed voir dire questions, if any, shall be filed on or before **September 10, 2013**,  
15 pursuant to Local Rule 162.

16 The parties may serve and file a non-argumentative, brief statement of the case which is  
17 suitable for reading to the jury at the outset of jury selection on or before **September 10, 2013**.  
18 The Court will consider the parties’ statements but will draft its own statement. The parties will  
19 be provided with the opportunity to review the Court’s prepared statement on the morning of trial.

20 The original and five copies of all trial exhibits, along with exhibit lists, shall be submitted  
21 to Courtroom Deputy Alice Timken no later than **September 10, 2013**.<sup>7</sup> Plaintiff’s exhibits shall  
22 be pre-marked with the prefix “PX” and numbered sequentially beginning with 100 (e.g., PX-100,  
23 PX-101, etc.). Defendants’ exhibits shall be pre-marked with the prefix “DX” and lettered  
24 sequentially beginning with A (e.g., DX-A, DX-B, etc.).

25 **The parties are required to meet and confer, by telephone or other means, to agree**  
26 **upon and identify their joint exhibits, if any.** Joint exhibits shall be pre-marked with the prefix

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27 <sup>7</sup> Original for the Courtroom Deputy, one copy for the undersigned, one copy for the court reporter, one copy for the  
28 witness stand, one copy for the opposing side, and one copy to be retained by the party.

1 “JT” and numbered sequentially beginning with 1 (e.g., JT-1, JT-2, etc.), and Defendants’ counsel  
2 shall submit the original and five copies of the joint trial exhibits, with exhibit lists, no later than **A**  
3 **September 10, 2013.**

4 If Defendants wish to use a videotape or a DVD for any purpose during trial, they shall  
5 submit a copy of the videotape or DVD to Courtroom Deputy Alice Timken by 4:00 p.m. on  
6 **September 10, 2013.**<sup>8</sup> If a written transcript of audible words on the tape is available, the Court  
7 requests that the transcript be submitted to the Courtroom Deputy Alice Timken along with the  
8 videotape or DVD, solely for the aid of the Court.

9 If counsel intends to use a laptop computer for presentation of evidence or intends to use  
10 any other audio/visual equipment belonging to the Court, counsel shall contact Courtroom Deputy  
11 Alice Timken at least one week prior to trial so that any necessary arrangements and/or training  
12 may be scheduled.

13 **XIX. Objections to Pretrial Order**

14 Objections to the Pretrial Order filed on August 1, 2013, were due on or before August 19,  
15 2013. Plaintiff and Defendants filed timely objections and the Amended Pretrial Order issues in  
16 response to the Court’s rulings on the parties’ objections. **No further objections will be**  
17 **considered.**

18 **XX. Miscellaneous Matters**

19 In his pretrial statement, Plaintiff states that during his deposition held on April 12, 2012,  
20 he requested a copy of the deposition but he was not provided with pages 53, 54, 55, and 56, and  
21 he is requesting those pages at this time.

22 The Court is uncertain how Plaintiff would have obtained a copy of his deposition given  
23 that on May 22, 2012, the Court issued an order denying Plaintiff’s motion for a free copy of his  
24 deposition transcript and informing him that he was entitled only to a review to make necessary  
25 changes, if he requested the review before the completion of the deposition. Fed. R. Civ. P.  
26 30(e)(1), (f)(3). (Doc. 60.)

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<sup>8</sup> Admissibility of any videotape or DVD is subject to the Federal Rules of Evidence.

1 If Plaintiff paid for a copy and it was missing pages, his recourse is to contact the court  
2 reporting agency from which he obtained the transcript. If Defendants provided Plaintiff with a  
3 courtesy copy, he may request the missing pages directly from counsel. The Court declines to  
4 intervene in the matter in light of its May 22, 2012, order and Plaintiff's lack of entitlement to a  
5 free copy.

6 \*\*\*

7 FAILURE TO COMPLY WITH ALL PROVISIONS OF THIS ORDER MAY BE GROUNDS  
8 FOR THE IMPOSITION OF SANCTIONS, INCLUDING POSSIBLE DISMISSAL OF THIS  
9 ACTION OR ENTRY OF DEFAULT, ON ANY AND ALL COUNSEL AS WELL AS ON ANY  
10 PARTY WHO CAUSES NON-COMPLIANCE WITH THIS ORDER.

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13 IT IS SO ORDERED.

14 Dated: August 27, 2013

/s/ Sheila K. Oberto  
UNITED STATES MAGISTRATE JUDGE

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