

1 reversed in part, and remanded the matter for further proceedings. (ECF No. 141.) On December
2 15, 2016, the Ninth Circuit issued its mandate. (ECF No. 143.)

3 Following remand, this action now proceeds to trial on Plaintiff's claims against
4 Defendant Wegman for violation of the Free Exercise Clause of the First Amendment of the
5 United States Constitution. In particular, this action proceeds on Plaintiff's claim that Defendant
6 Wegman violated his right to free exercise of his religion by switching him from a kosher diet to
7 a vegetarian diet and denying his requested dietary accommodations during multi-day Passover
8 observances. Under Federal Rules of Civil Procedure 16(b), the Court now sets a further
9 schedule for this litigation.

10 The parties are required to file pretrial statements in accordance with the schedule set
11 forth herein. In addition to the matters already required to be addressed in the pretrial statement
12 under Local Rule 281, the parties will be required to submit requests to obtain the attendance of
13 incarcerated witnesses. The procedures, requirements and deadlines for such a request are
14 outlined in detail below. The parties are advised that failure to comply with the procedures set
15 forth below may result in the preclusion of any and all witnesses.

16 At the trial of this case, Plaintiff must be prepared to introduce evidence to prove each of
17 the alleged facts that support the claims raised in the lawsuit. In general, there are two kinds of
18 trial evidence: (1) exhibits and (2) the testimony of witnesses. Plaintiff is responsible for
19 producing all of the evidence to prove his case, whether that evidence is in the form of exhibits or
20 witness testimony. If Plaintiff wants to call witnesses to testify, he must follow certain procedures
21 to ensure that the witnesses will be at the trial and available to testify.

22 1. Procedures for Obtaining Attendance of Incarcerated Witnesses Who Agree to Testify
23 Voluntarily

24 An incarcerated witness who agrees voluntarily to attend trial to give testimony cannot
25 come to court unless the Court orders the warden or other custodian to permit the witness to be
26 transported to court. The Court will not issue such an order unless it is satisfied that the
27 prospective witness has actual knowledge of relevant facts.

28 A party intending to introduce the testimony of incarcerated witnesses who have agreed

1 voluntarily to attend the trial must serve and file concurrent with the pretrial statement a written
2 motion for a court order requiring that such witnesses be brought to court at the time of trial. The
3 motion must: (1) state the name, address, and prison identification number of each such witness;
4 and (2) be accompanied by declarations showing that each witness is willing to testify and that
5 each witness has actual knowledge of relevant facts. The motion should be entitled “Motion for
6 Attendance of Incarcerated Witnesses.”

7 The willingness of the prospective witness can be shown in one of two ways: (1) the party
8 himself can swear by declaration under penalty of perjury that the prospective witness has
9 informed the party that he or she is willing to testify voluntarily without being subpoenaed, in
10 which declaration the party must state when and where the prospective witness informed the party
11 of this willingness; or (2) the party can serve and file a declaration, signed under penalty of
12 perjury by the prospective witness, in which the witness states that he or she is willing to testify
13 without being subpoenaed.

14 The prospective witness’s actual knowledge of relevant facts can be shown in one of two
15 ways: (1) if the party has actual firsthand knowledge that the prospective witness was an
16 eyewitness or an ear-witness to the relevant facts (e.g., if an incident occurred in Plaintiff’s cell
17 and, at the time, Plaintiff saw that a cellmate was present and observed the incident, Plaintiff may
18 swear to the cellmate’s ability to testify), the party himself can swear by declaration under penalty
19 of perjury that the prospective witness has actual knowledge; or (2) the party can serve and file a
20 declaration signed under penalty of perjury by the prospective witness in which the witness
21 describes the relevant facts to which the prospective witness was an eye or ear witness. Whether
22 the declaration is made by the party or by the prospective witness, it must be specific about the
23 incident, when and where it occurred, who was present, and how the prospective witness
24 happened to be in a position to see or to hear what occurred at the time it occurred.

25 The Court will review and rule on the motion for attendance of incarcerated witnesses,
26 specifying which prospective witnesses must be brought to court. Subsequently, the Court will
27 issue the order necessary to cause the witness’s custodian to bring the witness to court.

28 Motions for the attendance of incarcerated witnesses at trial, if any, must be filed on or

1 before **May 23, 2017**. Objections, if any, must be filed on or before **June 6, 2017**.

2 2. Procedures for Obtaining Attendance of Incarcerated Witnesses Who Refuse to
3 Testify Voluntarily

4 If a party seeks to obtain the attendance of incarcerated witnesses who refuse to testify
5 voluntarily, the party should submit with his pretrial statement a motion for the attendance of
6 such witnesses. Such motion should be in the form described above. In addition, the party must
7 indicate in the motion that the incarcerated witnesses are not willing to testify voluntarily.

8 3. Procedures for Obtaining Attendance of Unincarcerated Witnesses Who Agree to
9 Testify Voluntarily

10 It is the responsibility of the party who has secured an unincarcerated witness's voluntary
11 attendance to notify the witness of the time and date of trial. No action need be sought or obtained
12 from the Court.

13 4. Procedures for Obtaining Attendance of Unincarcerated Witnesses Who Refuse to
14 Testify Voluntarily

15 If a prospective witness is not incarcerated, and he or she refuses to testify voluntarily, the
16 witness must be served with a subpoena. Fed. R. Civ. P. 45. In addition, the party seeking the
17 witness's presence must tender an appropriate sum of money for the witness. *Id.* In the case of an
18 unincarcerated witness, the appropriate sum of money is the daily witness fee of \$40.00 plus the
19 witness's travel expenses. 28 U.S.C. § 1821.

20 If Plaintiff wishes to obtain the attendance of one or more unincarcerated witnesses who
21 refuse to testify voluntarily, Plaintiff must first notify the Court in writing of the name and
22 location of each unincarcerated witness. The Court will calculate the travel expense for each
23 unincarcerated witness and notify Plaintiff of the amount(s). Plaintiff must then, for each witness,
24 submit a money order made payable to the witness for the full amount of the witness's travel
25 expenses plus the daily witness fee of \$40.00. The subpoena will not be served upon the
26 unincarcerated witness by the United States Marshal unless the money order is tendered to the
27 Court. Because no statute authorizes the use of public funds for these expenses in civil cases, the
28 tendering of witness fees and travel expenses is required even if the party was granted leave to

1 proceed in forma pauperis.

2 If Plaintiff wishes to have the Marshal serve any unincarcerated witnesses who refuse to
3 testify voluntarily, Plaintiff must submit the money orders to the Court no later than **June 20,**
4 **2017**. To ensure timely submission of the money orders, Plaintiff must notify the Court of the
5 names and locations of his witnesses, in compliance with step one, on or before **May 9, 2017**.

6 The parties are advised that failure to file pretrial statements as required by this order may
7 result in the imposition of appropriate sanctions, which may include dismissal of the action or
8 entry of default.

9 Finally, the Court shall direct the Clerk's Office to provide the parties with
10 consent/decline forms. Within **thirty (30) days** from the date of service of this order, the parties
11 shall inform the Court whether they consent to or decline Magistrate Judge jurisdiction by filling
12 out the forms and returning them to the Court. The following is important information about
13 scheduling and trailing cases:

14 District Court Judges of the Fresno Division of the Eastern District of California now have
15 the heaviest caseload in the nation. As a result, each District Judge schedules multiple trials to
16 begin on each available trial date. Civil cases will trail and begin as soon as a courtroom is
17 cleared. The law requires that the Court give any criminal trial priority over civil trials or any
18 other matter. A civil trial set to begin while a criminal trial is proceeding will trail the completion
19 of the criminal trial.

20 The Court cannot give advance notice of which cases will trail or for how long because
21 the Court does not know which cases actually will go to trial or precisely how long each will last.
22 Once your trial date arrives, counsel, parties and witnesses must remain on 24-hour-stand-by until
23 a court opens. Since continuance to a date certain will simply postpone, but not solve, the
24 problem, continuances of any civil trial under these circumstances will no longer be entertained,
25 absent a specific and stated finding of good cause. The Court will use its best efforts to mitigate
26 the effect of the foregoing and to resolve all cases in a timely manner.

27 One alternative is for the parties to consent to a United States Magistrate Judge
28 conducting all proceedings, including trial and entry of final judgment, pursuant to 28 U.S.C. § 28

1 U.S.C. 636(c), Federal Rule of Civil Procedure 73, and Local Rule 305. The Eastern District
2 Magistrate Judges, all experienced former trial lawyers, use the same jury pool and same court
3 facilities as United States District Court Judges. Since Magistrate Judges do not conduct felony
4 trials, they have greater flexibility and schedule firm trial dates. Judgment entered by a United
5 States Magistrate Judge is appealable directly to the United States Court of Appeal for the Ninth
6 Circuit. (While there are scheduling benefits to consenting to Magistrate Judge jurisdiction,
7 substantive rulings and decisions will not be affected by whether a party chooses to consent or
8 not.)

9 As another response to its large caseload, the Fresno Division of the Eastern District of
10 California is assigning cases, whenever possible, to Article III District Court Judges from around
11 the nation as Visiting Judges. Under the Local Rules, Appendix A, such reassignments will be
12 random, and the parties will receive no advance notice before their case is reassigned to an Article
13 III District Court Judge from outside of the Eastern District of California.

14 Accordingly, the Court HEREBY ORDERS as follows:

- 15 1. This matter is set for telephonic trial confirmation hearing before the Honorable
16 Lawrence J. O'Neill on **June 20, 2017**, at 9:00 a.m. in Courtroom 4;
- 17 2. This matter is set for jury trial before the Honorable Lawrence J. O'Neill on **August**
18 **29, 2017**, at 8:30 a.m. in Courtroom 4;
- 19 3. Counsel for Defendant is required to arrange for the participation of Plaintiff in the
20 telephonic trial confirmation hearing and to initiate the telephonic hearing at (559)
21 499-5680;
- 22 4. Plaintiff shall serve and file a pretrial statement as described in this order on or before
23 **May 23, 2017**;
- 24 5. Defendant shall serve and file a pretrial statement as described in this order on or
25 before **June 6, 2017**;
- 26 6. In addition to electronically filing her pretrial statement, Defendant shall e-mail the
27 pretrial statement to: ljoorders@caed.uscourts.gov;
- 28 7. If Plaintiff intends to call incarcerated witnesses at time of trial, Plaintiff shall serve

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and file a motion for attendance of incarcerated witnesses as described in this order on or before **May 23, 2017**;

8. The opposition to the motion for the attendance of incarcerated witnesses, if any, shall be filed on or before **June 6, 2017**;

9. If Plaintiff wishes to obtain the attendance of unincarcerated witnesses who refuse to testify voluntarily, Plaintiff must notify the Court of their names and locations on or before **May 9, 2017**, and Plaintiff must submit the money orders, as described in subsection 4 of this order, to the Court on or before **June 20, 2017**;

10. The Clerk's Office shall send the parties consent/decline forms;

11. Within **thirty (30) days** from the date of service of this order, the parties shall notify the Court whether they consent to or decline Magistrate Judge jurisdiction by filling out the enclosed forms and returning them to the Court; and

12. The Clerk's Office shall send Plaintiff a copy of Local Rule 281.

IT IS SO ORDERED.

Dated: **December 20, 2016**

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