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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

BRIAN ELLIS PORTER,  
Plaintiff,  
v.  
CHERYLEE WEGMAN,  
Defendant.

Case No. 1:10-cv-01500-BAM (PC)  
**AMENDED SCHEDULING ORDER**  
Telephonic Trial Confirmation Hearing:  
**June 20, 2017** at 10:00 a.m. in Courtroom 8  
(BAM)  
Jury Trial: **August 29, 2017** at 8:30 a.m. in  
Courtroom 8 (BAM)

Plaintiff Brian Ellis Porter (“Plaintiff”) is a state prisoner proceeding pro se and in forma pauperis in this civil rights action under 42 U.S.C. § 1983.

This action proceeds on Plaintiff’s claims against Defendant Wegman for violation of the Free Exercise Clause of the First Amendment of the United States Constitution. In particular, this action proceeds on Plaintiff’s claim that Defendant Wegman violated his right to free exercise of his religion by switching him from a kosher diet to a vegetarian diet and denying his requested dietary accommodations during multi-day Passover observances.

Pursuant to 28 U.S.C. §636(c)(1), all parties have consented to conduct all further proceedings in this action before a U.S. Magistrate Judge, including trial and entry of judgment. (ECF Nos. 5, 150.) On April 13, 2017, the Court entered an order assigning the action to U.S. Magistrate Judge Barbara A. McAuliffe for all further purposes and proceedings. (ECF No. 151.)

1 Under Federal Rules of Civil Procedure 16(b), the Court now sets an amended schedule for this  
2 litigation.

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

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

15 1. Procedures for Obtaining Attendance of Incarcerated Witnesses Who Agree to Testify  
16 Voluntarily

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

21 A party intending to introduce the testimony of incarcerated witnesses who have agreed  
22 voluntarily to attend the trial must serve and file concurrent with the pretrial statement a written  
23 motion for a court order requiring that such witnesses be brought to court at the time of trial. The  
24 motion must: (1) state the name, address, and prison identification number of each such witness;  
25 and (2) be accompanied by declarations showing that each witness is willing to testify and that  
26 each witness has actual knowledge of relevant facts. The motion should be entitled “Motion for  
27 Attendance of Incarcerated Witnesses.”

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

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

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

22           Motions for the attendance of incarcerated witnesses at trial, if any, must be filed on or  
23 before **May 23, 2017**. Objections, if any, must be filed on or before **June 6, 2017**.

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

26           If a party seeks to obtain the attendance of incarcerated witnesses who refuse to testify  
27 voluntarily, the party should submit with his pretrial statement a motion for the attendance of  
28 such witnesses. Such motion should be in the form described above. In addition, the party must

1 indicate in the motion that the incarcerated witnesses are not willing to testify voluntarily.

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

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

7 4. Procedures for Obtaining Attendance of Unincarcerated Witnesses Who Refuse to  
8 Testify Voluntarily

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

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

24 If Plaintiff wishes to have the Marshal serve any unincarcerated witnesses who refuse to  
25 testify voluntarily, Plaintiff must submit the money orders to the Court no later than **June 20,**  
26 **2017.** To ensure timely submission of the money orders, Plaintiff must notify the Court of the  
27 names and locations of his witnesses, in compliance with step one, on or before **May 9, 2017.**

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

4           Accordingly, the Court HEREBY ORDERS as follows:

- 5           1. This matter is set for telephonic trial confirmation hearing before the Honorable  
6           Barbara A. McAuliffe on **June 20, 2017**, at 10:00 a.m. in Courtroom 8;
- 7           2. Parties appearing telephonically may do so by using the following dial-in number and  
8           passcode at the time set for the hearing: dial-in number 1-877-411-9748; passcode  
9           3190866. Counsel for Defendant is required to arrange for the participation of  
10           Plaintiff in the telephonic trial confirmation hearing by contacting the litigation  
11           coordinator at the institution where Plaintiff is housed;
- 12           3. This matter is set for jury trial before the Honorable Barbara A. McAuliffe on **August**  
13           **29, 2017**, at 8:30 a.m. in Courtroom 8;
- 14           4. Plaintiff shall serve and file a pretrial statement as described in this order on or before  
15           **May 23, 2017**;
- 16           5. Defendant shall serve and file a pretrial statement as described in this order on or  
17           before **June 6, 2017**;
- 18           6. In addition to electronically filing her pretrial statement, Defendant shall e-mail the  
19           pretrial statement to: bamorders@caed.uscourts.gov;
- 20           7. If Plaintiff intends to call incarcerated witnesses at time of trial, Plaintiff shall serve  
21           and file a motion for attendance of incarcerated witnesses as described in this order on  
22           or before **May 23, 2017**;
- 23           8. The opposition to the motion for the attendance of incarcerated witnesses, if any, shall  
24           be filed on or before **June 6, 2017**; and

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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**.

IT IS SO ORDERED.

Dated: April 14, 2017

/s/ Barbara A. McAuliffe  
UNITED STATES MAGISTRATE JUDGE