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

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|------------------|---|---------------------------------------|
| G. J. GUTIERREZ, |) | Case No.: 1:13-cv-00421-SAB (PC) |
| |) | |
| Plaintiff, |) | ORDER REGARDING PLAINTIFF’S MOTION |
| |) | FOR ATTENDANCE OF INCARCERATED |
| v. |) | WITNESSES AT TRIAL (ECF No. 129), AND |
| |) | SUPPLEMENTAL MOTION FOR WITNESSES |
| A. GUTIERREZ, |) | (ECF No. 138) |
| |) | |
| Defendant. |) | |
| |) | |
| |) | |

I.

INTRODUCTION

Plaintiff G. J. Gutierrez is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. This action proceeds to trial on Plaintiff’s claims against Defendant A. Gutierrez for excessive force and failure to protect in violation of the Eighth Amendment. Pursuant to 28 U.S.C. § 636(c), the parties have consented to the jurisdiction of a United States Magistrate Judge. (ECF Nos. 5, 117); Local Rule 302.

Currently before the Court is Plaintiff’s motion for the attendance of incarcerated witnesses at trial, filed August 7, 2017. (ECF No. 129.) Defendant filed an opposition on August 28, 2017. (ECF No. 132.) The motion was heard at the telephonic pretrial conference on September 1, 2017, and the Court ordered supplemental briefing. (ECF No. 134, at p. 19.)

Plaintiff filed a supplemental motion on September 15, 2017. (ECF No. 138.) The supplemental motion addresses potential incarcerated witnesses as well as expert witnesses. Defendant filed an opposition to the supplemental motion on September 22, 2017. (ECF No. 144.)¹

Both of Plaintiff’s motions are deemed submitted. Local Rule 230(l).

¹ On September 25, 2017, Plaintiff also filed a reply brief. No reply was permitted by the Court’s pretrial order (ECF No. 134, at p. 19), and no leave was sought by Plaintiff prior to filing the reply.

1 **II.**

2 **INCARCERATED WITNESSES**

3 **A. Witnesses Who Are No Longer Incarcerated**

4 Plaintiff's original motion requested the attendance of eight witnesses identified as inmates,
5 and his pretrial statement disclosed one additional inmate witness. Defendants objected to requiring
6 the production of six of those witnesses—J. Esparza (CDCR #AC4385), Reyes (CDCR #AG2981),
7 Sanchez (CDCR #AG5542), Valdez (CDCR #G15953), Fimbers (CDCR #AE9522), and Edwards
8 (CDCR #P06960)—on the ground that they are no longer incarcerated.

9 In Plaintiff's supplemental motion, Plaintiff withdraws the request to require the production of
10 the six formerly incarcerated witnesses. Accordingly, Plaintiff's motion is deemed withdrawn with
11 respect to those six witnesses

12 **B. Currently Incarcerated Witnesses**

13 Plaintiff's partial withdrawal of his motion leaves the following three inmate witnesses
14 remaining: (1) Aziz Mohammad Jamaledin, CDCR #G39138; (2) Johnny Sanchez, CDCR #E72914;
15 and (3) William Milton, CDCR #P38650. Inmate Jamaledin is currently housed at the California
16 Correctional Institution in Tehachapi, California. Inmate Sanchez and inmate Milton are both currently
17 housed at the Correctional Training Facility in Soledad, California.

18 **B. Legal Standards**

19 The uncertainty regarding whether or not the proposed witnesses are willing to testify
20 voluntarily does not preclude this Court from ordering their transportation. "Both sides in a trial have
21 the right to call witnesses, and the power to compel witness testimony is essential to our system of
22 justice." Barnett v. Norman, 782 F.3d 417, 422 (9th Cir. 2015). A judge cannot "allow a witness to
23 refuse to testify because he would prefer not to answer a question." Id. "The public's interest in full
24 disclosure and the fair administration of justice overrides concerns that testimony might be
25 inconvenient, burdensome, or harmful to a witness's social or economic status." Id.

26 Rather, in determining whether to grant Plaintiff's motion for the attendance of his proposed
27 witnesses, factors to be taken into consideration include (1) whether the inmate's presence will
28 substantially further the resolution of the case, (2) the security risks presented by the inmate's

1 presence, and (3) the expense of transportation and security, and (4) whether the suit can be stayed
2 until the inmate is released without prejudice to the cause asserted. Wiggins v. County of Alameda,
3 717 F.2d 466, 468 n.1 (9th Cir. 1983); see also Walker v. Sumner, 14 F.3d 1415, 1422 (9th Cir. 1994)
4 (district court did not abuse its discretion when it concluded the inconvenience and expense of
5 transporting inmate witness outweighed any benefit he could provide where the importance of the
6 witness's testimony could not be determined), abrogated on other grounds by Sandin v. Conner, 515
7 U.S. 472 (1995).

8 **C. Analysis**

9 Plaintiff argues that inmates Jamaleddin and Sanchez were percipient witnesses to the events
10 that gave rise to this action, as they were both approximately 8 to 10 feet from Plaintiff when
11 Defendant shot Plaintiff. Plaintiff asserts that both witnesses can testify as to the events during and
12 around the shooting of Plaintiff and can corroborate Plaintiff's account of the events. Regarding
13 inmate Milton, Plaintiff has identified him as his cellmate on the date of the relevant events, and
14 argues that inmate Milton has knowledge of Plaintiff's injuries (as a lay, non-expert witness) and their
15 effect on Plaintiff's daily functions. Plaintiff argues that inmate Milton can further testify to later
16 alleged retaliation against Plaintiff for his pursuit of this lawsuit.

17 Defendant argues that Plaintiff's statements regarding the witnesses are conclusory, and are not
18 supported by any declaration or by the incident report of the events at issue. The crime incident report
19 reflects that inmate Jamaleddin was a suspect in the incident, and a member of the Bulldog gang. (ECF
20 No. 112-3, at p. 7.) Inmate J. Sanchez is listed as a victim, and a member of the Southern Hispanics
21 gang. (Id.) Defendant argues that documentation created by the prison staff involved in the disturbance
22 showing the location of these inmates does not support that they were within 10 feet of Plaintiff during
23 the incident. Further, Defendant argues that neither Sanchez nor Jamaleddin would have been able to
24 witness the shooting itself because Sanchez was himself being assaulted, and Jamaleddin was an
25 aggressor in his own scuffle.

26 In evaluating the relevant factors and Plaintiff's submissions, the Court finds that Plaintiff has
27 not met his burden to demonstrate that inmates Jamaleddin, Sanchez, or Milton have relevant firsthand
28 knowledge that may substantially further the resolution of this case. Plaintiff has failed to submit any

1 declaration by any of these inmates or a declaration by himself showing that these inmates possess
2 actual knowledge of the disputed facts at issue here.

3 Although there is some indication that inmates Jamaleddin and Sanchez were generally present
4 during the prison disturbance on the date in question, Plaintiff has not shown that these inmates
5 actually were eye or ear-witnesses to the specific incidents underlying Plaintiff's claims. The trial
6 scheduling order setting forth the standards and procedures for obtaining the presence of incarcerated
7 witnesses were provided to Plaintiff months ago. (ECF No. 123.) Plaintiff was also previously granted
8 an extension of time to file a motion for the attendance of such witnesses. (ECF No. 128.) And, as
9 noted above, supplemental briefing on this issue was permitted when Plaintiff obtained trial counsel.
10 Nevertheless, any support for Plaintiff's assertions that inmates Jamaleddin or Sanchez have first-hand
11 knowledge of the facts underlying the disputed claims here has yet to be provided. The lack of a
12 showing that either of these inmates' testimony will further the resolution of this case, when
13 juxtaposed with the inherent risks in safety and security in transporting them here, as well as the costs
14 and inconveniences involved, requires that the Court deny Plaintiff's motion for their presence.

15 Likewise, Plaintiff has provided an inadequate factual basis for showing that inmate Milton has
16 any knowledge of the disputed facts at issue here. Plaintiff asserts that inmate Milton has witnessed
17 alleged retaliation by prison officials against Plaintiff for pursuing this lawsuit, but no such claim or
18 allegations are pending in this action. Plaintiff has also provided no declaration from himself or inmate
19 Milton describing the purported testimony that inmate Milton would provide regarding Plaintiff's
20 injuries and their effect on his daily functions. The Court notes that Plaintiff may testify regarding his
21 injuries and their effect on his daily functions, may provide medical evidence on the topic with a
22 proper foundation, and that the fact of his being shot is not disputed. Based on the showing made here,
23 the Court cannot determine whether the inconvenience, expense, and security concerns of transporting
24 inmate Milton are outweighed by any benefit his testimony would provide in this case.

25 Based on the foregoing, Plaintiff's motion for the attendance of inmates Jamaleddin, Sanchez,
26 and Milton is denied, without prejudice.

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1 **III.**

2 **EXPERT WITNESS DISCLOSURES**

3 Plaintiff also asserts in his motion that he intends to call a medical expert witness and a prison-
4 procedures expert witness at trial. Plaintiff requests an extension of time until October 12, 2017 to
5 make his expert disclosures pursuant to Federal Rule of Civil Procedure 26, based on Plaintiff's
6 counsel's recent appearance in this case. Defendant opposes the request.

7 Federal Rule of Civil Procedure 26 provides that a party must disclose to other parties expert
8 witnesses it may use at trial. Fed. R. Civ. P. 26(a)(2)(A). "A party must make these disclosures at the
9 times and in the sequence that the court orders." Fed. R. Civ. P. 26(a)(2)(D). Absent a stipulation or a
10 court order, expert witness disclosures must be made at least 90 days before the date set for trial, or in
11 the case of rebuttal expert witnesses, within 30 days after the other party's disclosure. Fed. R. Civ. P.
12 26(a)(2)(D)(i), (ii).

13 When Plaintiff's counsel came into this matter, the Court admonished counsel on the
14 importance of meeting the deadlines in this case. Although good cause was found to briefly delay the
15 trial date to allow counsel to come up to speed on the case, the Court has repeatedly impressed upon
16 the parties the importance of adhering to the deadlines set in this matter, of not wasting judicial
17 resources, and of not needlessly delaying the resolution of this case.

18 Here, the Court finds that sufficient diligence was shown and the interests of justice are best
19 served by allowing the late designation of these experts by Plaintiff. The requested extension is brief,
20 and there is sufficient time between the requested extended expert disclosure deadline and the trial
21 date to permit expert discovery and to allow for the disclosure of any rebuttal experts.

22 Defendant argues that there is prejudice here because discovery would be reopened at this late
23 date, but expert depositions were not required to be completed before the close of fact discovery in this
24 case. Rule 26(b) permits the deposition of expert witnesses after the deadline for their disclosure under
25 Rule 26(a)(2)(D), unless otherwise modified by Court order. See Fed. R. Civ. P. 26(b)(4)(A) ("A party
26 may depose any person who has been identified as an expert whose opinions may be presented at trial.
27 If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the
28 report is provided."). The discovery and scheduling order in this matter did not require expert

1 disclosures to be made or expert discovery to be completed by the fact discovery deadline. As stated
2 above, the Court will allow the parties to depose any experts following their disclosures.

3 Accordingly, Plaintiff's request is granted, and the expert disclosure deadline is extended until
4 October 12, 2017. Plaintiff is again admonished, however, that no further extensions of time will be
5 granted, and the Court requires that the parties adhere to the deadlines ordered in this matter.

6 **IV.**

7 **CONCLUSION AND ORDER**

8 For the reasons explained above, it is HEREBY ORDERED that:

- 9 1. Plaintiff's requests for the attendance of incarcerated witnesses are denied, as follows:
- 10 a. Plaintiff's motion for the attendance of inmates J. Esparza (CDCR #AC4385),
11 Reyes (CDCR #AG2981), Sanchez (CDCR #AG5542), Valdez (CDCR #G15953),
12 Fimbers (CDCR #AE9522), and Edwards (CDCR #P06960), is deemed withdrawn;
- 13 b. Plaintiff's motion for the attendance of inmates Aziz Mohammad Jamaledin
14 (CDCR #G39138), Johnny Sanchez (CDCR #E72914), and William Milton (CDCR
15 #P38650), is denied without prejudice; and
- 16 2. Plaintiff's request for an extension of time to disclose expert witnesses is granted.
17 Expert disclosures are due on or before October 12, 2017.

18
19 IT IS SO ORDERED.

20 Dated: September 28, 2017



21 UNITED STATES MAGISTRATE JUDGE