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

MICHAEL CAREY,

Plaintiff,

v.

R. PRATTI,

Defendant.

Case No. 1:15-cv-00767-AWI-EPG (PC)

**SCHEDULING ORDER AND ORDER
DIRECTING CLERK TO SEND PLAINTIFF
A COPY OF LOCAL RULE 281(b)**

Settlement Conf.: November 17, 2017
Time: 9:00 a.m.
CSP Corcoran

Telephonic Discovery
and Status Conference: January 22, 2018
Time: 1:30 p.m.
Courtroom 10 (EPG)

Non-expert
Discovery Cut-off: February 16, 2018

Expert Disclosure
Deadline: March 23, 2018

Rebuttal Expert
Disclosure Deadline: April 20, 2018

Expert Discovery
Cut-off: May 11, 2018

Dispositive Motion
Filing Deadline: June 22, 2018

Telephonic Trial
Confirmation Hearing: April 4, 2019
Time: 10:00 a.m.
Courtroom 2 (AWI)

Jury Trial: June 4, 2019
Time: 8:30 a.m.
Courtroom 2 (AWI)

This Court conducted a scheduling conference on September 13, 2017. Plaintiff Michael Carey telephonically appeared on his own behalf. Deputy Attorney General Brian Chan and Supervising Deputy Attorney General Christopher Becker telephonically appeared on behalf of

1 Defendant. Pursuant to Federal Rule of Civil Procedure 16(b), this Court now sets a schedule for
2 this action.

3 **I. DISCOVERY PROCEDURES**

4 The parties are now granted leave to serve discovery in addition to that provided as part of
5 initial disclosures. Pursuant to Federal Rules of Civil Procedure 1, 16, and 26-36, discovery shall
6 proceed as follows:

- 7 1. Discovery requests shall be served by the parties pursuant to Federal Rule of Civil
8 Procedure 5 and Local Rule 135. Discovery requests and responses shall not be filed
9 with the Court unless required by Local Rules 250.2, 250.3, or 250.4 (providing that
10 discovery requests shall not be filed unless or until there is a proceeding in which the
11 document or proof of service is at issue). A party may serve on any other party no
12 more than 15 interrogatories, 15 requests for production of documents, and 10 requests
13 for admission. On motion, these limits may be increased for good cause.
- 14 2. Responses to written discovery requests shall be due **forty-five (45) days** after the
15 request is first served. Boilerplate objections are disfavored and may be summarily
16 overruled by the Court. Responses to document requests shall include all documents
17 within a party's possession, custody or control. Fed. R. Civ. P. 34(a)(1). Documents
18 are deemed within a party's possession, custody, or control if the party has actual
19 possession, custody, or control thereof, or the legal right to obtain the property on
20 demand.¹
- 21 3. If any party or third party withholds a document on the basis of privilege, that party or
22 third party shall provide a privilege log to the requesting party identifying the date,
23 author, recipients, general subject matter, and basis of the privilege within **thirty (30)**
24 **days** after the date that responses are due. Failure to provide a privilege log within
25 this time shall result in a waiver of the privilege. To the extent the requesting party

26
27 ¹ Defendant(s)' responses should be consistent with their right to request documents pursuant to
28 California Government Code § 3306.5 ("Each employer shall keep each public safety officers' personnel file or a true
and correct copy thereof, and shall make the file or copy thereof available within a reasonable period of time after a
request thereof by the officer.").

1 disputes whether a document is privileged, it can raise that issue to the Court's
2 attention via a motion to compel (see below). If a party or third party withholds a
3 document on the basis of the official information privilege, the requesting party may
4 request that the Court conduct an *in camera* review of such document so that the Court
5 can balance the moving party's need for the documents in the litigation against the
6 reasons that are asserted in defending their confidentiality. In any such request for *in*
7 *camera* review, the party requesting review shall identify, with specificity, the
8 document(s) for which review is sought.

9 4. Pursuant to Federal Rule of Civil Procedure 30(a)(2)(B), Defendant(s) may depose
10 Plaintiff and any other witness confined in a prison on the condition that, at least
11 fourteen (14) days before such a deposition, Defendant(s) serve all parties with the
12 notice required by Federal Rule of Civil Procedure 30(b)(1). Plaintiff's failure to
13 participate in a properly noticed deposition could result in sanctions against Plaintiff,
14 including monetary sanctions and/or dismissal of this case. Pursuant to Federal Rule
15 of Civil Procedure 30(b)(4), the parties may take any deposition under this section by
16 video conference without a further motion or order of the Court. Due to security
17 concerns and institutional considerations not applicable to Defendant(s), Plaintiff must
18 seek leave from the Court to depose incarcerated witnesses pursuant to Federal Rule of
19 Civil Procedure 30(a)(2). Nothing herein forecloses a party from bringing a motion
20 for protective order pursuant to Federal Rule of Civil Procedure 26(c)(1) if necessary.

21 5. With the Court's permission, Plaintiff may serve third party subpoenas, including on
22 the California Department of Corrections and Rehabilitation and/or the Office of the
23 Inspector General, if Plaintiff seeks documents from entities that are not presently
24 defendants in this case. To issue a subpoena on these entities, or any other third
25 parties, Plaintiff must file a request for the issuance of a subpoena *duces tecum* with
26 the Court. If the Court approves the request, it may issue Plaintiff a subpoena *duces*
27 *tecum*, commanding the production of documents from a non-party, and may
28 command service of the subpoena by the United States Marshal Service. Fed. R. Civ.

1 P. 45; 28 U.S.C. 1915(d). However, the Court will consider granting such a request
2 *only if* the documents sought from the non-party are not equally available to Plaintiff
3 and are not obtainable from Defendant(s) through a request for production of
4 documents. Fed. R. Civ. P. 34. In any request for a subpoena, Plaintiff must: (1)
5 identify with specificity the documents sought and from whom; and (2) make a
6 showing in the request that the records are only obtainable through that third party.
7 The documents requested must also fall within the scope of discovery allowed in this
8 action. *See* Fed. R. Civ. P. 26(b)(1).

9 6. The parties are required to act in good faith during the course of discovery and the
10 failure to do so may result in the payment of expenses pursuant to Federal Rule of
11 Civil Procedure 37(a)(5) or other appropriate sanctions authorized by the Federal
12 Rules of Civil Procedure or the Local Rules.

13 7. A discovery and status conference has been set for **January 22, 2018, at 1:30 p.m.**
14 Parties have leave to appear by phone. To join the conference, each party is directed
15 to call the toll-free number **(888) 251-2909** and use **Access Code 1024453**. Up until
16 four weeks before the conference, the parties may file motions to compel further
17 discovery responses. No later than two weeks before the conference, the responding
18 party may file response(s) to motion(s) to compel. The motion should include a copy
19 of the request(s) and any response to the request(s) at issue. Unless there is a need for
20 discovery prior to the conference, motions to compel will not be considered until the
21 conference. Motions to compel will not be permitted after the conference absent good
22 cause. The parties should be prepared to address all discovery disputes at the
23 conference.

24 8. Plaintiff shall make arrangements with staff at his or her institution of confinement for
25 his or her attendance at the discovery and status conference. Plaintiff's institution of
26 confinement shall make Plaintiff available for the conference at the date and time
27 indicated above. To the extent possible, prior to the conference defense counsel shall
28 confirm with Plaintiff's institution of confinement that arrangements have been made

1 for Plaintiff's attendance.

2 **II. PAGE LIMITS AND COURTESY COPIES**

3 The parties are advised that unless prior leave of the Court is obtained before the filing
4 deadline,² all moving and opposition briefs or legal memoranda filed in civil cases before
5 Magistrate Judge Erica P. Grosjean shall not exceed twenty-five (25) pages. Reply briefs by the
6 moving party shall not exceed ten (10) pages. These page limits do not include exhibits.

7 Defendant(s) shall mail or deliver courtesy hard-copies of all motions over 10 pages in
8 length to the court at 2500 Tulare St., Room 1501, Fresno, CA 93721. Courtesy hard-copies
9 shall reflect the CM/ECF document numbers and pagination.

10 **III. NON-EXPERT DISCOVERY DEADLINE**

11 The deadline for the completion of all non-expert discovery is **February 16, 2018**. All
12 non-expert discovery must be provided by this date, including discovery compelled following the
13 discovery and status conference.

14 **IV. EXPERT DISCOVERY DEADLINES**

15 The deadline for all parties to serve their expert disclosures is **March 23, 2018**. Parties
16 have until **April 20, 2018**, to serve their rebuttal expert disclosures. The deadline for the
17 completion of all expert discovery is **May 11, 2018**.

18 **V. EXHAUSTION MOTIONS**

19 Defendant has informed the Court that he does not intend to present any challenge for
20 failure to exhaust administrative remedies. Thus, the failure to exhaust administrative remedies
21 defense is hereby considered waived. *See Albino v. Baca*, 747 F.3d 1162, 1170 (9th Cir. 2014)
22 (providing that the exhaustion question should be decided as early as feasible).

23 **VI. DISPOSITIVE MOTIONS DEADLINE**

24 The deadline for filing dispositive motions (except for dispositive motions based on
25 failure to exhaust administrative remedies) is **June 22, 2018**.

26 **VII. SETTLEMENT CONFERENCE**

27 A settlement conference is set before a federal magistrate judge on **November 17, 2017**,

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² Parties may seek leave by filing a short motion.

1 **at 9:00 a.m.**, at California State Prison, Corcoran, 4001 King Avenue, Corcoran, CA 93212.

- 2 1. A representative with full and unlimited authority to negotiate and enter into a
3 binding settlement shall attend in person.³
- 4 2. Those in attendance must be prepared to discuss the claims, defenses, and damages
5 at issue in this case. The failure of any counsel, party or authorized person subject
6 to this order to appear in person may result in the imposition of sanctions. In
7 addition, the conference will not proceed and will be reset to another date.
- 8 3. Defendant shall provide a confidential settlement statement to the following email
9 address: **settleconf@caed.uscourts.gov**. Plaintiff shall mail his confidential
10 settlement statement to U.S. District Court, 2500 Tulare Street, Fresno, California,
11 93721, **“Attention: Institution Settlement Judge for November 17, 2017.”** The
12 envelope shall be marked “Confidential Settlement Statement.” Settlement
13 statements shall arrive no later than November 10, 2017. Parties shall also file a
14 Notice of Submission of Confidential Settlement Conference Statement (See Local
15 Rule 270(d)). Settlement statements **should not be filed** with the Clerk of the
16 Court **nor served on any other party**. Settlement statements shall be clearly
17 marked “confidential” with the date and time of the settlement conference
18 indicated prominently thereon.
- 19 4. The confidential settlement statement shall be **no longer than five pages in**
20 **length**, typed or neatly printed, and include the following:

21 ³ While the exercise of its authority is subject to abuse of discretion review, “the district court has
22 the authority to order parties, including the federal government, to participate in mandatory settlement
23 conferences...” *United States v. United States District Court for the Northern Mariana Islands*, 694 F.3d 1051,
24 1053, 1057, 1059 (9th Cir. 2012) (“the district court has broad authority to compel participation in mandatory
25 settlement conference[s].”). The term “full authority to settle” means that the individuals attending the mediation
26 conference must be authorized to fully explore settlement options and to agree at that time to any settlement terms
27 acceptable to the parties. *G. Heileman Brewing Co., Inc. v. Joseph Oat Corp.*, 871 F.2d 648, 653 (7th Cir. 1989),
28 *cited with approval in Official Airline Guides, Inc. v. Goss*, 6 F.3d 1385, 1396 (9th Cir. 1993). The individual with
full authority to settle must also have “unfettered discretion and authority” to change the settlement position of the
party, if appropriate. *Pitman v. Brinker Int’l, Inc.*, 216 F.R.D. 481, 485-86 (D. Ariz. 2003), *amended on recon. in*
part, Pitman v. Brinker Int’l, Inc., 2003 WL 23353478 (D. Ariz. 2003). The purpose behind requiring the attendance
of a person with full settlement authority is that the parties’ view of the case may be altered during the face to face
conference. *Pitman*, 216 F.R.D. at 486. An authorization to settle for a limited dollar amount or sum certain can be
found not to comply with the requirement of full authority to settle. *Nick v. Morgan’s Foods, Inc.*, 270 F.3d 590,
596-97 (8th Cir. 2001).

- 1 a. A brief statement of the facts of the case.
- 2 b. A brief statement of the claims and defenses, i.e., statutory or other
- 3 grounds upon which the claims are founded; a forthright evaluation of the
- 4 party's likelihood of prevailing on the claims and defenses; and a
- 5 description of the major issues in dispute.
- 6 c. An estimate of the cost and time to be expended for further discovery,
- 7 pretrial, and trial.
- 8 d. The party's position on settlement, including present demands and offers
- 9 and a history of past settlement discussions, offers, and demands.
- 10 e. A brief statement of each party's expectations and goals for the settlement
- 11 conference, including how much a party is willing to accept and/or willing
- 12 to pay.

13 **VIII. MAGISTRATE JUDGE JURISDICTION**

14 The parties have declined the jurisdiction of a magistrate judge pursuant to 28 U.S.C. §
15 636(c). (ECF No. 25).

16 **IX. TELEPHONIC TRIAL CONFIRMATION HEARING**

17 A Telephonic Trial Confirmation Hearing is set for **April 4, 2019, at 10:00 a.m.**, in
18 Courtroom 2, before District Judge Anthony W. Ishii. Counsel for Defendant(s) is required to
19 arrange for the participation of Plaintiff in the Telephonic Trial Confirmation Hearing and to
20 initiate the telephonic hearing at (559) 499-5660.

21 In addition to the matters already required to be addressed in the pretrial statement in
22 accordance with Local Rule 281, Plaintiff will be required to make a particularized showing in
23 order to obtain the attendance of witnesses. The procedures and requirements for making such a
24 showing are outlined in detail below. Plaintiff is advised that failure to comply with the
25 procedures set forth below may result in the preclusion of any or all witnesses named in his
26 pretrial statement.

27 At the trial of this case, Plaintiff must be prepared to introduce evidence to prove each of
28 the alleged facts that support the claims raised in the lawsuit. In general, there are two kinds of

1 trial evidence: (1) exhibits and (2) the testimony of witnesses. It is Plaintiff's responsibility to
2 produce all of the evidence to prove his case, whether that evidence is in the form of exhibits or
3 witness testimony. If Plaintiff wants to call witnesses to testify, he must follow certain
4 procedures to ensure that the witnesses will be at the trial and available to testify.

5 1. Procedures for Obtaining Attendance of Incarcerated Witnesses Who Agree to
6 Testify Voluntarily - An incarcerated witness who agrees voluntarily to attend trial to give
7 testimony cannot come to court unless this Court orders the warden or other custodian to permit
8 the witness to be transported to court. This Court will not issue such an order unless it is satisfied
9 that: (a) the prospective witness is willing to attend; and (b) the prospective witness has actual
10 knowledge of relevant facts.

11 A party intending to introduce the testimony of incarcerated witnesses who have agreed to
12 voluntarily attend the trial must serve and file a written motion for a court order requiring that
13 such witnesses be brought to court at the time of trial. The motion must: (1) state the name,
14 address, and prison identification number of each such witness; and (2) be accompanied by
15 declarations showing that each witness is willing to testify and that each witness has actual
16 knowledge of relevant facts. The motion should be entitled "Motion for Attendance of
17 Incarcerated Witnesses."

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

25 The prospective witness's actual knowledge of relevant facts can be shown in one of two
26 ways: (1) if the party has actual firsthand knowledge that the prospective witness was an
27 eyewitness or an ear-witness to the relevant facts (e.g., if an incident occurred in Plaintiff's cell
28 and, at the time, Plaintiff saw that a cellmate was present and observed the incident, Plaintiff may

1 swear to the cellmate's ability to testify), the party himself can swear by declaration under penalty
2 of perjury that the prospective witness has actual knowledge; or (2) the party can serve and file a
3 declaration signed under penalty of perjury by the prospective witness in which the witness
4 describes the relevant facts to which the prospective witness was an eye- or ear witness. Whether
5 the declaration is made by the party or by the prospective witness, it must be specific about the
6 incident, when and where it occurred, who was present, and how the prospective witness
7 happened to be in a position to see or to hear what occurred at the time it occurred.

8 2. Procedures for Obtaining Attendance of Incarcerated Witnesses Who Refuse to
9 Testify Voluntarily - If a party seeks to obtain the attendance of incarcerated witnesses who
10 refuse to testify voluntarily, the party should serve and file a written motion for a court order
11 requiring that such witnesses be brought to court at the time of trial. Such motion should be in
12 the form described above. In addition, the party must indicate in the motion that the incarcerated
13 witnesses are not willing to testify voluntarily.

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

17 Motion(s) for the attendance of incarcerated witnesses, if any, must be filed on or before
18 **February 4, 2019**. Oppositions, if any, must be filed on or before **March 4, 2019**.

19 3. Procedures for Obtaining Attendance of Unincarcerated Witnesses Who Agree to
20 Testify Voluntarily - It is the responsibility of the party who has secured an unincarcerated
21 witness's voluntary attendance to notify the witness of the time and date of trial. No action need
22 be sought or obtained from the Court.

23 4. Procedures for Obtaining Attendance of Unincarcerated Witnesses Who Refuse to
24 Testify Voluntarily - If a prospective witness is not incarcerated, and he or she refuses to testify
25 voluntarily, the witness must be served with a subpoena. Fed. R. Civ. P. 45. In addition, the
26 party seeking the witness's presence must tender an appropriate sum of money for the witness.
27 *Id.* In the case of an unincarcerated witness, the appropriate sum of money is the daily witness
28 fee of \$40.00 plus the witness's travel expenses. 28 U.S.C. § 1821.

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

11 If Plaintiff wishes to have the Marshal serve any unincarcerated witnesses who refuse to
12 testify voluntarily, Plaintiff must submit the money orders to the Court no later than **March 4,**
13 **2019**. In order to ensure timely submission of the money orders, Plaintiff must notify the Court
14 of the names and locations of his witnesses, in compliance with step 4 above, no later than
15 **February 4, 2019**.

16 Plaintiff shall file and serve a pretrial statement as described in this order on or before
17 **February 4, 2019**. Defendant(s) shall file and serve a pretrial statement as described in this order
18 on or before **March 4, 2019**.

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

22 The Clerk of Court is DIRECTED to send Plaintiff a copy of Local Rule 281(b).

23 **X. TRIAL DATE**

24 A trial is set for **June 4, 2019, at 8:30 a.m.**, in Courtroom 2, before
25 District Judge Anthony W. Ishii.

26 **XI. EFFECT OF THIS ORDER**

27 This order represents the Court and the parties' best estimated schedule to complete this
28 case. Any party unable to comply with the dates outlined in this order shall immediately file an

1 appropriate motion or stipulation identifying the requested modification(s).

2 *The dates set in this order are considered to be firm and will not be modified absent a*
3 *showing of good cause, even if a stipulation to modify is filed.* Due to the impacted nature of the
4 civil case docket, this Court disfavors requests to modify established dates.

5 Failure to comply with this order may result in the imposition of sanctions.

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7 IT IS SO ORDERED.

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9 Dated: September 14, 2017

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/s/ Eric P. Gray
UNITED STATES MAGISTRATE JUDGE

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