

1 in accordance with Local Rule 281, Plaintiff will be required to make a particularized showing in
2 order to obtain the attendance of witnesses. The procedures, requirements, and deadlines for
3 making such a showing are outlined in detail below. Plaintiff is advised that failure to comply
4 with the procedures set forth below may result in the preclusion of any and all witnesses named in
5 his pretrial statement.¹

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

12 1. Procedures for Obtaining Attendance of Incarcerated Witnesses Who Agree to
13 Testify Voluntarily

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

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

25 The willingness of the prospective witness can be shown in one of two ways: (1) the party

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27 ¹ Notwithstanding the requirements set forth herein, it is within the Court's discretion to grant a motion for the
28 attendance of incarcerated witnesses if the moving party has shown the witnesses have relevant information and the
court determines the witnesses' presence will substantially further the resolution of the case. *Wiggins v. County of
Alameda*, 717 F.2d 466, 468 n.1 (9th Cir. 1983).

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

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

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

21 **Motions for the attendance of incarcerated witnesses, if any, must be filed on or**
22 **before January 9, 2020. Oppositions, if any, must be filed on or before February 10, 2020.**

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

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

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

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

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

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

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

23 **If Plaintiff wishes to have the Marshal serve any unincarcerated witnesses who**
24 **refuse to testify voluntarily, Plaintiff must submit the money orders to the Court no later**
25 **than February 10, 2020. In order to ensure timely submission of the money orders, Plaintiff**
26 **must notify the Court of the names and locations of his witnesses, in compliance with step**
27 **one, on or before December 20, 2019.**

28 The parties are advised that failure to file pretrial statements as required by this order may

1 result in the imposition of appropriate sanctions, which may include dismissal of the action or
2 entry of default.

3 **Consent to, or Decline, Magistrate Judge Jurisdiction:**

4 This matter is currently set to be tried before a District Judge. The following is important
5 information for the parties to consider regarding scheduling and trailing cases.

6 The District Court Judges of the Fresno Division of the Eastern District of California have
7 one of the heaviest caseloads in the nation. As a result, each District Judge schedules multiple
8 trials to begin on each available trial date. Civil cases will trail and begin as soon as a courtroom
9 is cleared. The law requires that the Court give any criminal trial priority over civil trials or any
10 other matter. A civil trial set to begin while a criminal trial is proceeding will trail the completion
11 of the criminal trial.

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

19 One alternative is for the parties to consent to a United States Magistrate Judge
20 conducting all proceedings, including trial and entry of final judgment, pursuant to 28 U.S.C. § 28
21 U.S.C. 636(c), Federal Rule of Civil Procedure 73, and Local Rule 305. The Eastern District
22 Magistrate Judges, all experienced former trial lawyers, use the same jury pool and same court
23 facilities as United States District Court Judges. Since Magistrate Judges do not conduct felony
24 trials, they have greater flexibility and schedule firm trial dates. Judgment entered by a United
25 States Magistrate Judge is appealable directly to the United States Court of Appeal for the Ninth
26 Circuit. While there are scheduling benefits to consenting to Magistrate Judge jurisdiction,
27 substantive rulings and decisions will not be affected by whether a party chooses to consent or
28 not.

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

6 Therefore, the Court shall direct the Clerk's office to provide the parties with
7 consent/decline forms. Within **thirty (30) days** from the date of service of this order, the parties
8 may inform the Court whether they consent to, or decline, Magistrate Judge jurisdiction by filling
9 out the forms and returning them to the Court. However, the parties are advised that they are free
10 to withhold consent without adverse substantive consequences.

11 Accordingly, the Court HEREBY ORDERS as follows:

- 12 1. This matter is set for a telephonic trial confirmation hearing before the United
13 States District Judge Dale A. Drozd on **March 9, 2020, at 1:30 p.m.** in Courtroom
14 5;
- 15 2. The parties shall appear telephonically for the March 9, 2020 telephonic trial
16 confirmation hearing by dialing into the conference at 877-402-9757 (using access
17 code 6966236) at the time of the hearing. Defense counsel will notify the prison
18 litigation coordinator who will dial into the conference for Plaintiff. Because the
19 Court may be hearing other matters using the same conference line, please wait to
20 state your appearance until your case has been called and appearances are
21 requested. Keep all background noise to a minimum. Use of any feature(s) that
22 may have an impact upon the quality of voice transmission (such as
23 speakerphones, headsets, etc.) are prohibited. Use of a landline or hand-held cell
24 phone is required;
- 25 3. This matter is set for jury trial before United States District Judge Dale A. Drozd
26 on **May 5, 2020, at 1:00 p.m.** in Courtroom 5;
- 27 4. Plaintiff shall serve and file a pretrial statement as described in this order on or
28 before **January 9, 2020**;

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- 5. Defendant shall serve and file a pretrial statement as described in this order on or before **February 10, 2020**;
- 6. In addition to electronically filing its pretrial statement, Defendant shall e-mail the pretrial statement to: dadorders@caed.uscourts.gov;
- 7. If Plaintiff intends to call incarcerated witnesses at time of trial, Plaintiff shall serve and file a motion for attendance of incarcerated witnesses as described in this order on or before **January 9, 2020**;
- 8. The opposition to the motion for the attendance of incarcerated witnesses, if any, shall be filed on or before **February 10, 2020**;
- 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 **December 20, 2019**; and Plaintiff must submit the money orders, as described in subsection 4 of this order, to the Court on or before **February 10, 2020**;
- 10. The Clerk's Office shall send Plaintiff a copy of Local Rule 281;
- 11. The Clerk's Office shall send the parties consent/decline forms;
- 12. 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. However, the parties are advised that they are free to withhold consent without adverse substantive consequences.

IT IS SO ORDERED.

Dated: **October 8, 2019**


UNITED STATES MAGISTRATE JUDGE