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

GREGORIO C. FUNTANILLA, JR.,                      No. 2:02-CV-1157-JAM-CMK-P

Plaintiff,

vs.

ORDER

MICHAEL JAFFE, et al.,

Defendants.

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Plaintiff, a prisoner proceeding pro se, brings this civil rights action pursuant to 42 U.S.C. § 1983. Pending before the court are the parties' status reports (Docs. 247 and 248).

Pursuant to Federal Rule of Civil Procedure 16(b), the court will, by this order, set a further schedule for this litigation.

In due course, the parties will be required to file pre-trial statements in accordance with the schedule set forth below. In addition to the matters already required to be addressed in the pre-trial statement in accordance with Eastern District of California Local Rule 281, plaintiff will be required to make a particularized showing in his pre-trial statement in order to obtain the attendance of witnesses. Plaintiff is advised that failure to comply with the procedures set forth below may result in the preclusion of any and all witnesses named in his pre-trial statement.

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

7 An incarcerated witness who agrees voluntarily to attend trial to give testimony  
8 cannot come to court unless this court orders the warden or other custodian to permit the witness  
9 to be transported to court. This court will not issue such an order (called a writ of habeas corpus  
10 ad testificandum) unless it is satisfied that: (1) the prospective witness is willing to attend; and  
11 (2) the prospective witness has actual knowledge of relevant facts.

12 With the pre-trial statement, a party intending to introduce the testimony of  
13 incarcerated witnesses who have agreed voluntarily to attend the trial must serve and file a  
14 written motion for a court order requiring that such witnesses be brought to court at the time of  
15 trial. The motion must:

- 16 1. State the name, CDCR identification number, and address of each such  
17 witness; and
- 18 2. Be accompanied by affidavits showing that each witness is willing to  
testify and that each witness has actual knowledge of relevant facts.

19 The willingness of the prospective witness can be shown in one of two ways:

- 20 1. The party himself can swear by affidavit that the prospective witness has  
21 informed the party that he or she is willing to testify voluntarily without  
22 being subpoenaed. The party must state in the affidavit when and where  
the prospective witness informed the party of this willingness; or
- 23 2. The party can serve and file an affidavit sworn to by the prospective  
24 witness, in which the witness states that he or she is willing to testify  
without being subpoenaed.

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1 The prospective witness' actual knowledge of relevant facts can be shown in one of two ways:

- 2 1. The party himself can swear by affidavit that the prospective witness has  
3 actual knowledge. However, this can be done only if the party has actual  
4 firsthand knowledge that the prospective witness was an eyewitness or an  
5 ear-witness to the relevant facts. For example, if an incident occurred in  
6 the plaintiff's cell and, at the time, the plaintiff saw that a cellmate was  
7 present and observed the incident, the plaintiff may swear to the cellmate's  
8 ability to testify; or
- 9 2. The party can serve and file an affidavit sworn to by the prospective  
10 witness in which the witness describes the relevant facts to which the  
11 prospective witness was an eye- or ear-witness. Whether the affidavit is  
12 made by the plaintiff or by the prospective witness, it must be specific  
13 about what the incident was, when and where it occurred, who was  
14 present, and how the prospective witness happened to be in a position to  
15 see or to hear what occurred at the time it occurred.

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

19 If a party seeks to obtain the attendance of incarcerated witnesses who refuse to  
20 testify voluntarily, the party should submit with his pre-trial statement a motion for the  
21 attendance of such witnesses. Such motion should be in the form described above. In addition,  
22 the party must indicate in the motion that the incarcerated witnesses are not willing to testify  
23 voluntarily.

24 It is the responsibility of the party who has secured an unincarcerated witness'  
25 voluntary attendance to notify the witness of the time and date of trial. No action need be sought  
26 or obtained from the court.

27 If a prospective witness is not incarcerated, and he or she refuses to testify  
28 voluntarily, not earlier than four weeks and not later than two weeks before trial, the party must  
29 prepare and submit to the United States Marshal a subpoena for service by the Marshal upon the  
30 witness. Blank subpoena forms may be obtained from the Clerk of the Court. Also, the party  
31 seeking the witness' presence must tender an appropriate sum of money to the witness through  
32 the United States Marshal. In the case of an unincarcerated witness, the appropriate sum of

1 money is the daily witness fee of \$40.00 plus the witness' travel expenses. A subpoena will not  
2 be served by the United States Marshal upon an unincarcerated witness unless the subpoena is  
3 accompanied by a money order made payable to the witness for the full amount of the witness'  
4 travel expenses plus the daily witness fee of \$40.00, and a copy of the court's order granting  
5 plaintiff in forma pauperis status. As noted earlier, because no statute authorizes the use of  
6 public funds for these expenses in civil cases, the tendering of witness fees and travel expenses is  
7 required even if the party was granted leave to proceed in forma pauperis.

8 Failure to comply with any portion of this order may result in the imposition of  
9 appropriate sanctions, including dismissal of the entire action. See Local Rule 110.

10 Having considered the parties' status reports, the court will set the following  
11 schedule:

- 12 1. Plaintiff shall file and serve his pre-trial statement, and any motions  
13 necessary to obtain the attendance of witnesses at trial, on or before May 2, 2016;
- 14 2. Defendants shall file their pre-trial statement on or before May 16, 2016;
- 15 3. A pre-trial conference, as described in Local Rule 282, shall be conducted  
16 by the undersigned on the file only, without appearances, following submission pre-trial  
17 statements; and
- 18 5. The matter will be set for trial by separate final pre-trial order following  
19 the pre-trial conference on the file.

20 IT IS SO ORDERED.

21  
22 DATED: February 19, 2016

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24 **CRAIG M. KELLISON**  
25 UNITED STATES MAGISTRATE JUDGE  
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