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8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10 ROBERT MITCHELL,

11 Plaintiff,

No. CIV S-06-2321 GEB GGH P

12 vs.

13 D.G. ADAMS, et al.,

14 Defendants.

FURTHER SCHEDULING ORDER

15 \_\_\_\_\_/  
16 Summary judgment in this matter has been resolved pursuant to order filed  
17 August 27, 2010. Good cause appearing, the court will, by this order, reset a schedule for this  
18 litigation.

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

25 At the trial of this case, the plaintiff must be prepared to introduce evidence to  
26 prove each of the alleged facts that support the claims raised in the lawsuit. In general, there are

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

5 I. Procedures for Obtaining Attendance of Incarcerated  
6 Witnesses Who Agree to Testify Voluntarily

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 unless it is satisfied that:

10 1. The prospective witness is willing to attend;

11 and

12 2. The prospective witness has actual knowledge of relevant facts.

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

17 The motion must:

18 1. State the name and address of each such witness;

19 and

20 2. Be accompanied by affidavits showing that each witness is willing to  
21 testify and that each witness has actual knowledge of relevant facts.

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

23 1. The party himself can swear by affidavit that the prospective witness  
24 has informed the party that he or she is willing to testify voluntarily  
25 without being subpoenaed. The party must state in the affidavit when and  
26 where the prospective witness informed the party of this willingness; or

1                   2. The party can serve and file an affidavit sworn to by the prospective  
2                   witness, in which the witness states that he or she is willing to testify  
3                   without being subpoenaed.

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

6                   1. The party himself can swear by affidavit that the prospective witness  
7                   has actual knowledge. However, this can be done only if the party has  
8                   actual firsthand knowledge that the prospective witness was an eyewitness  
9                   or an ear-witness to the relevant facts. For example, if an incident  
10                  occurred in the plaintiff's cell and, at the time, the plaintiff saw that a  
11                  cellmate was present and observed the incident, the plaintiff may swear to  
12                  the cellmate's ability to testify.

13                  Or

14                  2. The party can serve and file an affidavit sworn to by the prospective  
15                  witness in which the witness describes the relevant facts to which the  
16                  prospective witness was an eye- or ear-witness. Whether the affidavit is  
17                  made by the plaintiff or by the prospective witness, it must be specific  
18                  about what the incident was, when and where it occurred, who was  
19                  present, and how the prospective witness happened to be in a position to  
20                  see or to hear what occurred at the time it occurred.

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

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1                   II. Procedures for Obtaining Attendance of Incarcerated Witnesses Who Refuse  
2 to Testify Voluntarily

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

7                   III. Procedures for Obtaining Attendance of Unincarcerated Witnesses Who  
8 Agree to Testify Voluntarily

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

12                   IV. Procedures for Obtaining Attendance of Unincarcerated Witnesses Who  
13 Refuse to Testify Voluntarily

14                   If a prospective witness is not incarcerated, and he or she refuses to testify  
15 voluntarily, not earlier than four weeks and not later than two weeks before trial, the party must  
16 prepare and submit to the United States Marshal a subpoena for service by the Marshal upon the  
17 witness. Also, the party seeking the witness' presence must tender an appropriate sum of money  
18 to the witness through the United States Marshal. In the case of an unincarcerated witness, the  
19 appropriate sum of money is the daily witness fee of \$40.00 plus the witness' travel expenses.

20                   A subpoena will not be served by the United States Marshal upon an  
21 unincarcerated witness unless the subpoena is accompanied by a money order made payable to  
22 the witness for the full amount of the witness' travel expenses plus the daily witness fee of  
23 \$40.00. As noted earlier, because no statute authorizes the use of public funds for these expenses  
24 in civil cases, the tendering of witness fees and travel expenses is required even if the party was  
25 granted leave to proceed in forma pauperis.

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1 Good cause appearing, pursuant to Fed. R. Civ. P. 16(b), THIS COURT ORDERS  
2 AS FOLLOWS:

3 1. Plaintiff shall file and serve his pretrial statement and any motions necessary to  
4 obtain the attendance of witnesses at trial on or before November 19, 2010. Defendants shall file  
5 their pretrial statement on or before December 3, 2010. The parties are advised that failure to file  
6 a pretrial statement may result in the imposition of sanctions, including dismissal of this action.

7 2. Pretrial conference (as described in Local Rule 282) is set in this case for  
8 December 17, 2010, before the magistrate judge. The pretrial conference shall be conducted on  
9 the file only, without appearance by either party.

10 3. This matter is set before the Honorable Garland Burrell, Jr., for trial  
11 confirmation hearing on April 1, 2011 at 1:30 p.m. and for jury trial on May 24, 2011 at 9:00  
12 a.m.

13 DATED: September 2, 2010

14 /s/ Gregory G. Hollows

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UNITED STATES MAGISTRATE JUDGE

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17 mitc2321.41sjd