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

RAUL MONTANO,

Plaintiff,

No. CIV S-07-0800 KJN P

vs.

SOLOMON, et al.,

Defendants.

AMENDED DISCOVERY AND
SCHEDULING ORDER

_____ /

On February 9, 2010, this case was reassigned to the undersigned for all purposes. Docket No. 34. Presently pending are the requests of both parties that the time for discovery be extended, see Docket Nos. 28, 32, 33, which the court will grant for good cause shown. This change also requires an extension of time for filing dispositive motions.

The only defendant remaining in this action is Dr. Richard Tan, M.D, Docket No. 25, who has answered the Second Amended Complaint, Docket No. 26.

The deadline for discovery in this action was February 5, 2010. See Docket No. 27, at 4. Both parties sought an extension of this deadline prior to its expiration. Plaintiff seeks an extension of the deadline because: he was transferred from California State Prison-Solano to San Quentin on November 18, 2009, and has had limited access to his legal work; he cannot speak English so must rely on the assistance of bilingual inmates; and plaintiff has not received

1 responses to the discovery he has already propounded. Defendant seeks an extension of the
2 deadline due to the late assignment of current outside counsel to this case,¹ and the need for
3 additional time to conduct meaningful discovery.

4 Good cause appearing, see Federal Rule of Civil Procedure (“Fed. R. Civ. P.”)
5 6(b)(1)(A) (request made prior to expiration of deadline), the parties’ requests will be granted,
6 and the discovery deadline extended to June 11, 2010. The court will also extend the deadline
7 for filing dispositive motions to September 10, 2010.

8 Pursuant to Fed. R. Civ. P. 1, 16, and 26-36, discovery shall proceed in
9 accordance with paragraphs 1-5 of this order. In addition, the court will set an amended initial
10 schedule for this litigation.

11 Should this matter proceed to trial, the court will, by subsequent order, require the
12 parties to file pretrial statements. In addition to the matters required to be addressed in the
13 pretrial statement in accordance with Rule 281, Local Rules of the United States District Court,
14 Eastern District of California (“Local Rules”), plaintiff will be required to make a particularized
15 showing in the pretrial statement in order to obtain the attendance of witnesses at trial. Plaintiff
16 is advised that failure to comply with the procedures set forth below may result in the preclusion
17 of any and all witnesses named in the pretrial statement.

18 At the trial of this case, the plaintiff must be prepared to introduce evidence to
19 prove each of the alleged facts that support the claims raised in the lawsuit. In general, there are
20 two kinds of trial evidence: (1) exhibits; and (2) the testimony of witnesses. It is the plaintiff’s
21 responsibility to produce all of the evidence to prove the claims, whether that evidence is in the
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23 ¹ Defendant states that this case was first served on the California Attorney General, who
24 referred the matter in early October 2009 to the California Department of Corrections and
25 Rehabilitation to obtain outside contract counsel. Current counsel states that an answer was
26 promptly filed October 5, 2009, to preserve defendant’s rights. Although counsel improperly
names more than one defendant (Docket No. 33, at 1:26-27), and relies on an e-mail that does not
appear related to the instant case (Docket No. 33-2, at 2, 4), his request for additional time to
conduct discovery is well taken.

1 form of exhibits or witness testimony. If the plaintiff wants to call witnesses to testify, he must
2 follow certain procedures to ensure that the witnesses will be at the trial and available to testify.

3 I. Procedures for Obtaining Attendance of Incarcerated Witnesses Who
4 Agree to Testify Voluntarily

5 An incarcerated witness who agrees voluntarily to attend trial to give testimony
6 cannot come to court unless this court orders the warden or other custodian to permit the witness
7 to be transported to court. This court will not issue such an order unless it is satisfied that:

8 1. The prospective witness is willing to attend;

9 and

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

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

15 1. State the name, CDC Identification number, and address of each such
16 witness;

17 and

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

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

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

25 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 is willing to testify without
3 being subpoenaed.

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

6 1. The party can swear by affidavit that the prospective witness has actual
7 knowledge. However, this can be done only if the party has actual
8 firsthand knowledge that the prospective witness was an eyewitness or an
9 ear-witness to the relevant facts. For example, if an incident occurred in
10 the plaintiff's cell and, at the time, the plaintiff saw that a cellmate was
11 present and observed the incident, the plaintiff may swear to the cellmate's
12 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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2 II. Procedures for Obtaining Attendance of Incarcerated Witnesses Who
3 Refuse to Testify Voluntarily

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

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

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

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

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

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

4 Good cause appearing, IT IS HEREBY ORDERED that:

5 1. Plaintiff's motions (Docket Nos. 28 and 32), and defendant's motion (Docket
6 No. 33), are GRANTED.

7 2. The parties may conduct discovery until June 11, 2010. Any motions
8 necessary to compel discovery shall be filed by that date. All requests for discovery pursuant to
9 Fed. R. Civ. P. 31, 33, 34 or 36, shall be served not later than sixty (60) days prior to that date.

10 3. All pretrial motions, except motions to compel discovery, shall be filed on or
11 before September 10, 2010. Motions shall be briefed in accordance with paragraph 7 of this
12 court's order filed June 29, 2009 (Docket No. 23).

13 4. Discovery requests shall be served by the party seeking the discovery on all
14 parties to the action.² Discovery requests shall not be filed with the court except when required
15 by Local Rules 250.1, 250.2, 250.3 and 250.4.

16 5. Responses to written discovery requests shall be due forty-five days after the
17 request is served.

18 6. The parties are cautioned that filing of discovery requests or responses, except
19 as required by rule of court, may result in an order of sanctions, including, but not limited to, a
20 recommendation that the action be dismissed or the answer stricken.

21 7. Pursuant to Fed. R. Civ. P. 30(a), defendant may depose plaintiff and any other
22 witness confined in a prison upon condition that, at least fourteen days before such a deposition,
23 defendant serve all parties with the notice required by Fed. R. Civ. P. 30(b)(1).

24
25 ² If an attorney has filed a document with the court on behalf of any defendant, then
26 plaintiff must serve documents on that attorney and not on the defendant. See Fed. R. Civ. P.
5(b).

1 8. If disputes arise about the parties' obligations to respond to requests for
2 discovery, the parties shall comply with all pertinent rules including Fed. R. Civ. P. 5, 7, 11, 26,
3 and 37, and Local Rules 134, 135, 130, 131, 110, 142, and 230(l); but unless otherwise ordered,
4 Local Rule 251 shall not apply. Filing of a discovery motion that does not comply with all
5 applicable rules may result in imposition of sanctions, including but not limited to denial of the
6 motion.

7 9. Pretrial conference and trial dates will be set, as appropriate, following
8 adjudication of any dispositive motion, or the expiration of time for filing such a motion.

9 10. The Clerk of Court shall redesignate plaintiff's address as San Quentin State
10 Prison, San Quentin, California 94974.

11 DATED: February 16, 2010

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13 /s/ Kendall J. Newman
14 KENDALL J. NEWMAN
15 UNITED STATES MAGISTRATE JUDGE

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