

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

JOHN MICHAEL KIRK,

Petitioner,

No. CIV S-07-2521 GEB GGH E

VS.

TOM FELKER, et al.,

Respondents.

ORDER

Having ordered, in a concurrently filed order, that an evidentiary hearing is to be held on June 15, 2009, and appointing counsel therefor, to determine whether petitioner may be entitled to equitable tolling in the filing of his petition, the court now makes the following additional ORDERS with respect to the impending evidentiary hearing:

A. Witnesses

On or before ten days prior to the hearing the parties shall provide witness lists, including addresses and telephone numbers, to opposing counsel.

Each party may call any witnesses designated by the other

1. No other witness will be permitted to testify unless

a. The party offering the witness demonstrates that the witness is for the purpose of rebutting evidence which could not be reasonably anticipated

1 prior to the evidentiary hearing.

2 b. The witness was discovered after the exchange of witnesses and the
3 proffering party makes the showing required in “2,” below.
4 2. If not timely designated within the ten day period prior to the evidentiary
5 hearing, the parties shall promptly inform the court and opposing parties of the
6 existence of the unlisted witnesses so that the court may consider at the
7 evidentiary hearing whether the witnesses shall be permitted to testify. The
8 witnesses will not be permitted unless:

9 a. The witnesses could not reasonably have been discovered prior to the
10 exchange of witness lists;
11 b. The court and the opposing party were promptly notified upon
12 discovery of the witnesses;
13 c. If time permitted, the party proffered the witnesses for deposition; or
14 d. If time did not permit, a reasonable summary of the witnesses’
15 testimony was provided to the opposing party.

16 3. On or before twenty days prior to the hearing, the parties shall designate their
17 expert witnesses, if any; on or before thirty days prior to the hearing, movant shall provide
18 respondent and respondent shall provide movant, with the report of each party’s expert
19 witness(es) in compliance with Fed. R. Civ. P. 26;

20 B. Exhibits, Schedules and Summaries

21 Both parties shall exchange copies of their exhibits twenty days prior to the
22 evidentiary hearing. Any objections to exhibits may be raised at the hearing.

23 Movant will use numbers to mark exhibits; respondents will use letters.

24 1. No other exhibits will be permitted to be introduced unless:

25 a. The party proffering the exhibit demonstrates that the exhibit is for the
26 purpose of rebutting evidence which could not have been reasonably

anticipated, or

b. The exhibit was discovered after the exchange of exhibits and the proffering party makes the showing required in Paragraph "2" below.

2. If not timely exchanged within the fifteen day period prior to the evidentiary hearing, the parties shall promptly inform the court and opposing party of the existence of such exhibits so that the court may consider their admissibility at the evidentiary hearing. The exhibits will not be received unless the proffering party demonstrates:

a. The exhibits could not reasonably have been discovered earlier;

b. The court and the opposing party were promptly informed of their existence; or

c. The proffering party forwarded a copy of the exhibit(s) (if physically possible) to the opposing party. If the exhibit(s) may not be copied the proffering party must show that he has made the exhibit(s) reasonably available for inspection by the opposing party.

The parties are directed to each bring an “exhibit book” containing copies of their exhibits to the evidentiary hearing. The “exhibit book” is for bench use during trial.

C. Miscellaneous

Counsel shall make the appropriate writ ad testificandum filings if the presence of movant or any other incarcerated witness is desired. Petitioner shall file these writs at least thirty days prior to the hearing. The parties shall otherwise make their own arrangements for the attendance of non-incarcerated witnesses.

DATED: 01/12/09

/s/ Gregory G. Hollows

GREGORY G. HOLLOWSS
UNITED STATES MAGISTRATE JUDGE

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