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

PENNY ARNOLD,

Plaintiff,

CIV. NO. S-10-3119 KJM GGH PS

vs.

COUNTY OF EL DORADO, et al.,

Defendant.

STATUS (PRETRIAL  
SCHEDULING) ORDER

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Defendants' second motion to dismiss was tentatively resolved on November 17, 2011. Therefore, this case will be scheduled. Accordingly, the court makes the following findings and orders:

SERVICE OF PROCESS

All defendants have been served and no further service is permitted except with leave of court, good cause having been shown.

JOINER OF PARTIES/AMENDMENTS

No further joinder of parties or amendments to pleadings is permitted except with leave of court, good cause having been shown.

JURISDICTION/VENUE

Jurisdiction is undisputed and is hereby found to be proper, as is venue.

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1 MOTION HEARING SCHEDULES

2 All law and motion except as to discovery is left open, save and except that it  
3 shall be conducted so as to be completed by June 28, 2012. The word “completed” in this  
4 context means that all law and motion matters must be heard by the above date. Counsel are  
5 cautioned to refer to the local rules regarding the requirements for noticing such motions on the  
6 court’s regularly scheduled law and motion calendar. This paragraph does not preclude motions  
7 for continuances, temporary restraining orders or other emergency applications, and is subject to  
8 any special scheduling set forth in the “MISCELLANEOUS PROVISIONS” paragraph below.

9 The parties should keep in mind that the purpose of law and motion is to narrow  
10 and refine the legal issues raised by the case, and to dispose of by pretrial motion those issues  
11 that are susceptible to resolution without trial. To accomplish that purpose, the parties need to  
12 identify and fully research the issues presented by the case, and then examine those issues in light  
13 of the evidence gleaned through discovery. If it appears to counsel after examining the legal  
14 issues and facts that an issue can be resolved by pretrial motion, counsel are to file the  
15 appropriate motion by the law and motion cutoff set forth supra.

16 ALL PURELY LEGAL ISSUES ARE TO BE RESOLVED BY TIMELY  
17 PRETRIAL MOTION. Counsel are reminded that motions in limine are procedural devices  
18 designed to address the admissibility of evidence. COUNSEL ARE CAUTIONED THAT THE  
19 COURT WILL LOOK WITH DISFAVOR UPON SUBSTANTIVE MOTIONS PRESENTED  
20 IN THE GUISE OF MOTIONS IN LIMINE AT THE TIME OF TRIAL.

21 DISCOVERY

22 All discovery is left open, save and except that it shall be so conducted as to be  
23 completed by May 17, 2012. The word “completed” means that all discovery shall have been  
24 conducted so that all depositions have been taken and any disputes relative to discovery shall  
25 have been resolved by appropriate order if necessary and, where discovery has been ordered, the  
26 order has been complied with. Motions to compel discovery must be noticed on the

1 undersigned's calendar in accordance with the local rules of this court and so that such motions  
2 will be heard not later than May 3, 2012.

3 EXPERT DISCLOSURE

4 All counsel (and/or pro se parties) are to designate in writing and file with the  
5 court, and serve upon all other parties, the names of all experts that they propose to tender at trial  
6 not later than April 5, 2012. An expert witness not appearing on said lists will not be permitted  
7 to testify unless the party offering the witness demonstrates: (a) that the necessity of the witness  
8 could not have been reasonably anticipated at the time the lists were exchanged; (b) the court and  
9 opposing counsel were promptly notified upon discovery of the witness; and (c) that the witness  
10 was promptly proffered for deposition. Failure to provide the information required along with  
11 the expert designation may lead to preclusion of the expert's testimony or other appropriate  
12 sanctions.

13 For the purposes of this scheduling order, experts are defined as "percipient" and  
14 designated experts. Both types of experts shall be listed. Percipient experts are persons who,  
15 because of their expertise, have rendered expert opinions in the normal course of their work  
16 duties or observations pertinent to the issues in the case. Another term for their opinions are  
17 "historical opinions." Percipient experts are experts who, unless also designated as retained  
18 experts, are limited to testifying to their historical opinions and the reasons for them. That is,  
19 they may be asked to testify to their opinions given in the past and the whys and wherefores  
20 concerning the development of that opinion. However, they may not be asked to render a current  
21 opinion for the purposes of the litigation.

22 Retained experts, who may be percipient experts as well, are specifically  
23 designated by a party to be a testifying expert for the purposes of the litigation. The retained  
24 Rule 26 expert may express opinions formed for the purposes of the litigation.<sup>1</sup> A party

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26 <sup>1</sup>Retained experts may, or may not, be paid for their services. The critical distinction between  
percipient and retained experts is that the retained expert will have gathered information during the

1 designating a retained expert will be assumed to have acquired the express permission of the  
2 witness to be so listed.<sup>2</sup>

3           The parties shall comply with the information disclosure provisions of Fed. R.  
4 Civ. P. 26 (a)(2) (B) for any expert, who is in whole or in part designated as a *retained* expert.  
5 This information is due at the time of designation. Failure to supply the required information  
6 may result in the striking of the retained expert. No reports are necessary for purely percipient  
7 experts. Retained experts are to be fully prepared to render an informed opinion at the time of  
8 *designation* so that they may fully participate in any deposition taken by the opposing party.  
9 Retained experts will not be permitted to testify at trial as to any information gathered or  
10 evaluated, or opinion formed, which should have been reasonably available at the time of  
11 designation. The court will closely scrutinize for discovery abuse deposition opinions which  
12 differ markedly in nature and/or in bases from those expressed in the mandatory information  
13 disclosure.

14 FINAL PRETRIAL STATEMENTS AND CONFERENCE

15           The Final Pretrial Conference is set in courtroom #3 of the Honorable Kimberly J.  
16 Mueller on August 15, 2012, at 11:00 a.m. Counsel are cautioned that counsel appearing for  
17 Pretrial will in fact try the matter.

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20 course of the litigation *for the purpose of rendering an opinion on a disputed fact in the litigation*.  
21 Percipient experts are limited to the information available at the time their historical opinions were  
22 given. For example, a physician whose only contact with the litigation the was the treatment of a  
23 party prior to the commencement of litigation, or even after commencement, and whose only purpose  
24 was to treat the party, is a percipient expert. This doctor may have issued an opinion in the medical  
25 records, but he is not retained for the purpose of the litigation. However, that same doctor, if asked  
26 by a party to render an opinion for the purpose of litigation, over and above any historically rendered  
opinions, is a retained expert. See Goodman v. Staples The Office Superstore LLC, 644 F.3d 817  
(9th Cir. 2011) (holding percipient treating physician who transforms into expert witness must  
comply with Fed. R. Civ. P. 26(a)(2), and clarifying when such transformation takes place).

<sup>2</sup> The court is not interested in a designation of non-testifying Rule 26 experts, i.e., non-  
testifying consultants.

1 All parties are to be fully prepared for trial at the time of the Pretrial Conference,  
2 with no matters remaining to be accomplished except production of witnesses for oral testimony.  
3 Counsel are referred to Local Rules 281 and 282 relating to the contents of and time for filing  
4 Pretrial Statements. A FAILURE TO COMPLY WITH LOCAL RULES 281 AND 282 WILL  
5 BE GROUNDS FOR SANCTIONS.

6 Notwithstanding the provisions of Local Rule 281, which contemplates the filing  
7 of separate Pretrial Statements by plaintiffs and defendants, the parties are to prepare a JOINT  
8 STATEMENT with respect to the undisputed facts and disputed factual issues of the case. See  
9 Local Rule 281(b)(3), (4), and (6). The undisputed facts and disputed factual issues are to be set  
10 forth in two separate sections. The parties should identify those facts which are relevant to each  
11 separate cause of action. In this regard, the parties are to number each individual fact or factual  
12 issue. Where the parties are unable to agree as to what factual issues are properly before the  
13 court for trial, they should nevertheless list in the section on “DISPUTED FACTUAL ISSUES”  
14 all issues asserted by any of the parties and explain by parenthetical the controversy concerning  
15 each issue. The parties should keep in mind that, in general, each fact should relate or  
16 correspond to an element of the relevant cause of action. The parties should also keep in mind  
17 that the purpose of listing the disputed factual issues is to apprise the court and all parties about  
18 the precise issues that will be litigated at trial. The court is not interested in a listing of all  
19 evidentiary facts underlying the issues that are in dispute.<sup>3</sup> The joint statement of undisputed  
20 facts and disputed factual issues is to be filed with the court concurrently with the filing of

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22 <sup>3</sup> For example, and simplistically, if the claim to be adjudicated involved a traffic accident,  
23 the disputed factual issues might be: whether defendant negligently drove his vehicle through the  
24 intersection by reason of failing to observe traffic signals; whether such negligence caused the  
25 accident involving plaintiff, whether plaintiff’s actions (being distracted) contributed to the accident;  
26 whether plaintiff suffered injury and damages as a result of the accident [perhaps breaking out  
specific injuries and damages]. It would be inappropriate and unhelpful to list myriad evidentiary  
facts in dispute— whether the light had turned yellow at the time defendant’s vehicle approached the  
intersection, whether defendant’s skid marks were 30 feet long, whether plaintiff was distracted by  
use of a cell phone, and so forth. However, with respect to the listing of undisputed facts, the court  
will accept agreements as to evidentiary facts.

1 plaintiff's Pretrial Statement. If the case is tried to a jury, the undisputed facts will be read to the  
2 jury.

3 Pursuant to Local Rule 281(b)(10) and (11), the parties are required to provide in  
4 their Pretrial Statements a list of witnesses and exhibits that they propose to proffer at trial, no  
5 matter for what purpose. These lists shall not be contained in the Pretrial Statement itself, but  
6 shall be attached as separate documents to be used as addenda to the Final Pretrial Order.

7 Plaintiff's exhibits shall be listed numerically; defendant's exhibits shall be listed alphabetically.  
8 The Pretrial Order will contain a stringent standard for the proffering of witnesses and exhibits at  
9 trial not listed in the Pretrial Order. Counsel are cautioned that the standard will be strictly  
10 applied. On the other hand, the listing of exhibits or witnesses which counsel do not intend to  
11 call or use will be viewed as an abuse of the court's processes.

12 Counsel are also reminded that, pursuant to Fed. R. Civ. P. 16, it will be their duty  
13 at the Pretrial Conference to aid the court in (a) formulation and simplification of issues and the  
14 elimination of frivolous claims or defenses; (b) settling of facts which should be properly  
15 admitted; and (c) the avoidance of unnecessary proof and cumulative evidence. Counsel must  
16 prepare their Pretrial Statements, and participate in good faith at the Pretrial Conference, with  
17 these aims in mind. A FAILURE TO DO SO MAY RESULT IN THE IMPOSITION OF  
18 SANCTIONS which may include monetary sanctions, orders precluding proof, eliminations of  
19 claims or defenses, or such other sanctions as the court deems appropriate.

#### 20 TRIAL SETTING

21 Trial is set for October 1, 2012 at 9:00 a.m. in Courtroom No. #3 before the  
22 Honorable Kimberly J. Mueller. Trial will be by jury. The court expects the trial will take  
23 approximately four days.

#### 24 SETTLEMENT CONFERENCE

25 A Settlement Conference will be set at the time of the Pretrial Conference.

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