

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

GUILLERMO CHAVEZ,  
Plaintiff,  
v.  
GRANADOZ,  
Defendants.

No. 2:11-cv-1015 WBS CKD P

AMENDED SCHEDULING AND  
DISCOVERY ORDER

Plaintiff, a state prisoner, proceeds pro se with a civil rights complaint filed pursuant to 40 U.S.C. § 1983. On April 23, 2013, defendant’s motion to dismiss was denied. In an order dated May 2, 2013, the court noted that pursuant to the discovery and scheduling order entered April 27, 2012, the period for discovery had closed and the deadline for pretrial motions had passed. Sua sponte, the court ordered the deadline for discovery motions extended to May 30, 2013. Subsequently, defendant was granted an extension of time up and including July 15, 2013 to file a dispositive motion.

On May 30, 2013, plaintiff filed a motion requesting that a case scheduling order issue and requesting a stay of dispositive motions until discovery is complete. In a declaration signed under penalty of perjury, plaintiff states that he never received a scheduling order for this case. Plaintiff states that after he filed this case, he was transferred to various correctional facilities before ultimately being retained at his present institution, the California Medical Facility.

1 Plaintiff further alleges, incorrectly, that the defendant is obligated to forward his mail to him  
2 wherever he is incarcerated. Plaintiff states that he needs to conduct discovery in order to oppose  
3 any dispositive motion filed by the defense. Plaintiff states that if a scheduling order did in fact  
4 issue, he did not receive it and requests the court to issue an amended scheduling and discovery  
5 order. Defendant has not opposed the motion.

6 Review of the record reveals that plaintiff was properly served by mail with the court's  
7 April 27, 2012 scheduling and discovery order. (ECF No. 17.) Pursuant to Local Rule 182(f),  
8 service of documents at the record address of the party is fully effective, even when the  
9 documents are returned as undeliverable. In this case, however, the April 27, 2012 scheduling  
10 and discovery order was not returned, suggesting that it was received. It is the plaintiff's  
11 responsibility to keep the court apprised of his current address at all times. Contrary to plaintiff's  
12 allegation, plaintiff may not rely on the defendant or the California Department of Corrections  
13 and Rehabilitation to forward court orders to him wherever he is incarcerated.

14 Nevertheless, under the circumstances presented here, plaintiff's request for an amended  
15 discovery and scheduling order will be granted. The discovery and scheduling order entered  
16 April 27, 2012 is hereby vacated. Pursuant to Federal Rules of Civil Procedure 1, 16, and 26-36,  
17 discovery shall proceed in accordance with paragraphs 2-6 of this order. In addition, the court  
18 will set an amended schedule for this litigation.

19 Should this matter proceed to trial the court will, by subsequent order, require the parties  
20 to file pretrial statements. In addition to the matters required to be addressed in the pretrial  
21 statement in accordance with Local Rule 281, plaintiff will be required to make a particularized  
22 showing in the pretrial statement in order to obtain the attendance of witnesses at trial. Plaintiff is  
23 advised that failure to comply with the procedures set forth below may result in the preclusion of  
24 any and all witnesses named in the pretrial statement.

25 At the trial of this case, the plaintiff must be prepared to introduce evidence to prove each  
26 of the alleged facts that support the claims raised in the lawsuit. In general, there are two kinds of  
27 trial evidence: (1) exhibits and (2) the testimony of witnesses. It is the plaintiff's responsibility  
28 to produce all of the evidence to prove the claims, whether that evidence is in the form of exhibits

1 or witness testimony. If the plaintiff wants to call witnesses to testify, he must follow certain  
2 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 Agree to  
4 Testify Voluntarily

5 An incarcerated witness who agrees voluntarily to attend trial to give testimony cannot  
6 come to court unless this court orders the warden or other custodian to permit the witness to be  
7 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 incarcerated  
12 witnesses who have agreed voluntarily to attend the trial must serve and file a written motion for  
13 a court order requiring that such witnesses be brought to court at the time of trial. The motion  
14 must:

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

16 and

17 2. Be accompanied by affidavits showing that each witness is willing to testify  
18 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 can swear by affidavit that the prospective witness has informed the  
21 party that he is willing to testify voluntarily without being subpoenaed. The party  
22 must state in the affidavit when and where the prospective witness informed the  
23 party of this willingness;

24 Or

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

28 /////

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

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

9 Or

10 2. The party can serve and file an affidavit sworn to by the prospective witness in  
11 which the witness describes the relevant facts to which the prospective witness  
12 was an eye- or ear-witness. Whether the affidavit is made by the plaintiff or by the  
13 prospective witness, it must be specific about what the incident was, when and  
14 where it occurred, who was present, and how the prospective witness happened to  
15 be in a position to 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,  
17 specifying which prospective witnesses must be brought to court. Subsequently, the court will  
18 issue the order necessary to cause the witness' custodian to bring the witness to court.

19 II. Procedures for Obtaining Attendance of Incarcerated Witnesses Who Refuse to  
20 Testify Voluntarily

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

25 III. Procedures for Obtaining Attendance of Unincarcerated Witnesses Who Agree to  
26 Testify Voluntarily

27 It is the responsibility of the party who has secured an unincarcerated witness' voluntary  
28 attendance to notify the witness of the time and date of trial. No action need be sought or

1 obtained from the court.

2 IV. Procedures for Obtaining Attendance of Unincarcerated Witnesses Who Refuse to  
3 Testify Voluntarily

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

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

17 Good cause appearing, IT IS HEREBY ORDERED that:

18 1. Plaintiff's May 30, 2013 motion for case scheduling order (ECF No. 38) is GRANTED  
19 and the discovery and scheduling order entered April 27, 2012 is hereby vacated.

20 2. Discovery requests shall be served by the party seeking the discovery on all parties to  
21 the action.<sup>1</sup> Discovery requests shall not be filed with the court except when required by Local  
22 Rules 250.1, 250.2, 250.3 and 250.4.

23 3. Responses to written discovery requests shall be due forty-five days after the request is  
24 served.

25 4. The parties are cautioned that filing of discovery requests or responses, except as  
26 required by rule of court, may result in an order of sanctions, including, but not limited to, a

---

27 <sup>1</sup> If an attorney has filed a document with the court on behalf of any defendant, then plaintiff must  
28 serve documents on that attorney and not on the defendant. See Fed. R. Civ. P. 5(b).

1 recommendation that the action be dismissed or the answer stricken.

2 5. Pursuant to Federal Rule of Civil Procedure 30(a), defendants may depose plaintiff and  
3 any other witness confined in a prison upon condition that, at least fourteen days before such a  
4 deposition, defendants serve all parties with the notice required by Fed. R. Civ. P. 30(b)(1).

5 6. If disputes arise about the parties' obligations to respond to requests for discovery, the  
6 parties shall comply with all pertinent rules including Rules 5, 7, 11, 26, and 37 of the Federal  
7 Rules of Civil Procedure and Rules 134, 135, 130, 131, 110, 142, and 230(l) of the Local Rules of  
8 Practice for the United States District Court, Eastern District of California; unless otherwise  
9 ordered, Local Rule 251 shall not apply. Filing of a discovery motion that does not comply with  
10 all applicable rules may result in imposition of sanctions, including but not limited to denial of the  
11 motion.

12 7. The parties may conduct discovery until October 15, 2013. Any motions necessary to  
13 compel discovery shall be filed by that date. All requests for discovery pursuant to Fed. R. Civ.  
14 P. 31, 33, 34 or 36 shall be served not later than sixty days prior to that date.

15 8. All pretrial motions, except motions to compel discovery, shall be filed on or before  
16 January 15, 2014. Motions shall be briefed in accordance with paragraph 7 of this court's order  
17 filed February 17, 2012.

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

20 Dated: June 18, 2013

21   
22 \_\_\_\_\_  
23 CAROLYN K. DELANEY  
24 UNITED STATES MAGISTRATE JUDGE