

1 **II. Plaintiff’s “Motion for Subpoena”**

2 Plaintiff asks the court to have the U.S. Marshal serve subpoenas on two individuals to
3 ensure their appearance at trial. ECF No. 83. The motion indicates that both individuals were
4 incarcerated at one point, but the California Department of Corrections and Rehabilitation’s
5 inmate locator website indicates that one – identified by plaintiff as C. Smith, #T76356 – is no
6 longer incarcerated (or possibly plaintiff has provided an incorrect inmate number for this
7 individual). The other witness – Nelson, #K39042 – is incarcerated at California State Prison,
8 Sacramento. CDCR Inmate Locator, <http://inmatelocator.cdcr.ca.gov/> (searched February 24,
9 2015). Plaintiff’s single-page motion fails to comply with this court’s prior order instructing
10 plaintiff on the proper procedure for ensuring the attendance at trial of his witnesses. The court
11 will reiterate those requirements:

12 I. Obtaining Attendance of an Incarcerated Witness Who Intends to Testify
13 Voluntarily

14 A witness who is willing to testify without the compulsion of a subpoena,
15 but who is imprisoned or incarcerated, cannot appear to testify without a court
16 order directing the custodian to produce him at the time of trial. The court will
17 issue such an order only upon a showing that the witness has agreed to testify
18 voluntarily and has actual knowledge of relevant facts. Therefore, a party
19 intending to introduce testimony from such a witness must file with his pretrial
20 statement a motion for an order directing the witness’s custodian to produce the
21 witness for trial. The motion must:

- 22 1. Identify the witness by name, California Department of Corrections
23 and Rehabilitation number, and address;
- 24 2. Include affidavits showing that the witness intends to testify
25 voluntarily. This intention can be shown as follows:
 - 26 a. The party can swear by affidavit that the witness has
27 communicated to him an intention to testify voluntarily. The
28 affidavit must include a statement of when and where the

1 prospective witness informed the party of this willingness; or

2 b. The witness can swear by affidavit that he is willing to testify
3 without the compulsion of subpoena.

4 3. Include affidavits showing each witness has actual knowledge of
5 relevant facts. The witness's knowledge can be shown as follows:

6 a. The party can swear that he knows the witness saw or heard
7 relevant facts. For example, if something occurred in plaintiff's
8 cell and plaintiff saw that a cell-mate was present and observed the
9 incident, then plaintiff may swear to the cell-mate's ability to
10 testify; or,

11 b. The witness can swear to the relevant facts he observed. Any
12 such affidavit must describe the incident, state when it occurred,
13 where it occurred, who was present, and how the witness was in a
14 position to see or to hear what occurred.

15 II. Obtaining Attendance of an Incarcerated Witness Who Refuses to Testify
16 Voluntarily

17 If a party seeks to present testimony of an imprisoned or incarcerated
18 witness who does not intend to testify voluntarily, the party must with his pretrial
19 statement file a motion for an order directing that witness to appear. Such a
20 motion must comply with the requirements explained above but the movant must
21 demonstrate that any such witness does not intend to testify voluntarily.

22 III. Obtaining Attendance of an Unincarcerated Witness Who Agrees to Testify
23 Voluntarily

24 A party need not obtain an order to produce an unincarcerated witness
25 who intends to testify voluntarily. However, the party is responsible for ensuring
26 attendance of such a witness.

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1 IV. Obtaining Attendance of Unincarcerated Witnesses Who Refuse to Testify
2 Voluntarily

3 To obtain the presence of a witness who is at liberty and who refuses to
4 testify voluntarily, the party who intends to present that witness's testimony, and
5 who proceeds in forma pauperis, must complete and submit to the United States
6 Marshal a subpoena for service upon the witness. Blank subpoena forms may be
7 obtained from the Clerk of the Court. Along with a completed subpoena, the party
8 must also submit a copy of the court's order granting that party in forma pauperis
9 status. Additionally, the party must tender a money order payable to the witness
10 in the amount of the daily witness fee, \$40.00, plus the witness's travel expenses.
11 The party must also notify the court that these materials have been submitted to
12 the United States Marshal not earlier than four weeks and not later than two
13 weeks before trial. A subpoena will not be served by the United States Marshal
14 upon an unincarcerated witness unless the subpoena is accompanied by the
15 materials listed above. No statute authorizes the use of public funds for expenses
16 in civil cases and so even a plaintiff proceeding in forma pauperis must tender any
17 witness fees and travel expenses.

18 ECF No. 50 at 2-4. Plaintiff has not followed these procedures. If Mr. Smith is no longer
19 incarcerated and intends to testify voluntarily, plaintiff does not need a subpoena. If Mr. Smith is
20 no longer incarcerated and will not testify voluntarily, plaintiff must wait until not earlier than
21 four weeks before trial (and not later than two weeks before trial) and then submit his completed
22 subpoena form for Mr. Smith directly to the U.S. Marshal along with the \$40 daily witness fee
23 and the witness's travel expenses. For Mr. Nelson, plaintiff must provide the required affidavits
24 showing whether or not he will testify voluntarily and what relevant facts he possesses. If
25 plaintiff complies with these requirements, the court will direct Mr. Nelson's custodian to
26 produce him at trial; no subpoena form need be submitted by plaintiff. Because plaintiff has not
27 complied with the requirements, his motion to subpoena these two witnesses will be denied
28 without prejudice.

