1			
2			
3			
4			
5			
6			
7			
8	UNITED STATES DISTRICT COURT		
9	FOR THE EASTERN DISTRICT OF CALIFORNIA		
10			
11	LEE'THIEL PAYNE,	No. 2:11-cv-1970-TLN-EFB P	
12	Plaintiff,		
13	V.	ORDER	
14	J. MARTIN, et al.,		
15	Defendants.		
16			
17	Plaintiff is a state prisoner proceeding without counsel in an action brought under 42		
18	U.S.C. § 1983. Currently pending before the court are plaintiff's motions for a settlement		
19	conference (ECF No. 76) and for the issuance of subpoenas to two proposed trial witnesses (ECF		
20	No. 83) and defendant's motion to strike plaintiff's objections to defendant's pretrial statement		
21	(ECF No. 88).		
22	I. Plaintiff's Motion for Settlement Conference		
23 24	Defendant opposes plaintiff's motion for a settlement conference. ECF No. 81.		
24 25	Defendant informs the court that he does not believe a settlement conference would be		
23 26	productive, and declines to accept plaintiff's settlement offer or plaintiff's request for a counter- offer. In light of the apparent futility of a settlement conference, plaintiff's motion will be		
20 27	denied.		
28	////		
	1		

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, <u>http://inmatelocator.cdcr.ca.gov/</u> (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		

2

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	<u>Voluntarily</u>
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	<u>Voluntarily</u>
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.
27	/////
28	////

IV. <u>Obtaining Attendance of Unincarcerated Witnesses Who Refuse to Testify</u> Voluntarily

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

To obtain the presence of a witness who is at liberty and who refuses to testify voluntarily, the party who intends to present that witness's testimony, and who proceeds in forma pauperis, must complete and submit to the United States Marshal a subpoena for service upon the witness. Blank subpoena forms may be obtained from the Clerk of the Court. Along with a completed subpoena, the party must also submit a copy of the court's order granting that party in forma pauperis status. Additionally, the party must tender a money order payable to the witness in the amount of the daily witness fee, \$40.00, plus the witness's travel expenses. The party must also notify the court that these materials have been submitted to the United States Marshal not earlier than four weeks and not later than two weeks before trial. A subpoena will not be served by the United States Marshal upon an unincarcerated witness unless the subpoena is accompanied by the materials listed above. No statute authorizes the use of public funds for expenses in civil cases and so even a plaintiff proceeding in forma pauperis must tender any 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 the 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 subpoen these two witnesses will be denied 28 without prejudice.

4

1

III. Defendant's Motion to Strike

The court will grant defendant's motion to strike plaintiff's objections to defendant's pretrial statement. The court informs plaintiff that the pretrial statement exists for the education of the court and will not determine the facts or law presented to the jury or the resolution of the evidentiary issues identified by the parties. If plaintiff opposes a witness or item of evidence listed by defendant, he may file a motion in limine addressing that issue with the court within the timeframe that will be provided in the court's pretrial order.

8	IV.	Order
9		Accordingly, it is hereby ORDERED that:
10		1. Plaintiff's July 1, 2014 motion for a settlement conference (ECF No. 76) is denied;
11		2. Plaintiff's July 30, 2014 motion for issuance of subpoenas (ECF No. 83) is denied
12		without prejudice; and
13		3. Defendant's November 3, 2014 motion to strike plaintiff's objections to
14		defendant's pretrial statement (ECF No. 88) is granted, and the Clerk of the Court
15		is directed to strike ECF No. 87.
16	Dated: F	Cebruary 25, 2015.
17		Somund F. Bilman
18		EDMUND F. BRÈNNAN UNITED STATES MAGISTRATE JUDGE
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		