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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MARTIN WARE,
Plaintiff,
v.
M. McDONALD, et al.,
Defendants.

No. 2:12-cv-1505 TLN KJN P
FURTHER SCHEDULING ORDER

Motions for summary judgment in this matter have been resolved pursuant to order filed March 31, 2017. This case proceeds on plaintiff’s claims that defendants Holt, Giessner, and Glover used excessive force. Good cause appearing, the court will, by this order, set a further schedule for this litigation.

The parties will be required to file pretrial statements in accordance with the schedule set forth below. As set forth in this court’s initial scheduling order, in addition to the matters already required to be addressed in the pretrial statement in accordance with Local Rule 281, plaintiff will be required to make a particularized showing in the pretrial statement in order to obtain the attendance of witnesses. Plaintiff is advised that failure to comply with the procedures set forth below may result in the preclusion of any and all witnesses named in the pretrial statement.

At the trial of this case, the plaintiff must be prepared to introduce evidence to prove each of the alleged facts that support the claims raised in the lawsuit. In general, there are two kinds of

1 trial evidence: (1) exhibits; and (2) the testimony of witnesses. It is the plaintiff's responsibility
2 to produce all of the evidence to prove the case, whether that evidence is in the form of exhibits
3 or witness testimony. If the plaintiff wants to call witnesses to testify, plaintiff must follow
4 certain procedures to ensure that the witnesses will be at the trial and available to testify.

5 I. Procedures for Obtaining Attendance of Incarcerated Witnesses Who Agree to
6 Testify Voluntarily

7 An incarcerated witness who agrees voluntarily to attend trial to give testimony cannot
8 come to court unless this court orders the warden or other custodian to permit the witness to be
9 transported to court. This court will not issue such an order unless it is satisfied that:

- 10 1. The prospective witness is willing to attend;
- 11 and
- 12 2. The prospective witness has actual knowledge of relevant facts.

13 With the pretrial statement, a party intending to introduce the testimony of incarcerated
14 witnesses who have agreed voluntarily to attend the trial must serve and file a written motion for
15 a court order requiring that such witnesses be brought to court at the time of trial.

16 The motion must:

- 17 1. State the name and address of each such witness;
- 18 and
- 19 2. Be accompanied by affidavits showing that each witness is willing to testify
20 and that each witness has actual knowledge of relevant facts.

21 The willingness of the prospective witness can be shown in one of two ways:

- 22 1. The party can swear by affidavit that the prospective witness has informed the
23 party that he or she is willing to testify voluntarily without being subpoenaed. The
24 party must state in the affidavit when and where the prospective witness informed
25 the party of this willingness;

26 Or

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

1 subpoenaed.

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

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

10 Or

11 2. The party can serve and file an affidavit sworn to by the prospective witness in
12 which the witness describes the relevant facts to which the prospective witness
13 was an eye- or ear-witness. Whether the affidavit is made by the plaintiff or by the
14 prospective witness, it must be specific about what the incident was, when and
15 where it occurred, who was present, and how the prospective witness happened to
16 be in a position to see or to hear what occurred at the time it occurred.

17 The court will review and rule on the motion for attendance of incarcerated witnesses,
18 specifying which prospective witnesses must be brought to court. Subsequently, the court will
19 issue the order necessary to cause the witness' custodian to bring the witness to court.

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

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

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

28 It is the responsibility of the party who has secured an unincarcerated witness' voluntary

1 attendance to notify the witness of the time and date of trial. No action need be sought or
2 obtained from the court.

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

5 If a prospective witness is not incarcerated, and he or she refuses to testify voluntarily, not
6 earlier than four weeks and not later than two weeks before trial, the party must prepare and
7 submit to the United States Marshal a subpoena for service by the Marshal upon the witness.
8 Also, the party seeking the witness' presence must tender an appropriate sum of money to the
9 witness through the United States Marshal. In the case of an unincarcerated witness, the
10 appropriate sum of money is the 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. As noted
14 earlier, because no statute authorizes the use of public funds for these expenses in civil cases, the
15 tendering of witness fees and travel expenses is required even if the party was granted leave to
16 proceed in forma pauperis.

17 V. Miscellaneous

18 As set forth in Local Rule 281, in their respective pretrial statements, the parties shall
19 advise whether a court settlement conference under Local Rule 270 is appropriate. If it is, the
20 parties shall indicate whether the undersigned may participate in the settlement conference and
21 shall affirmatively waive any claim of disqualification on that basis, or whether the parties request
22 a different settlement judge. In addition, plaintiff shall indicate his preference as to whether he
23 would like to participate in the settlement conference in person, or whether he would like to
24 participate in the settlement conference by video conference, if available.

25 In addition, the parties' attention is drawn to the expedited trial setting procedures
26 available upon consent to magistrate judge jurisdiction.

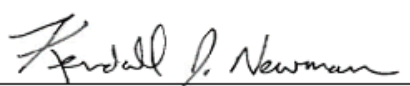
27 Good cause appearing, pursuant to Fed. R. Civ. P. 16(b), THIS COURT ORDERS AS
28 FOLLOWS:

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1. Discovery is closed.
2. Law and motion is closed.
3. Plaintiff shall file and serve his pretrial statement and any motions necessary to obtain the attendance of witnesses at trial on or before June 26, 2017. Defendants shall file their pretrial statement on or before July 10, 2017. The parties are advised that failure to file a pretrial statement may result in the imposition of sanctions, including dismissal of this action.
4. Pretrial conference (as described in Local Rule 282) is set in this case for September 25, 2017, before the magistrate judge. The pretrial conference shall be conducted on the file only, without appearance by either party.
5. The date for jury trial will be set in the pretrial order.

Dated: April 25, 2017

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KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE