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7 UNITED STATES DISTRICT COURT
8 FOR THE EASTERN DISTRICT OF CALIFORNIA
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10 NAM BA NGUYEN,

11 Plaintiff,

12 v.

13 CALIFORNIA PRISON HEALTH
14 SERVICE, et al.,

15 Defendants.
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No. 2:13-cv-0963-MCE-EFB P

ORDER DIRECTING FILING OF PRETRIAL
STATEMENTS

17 Plaintiff is a former California state prisoner proceeding without counsel in an action
18 brought under 42 U.S.C. § 1983. On October 10, 2017, after the court granted defendants'
19 motion for summary judgment and the Clerk of the Court entered judgment in their favor,
20 plaintiff filed a notice of appeal. ECF No. 87. On September 21, 2018, the U.S. Court of
21 Appeals for the Ninth Circuit issued an order affirming in part and reversing in part this court's
22 summary judgment and dismissal order, and remanded the action to this court for further
23 proceedings. *See* ECF No. 91 (finding that summary judgment was improper on plaintiff's
24 deliberate indifference claims regarding defendants Osman's and Champen's failure to treat his
25 inability to chew solid food). Accordingly, the court will order the parties to file pretrial
26 statements in accordance with Local Rule 281. Plaintiff is hereby advised that failure to comply
27 with the procedures set forth below may result in the preclusion of any and all witnesses named in
28 his pretrial statement.

1 At trial, plaintiff must be prepared to introduce evidence to prove each of the alleged facts
2 in support of his claims. Trial evidence generally takes the form of: (a) exhibits; and (b) witness
3 testimony. It is plaintiff's responsibility to produce all of the evidence to prove his case, whether
4 that evidence is in the form of exhibits or witness testimony. If plaintiff wants to call witnesses to
5 testify, he must follow certain procedures to ensure that the witnesses will be at the trial and
6 available to testify.

7 The following procedures apply for calling witnesses:

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

9 A witness who is willing to testify without the compulsion of a subpoena, but who is
10 imprisoned or incarcerated, cannot appear to testify without a court order directing the custodian
11 to produce him at the time of trial. The court will issue such an order only upon a showing that
12 the witness has agreed to testify voluntarily and has actual knowledge of relevant facts.

13 Therefore, a party intending to introduce testimony from such a witness must file *with his*
14 *pretrial statement* a motion for an order directing the witness's custodian to produce the witness
15 for trial. The motion must:

- 16 1. Identify the witness by name, California Department of Corrections and Rehabilitation
17 number, and address;
- 18 2. Include affidavits showing that the witness intends to testify voluntarily. This
19 intention can be shown as follows:
 - 20 a. The *party* can swear by affidavit that the witness has communicated to him
21 an intention to testify voluntarily. The affidavit must include a statement
22 of when and where the prospective witness informed the party of this
23 willingness; or
 - 24 b. The *witness* can swear by affidavit that he is willing to testify without the
25 compulsion of subpoena.
- 26 3. Include affidavits showing each witness has actual knowledge of relevant facts.

27 The witness's knowledge can be shown as follows:

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- 1 a. The *party* can swear that he knows the witness saw or heard relevant facts.
2 For example, if something occurred in plaintiff's cell and plaintiff saw that
3 a cell-mate was present and observed the incident, then plaintiff may swear
4 to the cell-mate's ability to testify; or,
5 b. The *witness* can swear to the relevant facts he observed.

6 Any such affidavit must describe the incident, state when it occurred, where it occurred,
7 who was present, and how the witness was in a position to see or to hear what occurred.

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

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

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

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

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

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

21 To obtain the presence of a witness who is at liberty and who refuses to testify voluntarily,
22 the party who intends to present that witness's testimony, and who proceeds in forma pauperis,
23 must complete and submit to the United States Marshal a subpoena for service upon the witness.
24 Blank subpoena forms may be obtained from the Clerk of the Court. Along with a completed
25 subpoena, the party must also submit a copy of the court's order granting that party in forma
26 pauperis status. Additionally, the party must tender a money order payable to the witness in the
27 amount of the daily witness fee, \$40.00, *plus the witness's travel expenses*. The party must also
28 notify the court that these materials have been submitted to the United States Marshal *not earlier*

1 *than four weeks and not later than two weeks before trial.* A subpoena will not be served by the
2 United States Marshal upon an unincarcerated witness unless the subpoena is accompanied by the
3 materials listed above. No statute authorizes the use of public funds for expenses in civil cases
4 and so even a plaintiff proceeding in forma pauperis must tender any witness fees and travel
5 expenses.

6 In accordance with the above, IT IS HEREBY ORDERED that:

- 7 1. Within thirty days of the date of this order, plaintiff shall file and serve a pretrial
8 statement and any motions necessary to obtain the attendance of witnesses at trial.
9 Plaintiff is cautioned that failure to file a pretrial statement in accordance with this
10 order may result in the imposition of sanctions, including dismissal of this action.
- 11 2. Defendants shall file a pretrial statement not later than thirty days after the filing of
12 plaintiff's statement.
- 13 3. Pretrial conference (as described in Local Rule 282) will be conducted on the file only,
14 without appearance by either party.
- 15 4. The date for jury trial before a district judge will be set in the pretrial order.

16 DATED: October 17, 2018.

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18 EDMUND F. BRENNAN
19 UNITED STATES MAGISTRATE JUDGE
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