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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,  
  
Plaintiff,  
  
v.  
  
JOHN DONNELLY SWEENEY, et al.,  
  
Defendants.

No. 2:17-cv-0112 KJM KJN  
  
STATUS (PRETRIAL SCHEDULING)  
  
ORDER

An initial scheduling conference was held in this case on June 8, 2017. Gregory Broderick and Rochelle Russell appeared for plaintiff; Lawrence Bazel appeared for defendants.

Having reviewed the parties' Joint Status Report filed on June 1, 2017, and discussed a schedule for the case with counsel at the hearing, the court makes the following orders:

I. SERVICE OF PROCESS

All named defendants have been served and no further service is permitted without leave of court, good cause having been shown.

II. ADDITIONAL PARTIES/AMENDMENTS/PLEADINGS

Any joinder of parties or amendments to the pleadings shall be filed by **December 1, 2017**. No additional joinder or amendments to pleadings will be permitted without leave of

1 court, good cause having been shown. *See* Fed. R. Civ. P. 16(b); *Johnson v. Mammoth*  
2 *Recreations, Inc.*, 975 F.2d 604 (9th Cir. 1992).

3 **III. JURISDICTION/VENUE**

4 Jurisdiction is predicated upon 28 U.S.C. §§ 1331 & 1345 and 33 U.S.C.  
5 § 1319(b). Jurisdiction and venue are not disputed.

6 **IV. DISCOVERY**

7 Initial disclosures as required by Federal Rule of Civil Procedure 26(a) shall have  
8 been completed by **June 8, 2017**. All discovery shall be completed by **August 15, 2018**. In this  
9 context, “completed” means that all discovery shall have been conducted so that all depositions  
10 have been taken and any disputes relative to discovery shall have been resolved by appropriate  
11 order if necessary and, where discovery has been ordered, the order has been obeyed. All  
12 motions to compel discovery must be noticed on the magistrate judge’s calendar in accordance  
13 with the local rules of this court. While the assigned magistrate judge reviews proposed  
14 discovery phase protective orders, requests to seal or redact are decided by Judge Mueller as  
15 discussed in more detail below. In addition, while the assigned magistrate judge handles  
16 discovery motions, the magistrate judge cannot change the schedule set in this order, except that  
17 the magistrate judge may modify a discovery cutoff to the extent such modification does not have  
18 the effect of requiring a change to the balance of the schedule.

19 The parties will exhaust efforts to reach a stipulation regarding any increase in  
20 numbers of interrogatories and depositions, in excess of the caps provided by the Federal Rules of  
21 Civil Procedure. If they are unable to reach agreement, they shall submit their dispute to the  
22 assigned magistrate judge.

23 The court separately has approved the parties’ stipulated agreements regarding  
24 electronically stored information (ESI) and discovery procedures, and inadvertent disclosure of  
25 privileged information (Fed. R. Civ. Evid. 502). These orders are to be treated as companion  
26 orders to this scheduling order, with the same force and effect.

27 The parties will, within fourteen (14) days of the scheduling conference, file with  
28 the court a stipulation and proposed order, or separate proposed orders if no stipulation can be

1 reached, providing: (a) a discovery phase protective order to facilitate discovery of material a  
2 party claims as confidential, in particular financial information; and (b) an order governing  
3 preparation of privilege logs as required by Fed. R. Civ. P. 26(b)(5) addressing the presence of  
4 privileged or work product material embedded in e-mail communications. To the extent the  
5 parties are unable to reach agreement regarding the effect of a Common Interest Confidentiality  
6 Agreement between the United States, the San Francisco Regional Water Quality Board and the  
7 San Francisco Bay Conservation and Development Commission, the parties shall submit their  
8 dispute to the assigned magistrate judge.

9 V. DISCLOSURE OF EXPERT WITNESSES

10 The parties shall provide “opening expert reports,” i.e., to make disclosures and  
11 provide information under Federal Rule of Civil Procedure 26(a)(2) to the extent that they may  
12 use any witness at trial to present evidence under Federal Rule of Evidence 702, 703, or 705, by  
13 **June 8, 2018**. This deadline applies to the extent that the party bears the burden of proof on the  
14 subject matter at hand. Further, with respect to “retained experts” (i.e., an individual “retained or  
15 specially employed to provide expert testimony in the case or one whose duties regularly involve  
16 giving expert testimony,” Fed. R. Civ. P. 26(a)(2)(B)), opening expert reports must comply with  
17 Fed. R. Civ. P. 26(a)(2)(B). With respect to “percipient experts” (persons who, because of their  
18 expertise, have rendered expert opinions in the normal course of their work duties or observations  
19 pertinent to the issues in the case), opening expert reports may take the form of summaries and  
20 otherwise comply with Fed. R. Civ. P. 26(a)(2)(C).

21 The parties shall provide “responsive expert reports,” i.e., the deadline for parties  
22 to make disclosures and provide information under Rule 26(a)(2) to the extent that they intend to  
23 use such information solely to contradict or rebut evidence on the same subject matter identified  
24 by the opposing side under Rule 26(a)(2)(B) or (C), by **July 27, 2018**. With respect to retained  
25 experts, responsive expert reports must comply with Fed. R. Civ. P. 26(a)(2)(B). With respect to  
26 percipient experts, responsive expert reports may take the form of summaries and must comply  
27 with Fed. R. Civ. P. 26(a)(2)(C). No additional expert reports, including any purported  
28 supplemental expert reports, may be drafted or provided absent prior leave of court.

1 A party shall identify whether a disclosed expert is percipient, retained, or both. It  
2 will be assumed that a party designating a retained expert has acquired the express permission of  
3 the witness to be so listed. Parties designating percipient experts must state in the designation  
4 who is responsible for arranging the deposition of such persons.

5 All experts designated are to be fully prepared at the time of designation to render  
6 an informed opinion, and give the bases for their opinion, so that they will be able to give full and  
7 complete testimony at any deposition taken by the opposing party. Experts will not be permitted  
8 to testify at trial as to any information gathered or evaluated, or opinion formed, after deposition  
9 taken subsequent to designation. Depositions of any expert witnesses disclosed in accordance  
10 with Rule 26(a)(2) will not count toward the limitations of 10 depositions set forth in the fact  
11 discovery section above. No interrogatories may be directed to a retained expert.

12 All expert discovery shall be completed by **September 10, 2018**.

13 Each side will bear the costs of its own retained experts in responding to  
14 discovery, and no party seeking discovery will be required to pay the other side's retained expert  
15 any fee for the time spent in responding to discovery.

16 **VI. MOTION HEARING SCHEDULE**

17 All dispositive motions, except motions for continuances, temporary restraining  
18 orders or other emergency applications, shall be heard no later than **November 16, 2018**.<sup>1</sup> The  
19 parties may obtain available hearing dates by checking Judge Mueller's page on the court's  
20 website.

21 All purely legal issues are to be resolved by timely pretrial motions. Local Rule  
22 230 governs the calendaring and procedures of civil motions; the following provisions also apply:

23 (a) The opposition and reply must be filed by 4:00 p.m. on the day due; and

24 (b) When the last day for filing an opposition brief falls on a legal holiday, the  
25 opposition brief shall be filed on the last court day immediately preceding the legal holiday.

26 Failure to comply with Local Rule 230(c), as modified by this order, may be deemed consent to  
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28 <sup>1</sup> Note that this date may not correspond to a law and motion calendar date.

1 the motion and the court may dispose of the motion summarily. *Brydges v. Lewis*, 18 F.3d 651,  
2 652-53 (9th Cir. 1994).

3 The court values the importance of training young attorneys. The parties are  
4 encouraged to consider assigning oral argument to a young attorney. If a written request for oral  
5 argument is filed before a hearing, stating an attorney of four or fewer years out of law school  
6 will argue the oral argument, then the court will ordinarily hold the hearing, although the court's  
7 schedule and calendar may require the hearing to be reset. Otherwise, the court may find it  
8 appropriate in some actions to submit a motion without oral argument.

9 The court places a page limit of twenty (20) pages on all moving papers, twenty  
10 (20) pages on oppositions, and ten (10) pages for replies. All requests for page limit increases  
11 must be made in writing at least fourteen (14) days prior to the filing of the motion.

12 Prior to filing a motion in a case in which the parties are represented by counsel,  
13 counsel shall engage in a pre-filing meet and confer to discuss thoroughly the substance of the  
14 contemplated motion and any potential resolution. Plaintiff's counsel should carefully evaluate  
15 the defendant's contentions as to deficiencies in the complaint and in many instances the party  
16 considering a motion should agree to any amendment that would cure a curable defect. Counsel  
17 should discuss the issues sufficiently so that if a motion of any kind is filed, including for  
18 summary judgment, the briefing is directed only to those substantive issues requiring resolution  
19 by the court. Counsel should resolve minor procedural or other non-substantive matters during  
20 the meet and confer. **A notice of motion shall contain a certification by counsel filing the**  
21 **motion that meet and confer efforts have been exhausted, with a brief summary of meet and**  
22 **confer efforts.**

23 The parties are cautioned that failure to raise a dispositive legal issue that could  
24 have been tendered to the court by proper pretrial motion prior to the dispositive motion cut-off  
25 date may constitute waiver of such issue.

## 26 VII. SEALING

27 No document will be sealed, nor shall a redacted document be filed, without the  
28 prior approval of the court. If a document for which sealing or redaction is sought relates to the

1 record on a motion to be decided by Judge Mueller, the request to seal or redact should be  
2 directed to her and not the assigned Magistrate Judge. All requests to seal or redact shall be  
3 governed by Local Rules 141 (sealing) and 140 (redaction); protective orders covering the  
4 discovery phase of litigation shall not govern the filing of sealed or redacted documents on the  
5 public docket. The court will only consider requests to seal or redact filed by the proponent of  
6 sealing or redaction. If a party plans to make a filing that includes material an opposing party has  
7 identified as confidential and potentially subject to sealing, the filing party shall provide the  
8 opposing party with sufficient notice in advance of filing to allow for the seeking of an order of  
9 sealing or redaction from the court.

10 **VIII. MID LITIGATION STATUS CONFERENCE**

11 A mid-litigation status conference is set for **October 25, 2018 at 2:30 p.m.** in  
12 Courtroom No. 3, 15th Floor.

13 **IX. FINAL PRETRIAL CONFERENCE**

14 The Final Pretrial Conference is set for **April 5, 2019**, at 10:00 a.m. At least one  
15 of the attorneys who will conduct the trial for each of the parties shall attend the Final Pretrial  
16 Conference. If by reason of illness or other unavoidable circumstance a trial attorney is unable to  
17 attend, the attorney who attends in place of the trial attorney shall have equal familiarity with the  
18 case and equal authorization to make commitments on behalf of the client.

19 Counsel for all parties are to be fully prepared for trial at the time of the Final  
20 Pretrial Conference, with no matters remaining to be accomplished except production of  
21 witnesses for oral testimony. The parties shall confer and file a joint pretrial conference  
22 statement by **March 15, 2019**. The provisions of Local Rule 281 shall apply with respect to the  
23 matters to be included in the joint pretrial statement. In addition to those subjects listed in Local  
24 Rule 281(b), the parties are to provide the court with the following:

25 - A plain, concise statement that identifies every non-discovery motion previously  
26 tendered to the court and its resolution.

27 - A concise, joint list of undisputed core facts that are relevant to each claim.

28 Disputed core facts should then be identified in the same manner. The parties are reminded not to

1 identify every fact in dispute but only those disputed facts that are essential to the formulation of  
2 each claim. Each disputed fact and undisputed fact should be separately numbered or lettered.  
3 Where the parties are unable to agree on the core disputed facts, they should nevertheless list core  
4 disputed facts in the above manner.

5 - Concise lists of disputed evidentiary issues that will be the subject of a party's  
6 motion *in limine*, and whether the parties believe resolution of any of these motions will be  
7 necessary before the first day of trial.

8 - Each party's points of law, which concisely describe the legal basis or theory  
9 underlying their claims and defenses. Points of law should reflect issues derived from the core  
10 undisputed and disputed facts. Parties shall not include argument with any point of law; the  
11 parties may include concise arguments in their trial briefs.

12 Discovery documents to be listed in the pretrial statement shall not include  
13 documents to be used only for impeachment and in rebuttal.

14 The parties are reminded that pursuant to Local Rule 281 they are required to  
15 attach to the Final Pretrial Conference Statement an exhibit listing witnesses and exhibits they  
16 propose to offer at trial. After the name of each witness, each party shall provide a brief  
17 statement of the nature of the testimony to be proffered. The parties may file a joint list or each  
18 party may file separate lists. These list(s) shall not be contained in the body of the Final Pretrial  
19 Conference Statement itself, but shall be attached as separate documents to be used as addenda to  
20 the Final Pretrial Order.

21 Plaintiff's exhibits shall be listed numerically. Defendant's exhibits shall be listed  
22 alphabetically. The parties shall use the standard exhibit stickers provided by the court: pink for  
23 plaintiff and blue for defendant. In the event that the alphabet is exhausted, the exhibits shall be  
24 marked "AA-ZZ". However, if the amount of defendant exhibits exceeds "ZZ" exhibits shall be  
25 then listed as AAA, BBB, CCC etc. All multi-page exhibits shall be stapled or otherwise fastened  
26 together and each page within the exhibit shall be numbered. The list of exhibits shall not include  
27 excerpts of depositions to be used only for impeachment. In the event that plaintiff(s) and  
28 defendant(s) offer the same exhibit during trial, that exhibit shall be referred to by the designation

1 the exhibit is first identified. The court cautions the parties to pay attention to this detail so that  
2 all concerned will not be confused by one exhibit being identified with both a number and a letter.  
3 The parties are encouraged to consult concerning exhibits and, to the extent possible, provide  
4 joint exhibits, which shall be designated as JX and listed numerically, e.g., JX-1, JX-2.

5 The Final Pretrial Order will contain a stringent standard for the offering at trial of  
6 witnesses and exhibits not listed in the Final Pretrial Order, and the parties are cautioned that the  
7 standard will be strictly applied. On the other hand, the listing of exhibits or witnesses that a  
8 party does not intend to offer will be viewed as an abuse of the court's processes.

9 Counsel shall produce all trial exhibits to Casey Schultz, the Courtroom Deputy,  
10 no later than 3:00 p.m. on the Friday before trial.

11 Failure to comply with Local Rule 281, as modified by this order, may be grounds  
12 for sanctions.

13 The parties also are reminded that pursuant to Rule 16 of the Federal Rules of  
14 Civil Procedure it will be their duty at the Final Pretrial Conference to aid the court in: (a) the  
15 formulation and simplification of issues and the elimination of frivolous claims or defenses; (b)  
16 the settling of facts that should properly be admitted; and (c) the avoidance of unnecessary proof  
17 and cumulative evidence. Counsel must cooperatively prepare the joint Final Pretrial Conference  
18 Statement and participate in good faith at the Final Pretrial Conference with these aims in mind.<sup>2</sup>  
19 A failure to do so may result in the imposition of sanctions which may include monetary  
20 sanctions, orders precluding proof, elimination of claims or defenses, or such other sanctions as  
21 the court deems appropriate.

22 Concurrently with the filing of the Joint Final Pretrial Conference Statement,  
23 counsel shall submit to chambers the word processable version of the Statement, in its entirety  
24 (including the witness and exhibit lists) to: [kjmorders@caed.uscourts.gov](mailto:kjmorders@caed.uscourts.gov).

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27 <sup>2</sup> "If the pretrial conference discloses that no material facts are in dispute and that the undisputed  
28 facts entitle one of the parties to judgment as a matter of law," the court may summarily dispose  
of the case or claims. *Portsmouth Square v. Shareholders Protective Comm.*, 770 F.2d 866, 868-  
69 (9th Cir. 1985).



1 X. MOTIONS IN LIMINE

2 All motions *in limine* must be filed in conjunction with the joint pretrial statement.  
3 In most cases, motions *in limine* are addressed and resolved on the morning of the first day of  
4 trial. As noted above, the parties may alert the court at the final pretrial conference and in their  
5 final pretrial statement that a particular motion or motions should be resolved earlier. At the final  
6 pretrial conference, the court will then set a briefing and hearing schedule on these motions *in*  
7 *limine* as necessary.

8 The parties are reminded that a motion *in limine* is a pretrial procedural device  
9 designed to address the admissibility of evidence. The court looks with disfavor upon  
10 dispositional motions presented at the Final Pretrial Conference or at trial in the guise of motions  
11 *in limine*.

12 XI. TRIAL SETTING

13 The bench trial is set for **May 20, 2019** at 9:00 a.m. The parties estimate a trial  
14 length of approximately eight (8) to ten (10) days. Trial briefs are due by **May 6, 2019**.

15 XII. SETTLEMENT CONFERENCE

16 The parties have expressed interest in appearing for settlement conference and  
17 waive a conflict to the assigned magistrate judge acting as settlement judge. A settlement  
18 conference is confirmed before Judge Newman for the date closest to the parties' requested date,  
19 **October 17, 2017 at 9:00 a.m.** in Courtroom No. 25, 8th Floor.

20 The parties are directed to exchange non-confidential settlement conference statements  
21 seven (7) days prior to this settlement conference. These statements shall simultaneously be  
22 delivered to the Court using the following email address: [kjnorders@caed.uscourts.gov](mailto:kjnorders@caed.uscourts.gov). If a party  
23 desires to share additional confidential information with the court, they may do so as provided by  
24 the provisions of Local Rule 270(d) and (e). Waivers will be required if not previously filed.

25 XIII. MODIFICATION OF STATUS (PRETRIAL SCHEDULING) ORDER

26 The parties are reminded that pursuant to Rule 16(b) of the Federal Rules of Civil  
27 Procedure, the Status (Pretrial Scheduling) Order shall not be modified except by leave of court  
28 upon a showing of good cause. Agreement by the parties pursuant to stipulation alone does not

1 constitute good cause. Except in extraordinary circumstances, unavailability of witnesses or  
2 counsel does not constitute good cause.

3 The assigned magistrate judge is authorized to modify only the discovery dates  
4 shown above to the extent any such modification does not impact the balance of the schedule of  
5 the case.

6 **XIV. OBJECTIONS TO STATUS (PRETRIAL SCHEDULING) ORDER**

7 This Status Order will become final without further order of the court unless  
8 objections are filed within fourteen (14) *calendar* days of service of this Order.

9 IT IS SO ORDERED.

10 DATED: June 29, 2017.

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UNITED STATES DISTRICT JUDGE