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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

KAREEM J. HOWELL,
Plaintiff,
v.
M. LIDDELL, et al.,
Defendants.

No. 2:19-cv-0578 TLN KJN P

ORDER

Plaintiff is a state prisoner, proceeding without counsel, with a civil rights action pursuant to 42 U.S.C. § 1983. On March 26, 2021, the district court adopted the February 4, 2021 findings and recommendations. Accordingly, this matter is set for an evidentiary hearing with respect to whether plaintiff exhausted his administrative remedies. (See ECF No. 51.) The procedures for the evidentiary hearing are set forth herein.

A. Witnesses

On or before forty-five days prior to the hearing, the parties shall provide witness lists. Each party may call any witness designated by the other.

1. No other witness will be permitted to testify unless:

a. The party offering the witness demonstrates that the witness is for the purpose of rebutting evidence which could not be reasonably anticipated prior to the evidentiary hearing.

1 b. The witness was not discovered after the exchange of witnesses and the
2 proferring party makes the showing required in “2” below.

3 2. Within the thirty day period prior to the evidentiary hearing, the parties shall promptly
4 inform the court and opposing parties of the existence of the unlisted witnesses so that the court
5 may consider at the evidentiary hearing whether the witnesses shall be permitted to testify. The
6 witnesses will not be permitted unless:

7 a. The witnesses could not reasonably have been discovered prior to the exchange
8 of witness lists;

9 b. The court and the opposing party were promptly notified upon discovery of the
10 witnesses;

11 c. If time permitted, the party proffered the witnesses for deposition; or

12 d. If time did not permit, a reasonable summary of the witnesses’ testimony was
13 provided to the opposing party.

14 The procedures for plaintiff to obtain witnesses at the evidentiary hearing are the same as
15 those set forth in the November 8, 2019 scheduling order. The undersigned repeats those
16 procedures herein.

17 I. Procedures for Obtaining Attendance of Incarcerated Witnesses Who Agree to Testify
18 Voluntarily

19 An incarcerated witness who agrees voluntarily to attend the evidentiary hearing to give
20 testimony cannot come to court unless this court orders the warden or other custodian to permit
21 the witness to be transported to court. This court will not issue such an order unless it is satisfied
22 that:

23 1. The prospective witness is willing to attend;

24 and

25 2. The prospective witness has actual knowledge of relevant facts.

26 Forty-five days prior to the evidentiary hearing, a party intending to introduce the
27 testimony of incarcerated witnesses who have agreed voluntarily to attend the evidentiary hearing

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1 must serve and file a written motion for a court order requiring that such witnesses be brought to
2 court at the time of the evidentiary hearing. The motion must:

- 3 1. State the name, CDC Identification number, and address of each such witness;
4 and
- 5 2. Be accompanied by affidavits showing that each witness is willing to testify
6 and that each witness has actual knowledge of relevant facts.

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

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

12 Or

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

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

- 18 1. The party can swear by affidavit that the prospective witness has actual
19 knowledge. However, this can be done only if the party has actual firsthand
20 knowledge that the prospective witness was an eyewitness or an ear-witness to the
21 relevant facts;

22 Or

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

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

4 II. Procedures for Obtaining Attendance of Incarcerated Witnesses Who Refuse to Testify
5 Voluntarily

6 If a party seeks to obtain the attendance of incarcerated witnesses who refuse to testify
7 voluntarily, forty-five days prior to the evidentiary hearing, the party should submit a motion for
8 the attendance of such witnesses. Such motion should be in the form described above. In
9 addition, the party must indicate in the motion that the incarcerated witnesses are not willing to
10 testify voluntarily.

11 III. Procedures for Obtaining Attendance of Unincarcerated Witnesses Who Agree to
12 Testify Voluntarily

13 It is the responsibility of the party who has secured an unincarcerated witness' voluntary
14 attendance to notify the witness of the time and date of the evidentiary hearing. No action need
15 be sought or obtained from the court.

16 IV. Procedures for Obtaining Attendance of Unincarcerated Witnesses Who Refuse to
17 Testify Voluntarily

18 If a prospective witness is not incarcerated, and he or she refuses to testify voluntarily,
19 forty-five days before the evidentiary hearing, the party must prepare and submit to the United
20 States Marshal a subpoena for service by the Marshal upon the witness. (Blank subpoena forms
21 may be obtained from the Clerk of the Court). Also, the party seeking the witness' presence must
22 tender an appropriate sum of money to the witness through the United States Marshal. In the case
23 of an unincarcerated witness, the appropriate sum of money is the daily witness fee of \$40.00 plus
24 the witness' travel expenses.

25 A subpoena will not be served by the United States Marshal upon an unincarcerated
26 witness unless the subpoena is accompanied by a money order made payable to the witness for
27 the full amount of the witness' travel expenses plus the daily witness fee of \$40.00. As noted
28 earlier, because no statute authorizes the use of public funds for these expenses in civil cases, the

1 tendering of witness fees and travel expenses is required even if the party was granted leave to
2 proceed in forma pauperis.

3 V. Potential Witness Released from Custody

4 With his opposition to the motion for summary judgment, plaintiff provided two inmate
5 declarations. (ECF No. 51 at 7-8.) The inmate locator for the CDCR shows that inmate Mark A.
6 Hunt, F-60076, is no longer in CDCR custody. Accordingly, counsel for defendants shall provide
7 the court with Mr. Hunt's last known address.

8 B. Exhibits, Schedules and Summaries

9 Both parties shall exchange copies of their exhibits thirty days prior to the evidentiary
10 hearing. Any objections to the exhibits may be raised at the hearing.

11 1. No other exhibits will be permitted to be introduced unless:

12 a. The party proffering the exhibit demonstrates that the exhibit is for the purpose
13 of rebutting evidence which could not have been reasonably anticipated, or

14 b. The exhibit was discovered after the exchange of exhibits and the proffering
15 party makes the showing required in Paragraph "2" below.

16 2. Within the fifteen-day period prior to the evidentiary hearing, the parties shall
17 promptly inform the court and opposing counsel of the existence of such exhibits so that the court
18 may consider their admissibility at the evidentiary hearing. The exhibits will not be received
19 unless the proffering party demonstrates:

20 a. The exhibits could not reasonably have been discovered earlier;

21 b. The court and the opposing party were promptly informed of their existence; or

22 c. The proffering party forwarded a copy of the exhibit(s) (if physically possible)

23 to the opposing party. If the exhibit(s) may not be copied the proffering party must show that he
24 has made the exhibit(s) reasonably available for inspection by the opposing party.

25 C. Evidentiary Hearing

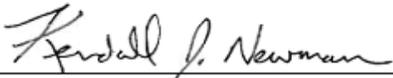
26 The U.S. Courthouse is currently closed to the public due to the current COVID-19
27 pandemic. Thus, along with their witness lists, the parties shall also inform the court whether

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1 anyone has an objection to the court holding the evidentiary hearing by Zoom, or whether the
2 hearing should be delayed until it can be held in person.

3 Accordingly, IT IS HEREBY ORDERED that an evidentiary hearing is set for July 6,
4 2021, at 9:00 a.m., before the undersigned; the parties shall prepare for the hearing in accordance
5 with the terms set forth in this order.

6 Dated: March 31, 2021

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KENDALL J. NEWMAN
9 UNITED STATES MAGISTRATE JUDGE

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