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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ANTHONY C. HALBERT,)	Civil No. 07cv1607-L(WVG)
)	
Plaintiff,)	ORDER REJECTING AMENDED
)	PROPOSED PRETRIAL ORDER
v.)	AND CONTINUING FINAL
)	PRETRIAL CONFERENCE
COUNTY OF SAN DIEGO, <i>et al.</i> ,)	
)	
Defendants.)	

On November 15, 2010 this civil rights action came on for a pretrial conference. Alvin M. Gomez, Esq. appeared on behalf of Plaintiff, Michael R. McGuinness, Esq. appeared on behalf of Defendant Roger Rodriguez, Diane M. Schweiner, Esq. appeared on behalf of Defendant Glenn Graczyk, and Tarquin Preziosi, Esq. appeared on behalf of Defendant Sam Samoa. Pursuant to the order of this court issued on October 22, 2010, the parties had lodged an amended proposed pretrial order. For the reasons stated at the hearing and as amplified below, the amended proposed pretrial order is **REJECTED** and the final pretrial conference is **CONTINUED**.

The amended proposed pretrial order inadequately defines the factual and legal issues for trial consistent with the March 30, 2010 order on cross-motions for summary judgment (“Order”). Specifically, in the October 22, 2010 order rejecting the initial version of the proposed pretrial order, the parties were directed to revise the factual issues based on the

1 elements of the excessive force claims remaining after cross-motions for summary judgment and
2 the findings regarding disputed issues of fact. The parties have not done so. For the reasons
3 more fully discussed at the hearing, the issue of fact listed as item 1 in the amended proposed
4 pretrial order needs to be broken down to the issues of fact corresponding to the three theories of
5 excessive force which remain in the case and the elements of the claim, to the extent they remain
6 disputed. As discussed at the hearing, the issue listed as item 13, must be revised consistently
7 with the excessive force factors. *See, e.g., Tekle v. United States*, 511 F.3d 839, 844-45 (9th Cir.
8 2007); Ninth Cir. Model Civ. Jury Instr. no. 9.22 (same factors).

9 Given that only the excessive force cause of action remains, the section of the amended
10 proposed pretrial order listing the issues of law to be litigated needs to be revised. The first
11 issue, "Whether each Defendant acted under color of law," has been resolved for purposes of
12 trial. All Defendants admit that they acted in their respective capacities as law enforcement
13 officers, and therefore under color of law, at the relevant time. At the hearing, the counsel
14 explained that an issue remains only with respect to attorney's fees and only with respect to
15 Defendant Graczyk. Should Plaintiff prevail at trial, Defendant Graczyk, while admitting that he
16 acted in his capacity as a federal law enforcement officer, does not admit that he acted under the
17 color of state law for purposes of attorney's fees. Because the parties reserved attorney's fees
18 for a post-trial motion, the issue is not to be decided at trial. The amended proposed pretrial
19 order shall therefore be revised accordingly.

20 The third listed issue, "Whether any Defendant violated Plaintiff Halbert's Fourth
21 Amendment right to be free from unreasonable searches and seizures," needs to be revised to
22 reflect that there is no claim for unreasonable search remaining in this case. The second issue,
23 "Whether any Defendant violated 42 U.S.C. § 1983 and the civil rights of Plaintiff by engaging
24 in the use of excessive force," is subsumed in the third issue, considering that there is no dispute
25 whether Defendants acted under color of law. *See* Ninth Cir. Model Jury Instr. 9.2.

26 The fourth issue, "Whether Defendants are entitled to qualified immunity," should be
27 revised because Defendants' qualified immunity argument was rejected on summary judgment.

28 //

1 (See Order at 21-22 & 26.) As indicated in the October 22, 2010 order, the court is not inclined
2 to revisit issues which were decided on summary judgment.

3 The fifth legal issue, raised on behalf of Defendant Graczyk, is "Whether any Defendant
4 can be liable to Plaintiff under the 'integral participation' theory of the alleged acts of other
5 Defendants." As stated in the October 22, 2010 order, this issue will be decided by a motion
6 rather than at trial because it raises solely the legal issue about the continued viability of the
7 integral participant doctrine after *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2008).

8 The seventh listed issue, "Whether Plaintiff may seek damages for alleged physical and
9 psychological injuries when such injuries were caused in whole or in part by acts or omissions
10 found by the Court to be constitutional," should be omitted. It is beyond dispute that if
11 Defendants did not violate Plaintiff's constitutional rights, there cannot be a verdict for Plaintiff.
12 *See Ninth Cir. Civ. Jury Instr. 9.2* ("If you find the plaintiff has proved each of [the section
13 1983] elements, and if you find that the plaintiff has proved all the elements he is required to
14 prove under Instruction [regarding excessive force [no. 9.22]], your verdict should be for the
15 plaintiff. If, on the other hand, the plaintiff has failed to prove any one or more of these
16 elements, your verdict should be for the defendant.") To the extent the issue is whether, under
17 circumstances where only some of Defendants' conduct during the incident is found
18 unconstitutional, Plaintiff should recover damages which were caused by the incident in general,
19 the issue is a factual one of causation, and is addressed in the amended proposed pretrial order
20 by the issues of fact listed as items 2 through 4. Finally, to the extent the issue is whether
21 Plaintiff can prove causation without expert testimony, the issue is an evidentiary one for
22 motions in limine and evidentiary objections rather than an issue of law to be tried.

23 The last issue of law on the list, "Whether Plaintiff may recover any future medical
24 expense or lost wages damages in the absence of an expert testifying regarding the present value
25 of any future damages," is an evidentiary issue for motions in limine and objections rather than
26 an issue of law to be tried. It should therefore be excluded.

27 The parties propose an eight-day trial with 29 witnesses and 104 exhibits. As discussed at
28 the hearing, this appears excessive in light of the claims which remain in the case. The parties

1 are encouraged to again review the summary judgment order and frame the evidence they intend
2 to introduce only around the issues which remain disputed.

3 Based on the foregoing, it is hereby **ORDERED** as follows:

4 1. The amended proposed pretrial order dated November 5, 2010 is hereby **REJECTED**.


5 2. The parties shall meet and confer in person to prepare a revised proposed pretrial order
6 in compliance with this order and the guidance provided at the hearing.

7 3. No later than **November 29, 2010**, Plaintiff shall deliver to chambers three copies of a
8 fully executed revised proposed pretrial order.

9 4. The final pretrial conference is **CONTINUED** to **December 6, 2010 at 11:00 a.m.**

10 **IT IS SO ORDERED.**

11
12 DATED: November 16, 2010

13 
14 M. James Lorenz
United States District Court Judge

15 COPY TO:

16 HON. WILLIAM V. GALLO
UNITED STATES MAGISTRATE JUDGE

17 ALL PARTIES/COUNSEL
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