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6 **UNITED STATES DISTRICT COURT**  
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8 **EASTERN DISTRICT OF CALIFORNIA**

9 ROBERT QUINCY THOMAS,

CASE NO. 1:02-CV-05550-REC-LJO-P

10 Plaintiff,

**AMENDED SECOND SCHEDULING  
ORDER**

11 v.

Motions in Limine Deadline: November 21,  
2005

12 LT. M. STAINER,

13 Defendant.

Telephonic Trial Confirmation  
Hearing: December 1, 2005 at 8:30 a.m. in  
Courtroom 6 (LJO)

Jury Trial: January 10, 2006, at 9:00 a.m. in  
Courtroom 1 (REC)

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17 I. Second Scheduling Order

18 Plaintiff Robert Quincy Thomas (“plaintiff”) is a state prisoner proceeding pro se and in  
19 forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. This action is proceeding on  
20 plaintiff’s complaint, filed on May 13, 2002, against defendant Stainer (“defendant”) for use of  
21 excessive physical force, in violation of the Eighth Amendment. Pursuant to Rule 16(b) of the  
22 Federal Rules of Civil Procedure, the Court will, by this order, set a further schedule for this  
23 litigation.

24 A. Pre-Trial Statements

25 The parties are required to file pre-trial statements in accordance with the schedule set forth  
26 herein. In addition to the matters already required to be addressed in the pre-trial statement in  
27 accordance with Local Rule 16-281, plaintiff will be required to make a particularized showing in  
28

1 order to obtain the attendance of witnesses. The procedures and requirements for making such a  
2 showing are outlined in detail below. Plaintiff is advised that failure to comply with the procedures  
3 set forth below may result in the preclusion of any and all witnesses named in his pre-trial statement.

4 The parties are advised that failure to file pre-trial statements as required by this order may  
5 result in the imposition of appropriate sanctions, which may include dismissal of the action or entry  
6 of default.

7 B. Evidence and Witness Information

8 At the trial of this case, plaintiff must be prepared to introduce evidence to prove each of the  
9 alleged facts that support the claims raised in the lawsuit. In general, there are two kinds of trial  
10 evidence: (1) exhibits and (2) the testimony of witnesses. It is plaintiff's responsibility to produce  
11 all of the evidence to prove his case, whether that evidence is in the form of exhibits or witness  
12 testimony. If plaintiff wants to call witnesses to testify, he must follow certain procedures to ensure  
13 that the witnesses will be at the trial and available to testify.

14 \_\_\_\_\_ 1. Procedures for Obtaining Attendance of Incarcerated Witnesses Who Agree  
15 to Testify Voluntarily - An incarcerated witness who agrees voluntarily to attend trial to give  
16 testimony cannot come to court unless this Court orders the warden or other custodian to permit the  
17 witness to be transported to court. This Court will not issue such an order unless it is satisfied that:  
18 (a) the prospective witness is willing to attend; and (b) the prospective witness has actual knowledge  
19 of relevant facts.

20 A party intending to introduce the testimony of incarcerated witnesses who have agreed  
21 voluntarily to attend the trial must serve and file a written motion for a court order requiring that  
22 such witnesses be brought to court at the time of trial. The motion must: (1) state the name, address,  
23 and prison identification number of each such witness; and (2) be accompanied by declarations  
24 showing that each witness is willing to testify and that each witness has actual knowledge of relevant  
25 facts. The motion should be entitled "Motion for Attendance of Incarcerated Witnesses."

26 The willingness of the prospective witness can be shown in one of two ways: (1) the party  
27 himself can swear by declaration under penalty of perjury that the prospective witness has informed  
28 the party that he or she is willing to testify voluntarily without being subpoenaed, in which

1 declaration the party must state when and where the prospective witness informed the party of this  
2 willingness; or (2) the party can serve and file a declaration, signed under penalty of perjury by the  
3 prospective witness, in which the witness states that he or she is willing to testify without being  
4 subpoenaed.

5 The prospective witness's actual knowledge of relevant facts can be shown in one of two  
6 ways: (1) if the party has actual firsthand knowledge that the prospective witness was an eyewitness  
7 or an ear-witness to the relevant facts (i.e., if an incident occurred in plaintiff's cell and, at the time,  
8 plaintiff saw that a cellmate was present and observed the incident, plaintiff may swear to the  
9 cellmate's ability to testify), the party himself can swear by declaration under penalty of perjury that  
10 the prospective witness has actual knowledge; or (2) the party can serve and file a declaration signed  
11 under penalty of perjury by the prospective witness in which the witness describes the relevant facts  
12 to which the prospective witness was an eye- or ear-witness. Whether the declaration is made by the  
13 party or by the prospective witness, it must be specific about the incident, when and where it  
14 occurred, who was present, and how the prospective witness happened to be in a position to see or  
15 to hear what occurred at the time it occurred.

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

19 **Motions for the attendance of incarcerated witnesses, if any, must be filed on or before**  
20 **October 31, 2005. Oppositions, if any, must be filed on or before November 21, 2005.**

21 2. Procedures for Obtaining Attendance of Incarcerated Witnesses Who Refuse  
22 to Testify Voluntarily - If a party seeks to obtain the attendance of incarcerated witnesses who  
23 refuse to testify voluntarily, the party should submit with his pre-trial statement a motion for the  
24 attendance of such witnesses. Such motion should be in the form described above. In addition, the  
25 party must indicate in the motion that the incarcerated witnesses are not willing to testify voluntarily.

26 3. Procedures for Obtaining Attendance of Unincarcerated Witnesses Who Agree  
27 to Testify Voluntarily - It is the responsibility of the party who has secured an unincarcerated

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

3 4. Procedures for Obtaining Attendance of Unincarcerated Witnesses Who  
4 Refuse to Testify Voluntarily - If a prospective witness is not incarcerated, and he or she refuses  
5 to testify voluntarily, the witness must be served with a subpoena. Fed. R. Civ. P. 45. In addition,  
6 the party seeking the witness's presence must tender an appropriate sum of money for the witness.  
7 Id. In the case of an unincarcerated witness, the appropriate sum of money is the daily witness fee  
8 of \$40.00 plus the witness's travel expenses. 28 U.S.C. § 1821.

9 If plaintiff wishes to obtain the attendance of one or more unincarcerated witnesses who  
10 refuse to testify voluntarily, plaintiff must first notify the Court in writing of the name and location  
11 of each unincarcerated witness. The Court will calculate the travel expense for each unincarcerated  
12 witness and notify plaintiff of the amount(s). Plaintiff must then, for each witness, submit a money  
13 order made payable to the witness for the full amount of the witness's travel expenses plus the daily  
14 witness fee of \$40.00. The subpoena will not be served upon the unincarcerated witness by the  
15 United States Marshal unless the money order is tendered to the Court. Because no statute  
16 authorizes the use of public funds for these expenses in civil cases, the tendering of witness fees and  
17 travel expenses is required even if the party was granted leave to proceed in forma pauperis.

18 **If plaintiff wishes to have the Marshal serve any unincarcerated witnesses who refuse**  
19 **to testify voluntarily, plaintiff must submit the money orders to the Court no later than**  
20 **November 21, 2005.** In order to ensure timely submission of the money orders, plaintiff should  
21 notify the Court of the names and locations of his witnesses, in compliance with step one, as soon  
22 as possible.

23 C. Briefing Schedule and Hearing on Motions in Limine

24 Any party may file a motion in limine. The purpose of a motion in limine is to establish in  
25 advance of the trial that certain evidence should not be offered at trial. Although the Federal Rules  
26 do not explicitly provide for the filing of motions in limine, the Court has the inherent power to hear  
27 and decide such motions as a function of its duty to expeditiously manage trials by eliminating  
28 evidence that is clearly inadmissible for any purpose. Luce v. United States, 469 U.S. 38, 41 n. 4

1 (1984); Jonasson v. Lutheran Child and Family Services, 115 F. 3d 436, 440 (7th Cir. 1997). The  
2 Court will grant a motion in limine, and thereby bar use of the evidence in question, only if the  
3 moving party establishes that the evidence clearly is not admissible for any valid purpose. Id.;  
4 Hawthorne Partners v. AT & T Technologies, Inc., 831 F. Supp. 1398, 1400 (N.D. Ill. 1993).

5 All motions in limine must be served on the other party, and filed with the Court, by  
6 **November 21, 2005**. Any motion in limine must clearly identify the nature of the evidence that the  
7 moving party seeks to prohibit the other side from offering at trial.

8 Any opposition to a motion in limine must be served on the other party, and filed with the  
9 Court, by **December 19, 2005**.

10 After reviewing the motions in limine, if the Court deems it necessary, the Court will set a  
11 hearing date prior to trial for motions in limine. If the Court does not deem a separate date  
12 necessary, motions in limine will be heard on the morning of trial at 9:00 a.m.

13 Whether or not a party files a motion in limine, that party may still object to the introduction  
14 of evidence during the trial.

15 Accordingly, the Court HEREBY ORDERS as follows:

- 16 1. This matter is set for telephonic trial confirmation hearing before the undersigned on  
17 **December 1, 2005, at 8:30 a.m.** in Courtroom 6;
- 18 2. This matter is set for jury trial before the Honorable Robert E. Coyle on **January 10,**  
19 **2006, at 9:00 a.m.** in Courtroom 1;
- 20 3. Counsel for defendant is required to arrange for the participation of plaintiff in the  
21 telephonic trial confirmation hearing and to initiate the telephonic hearing at (559)  
22 498-7322;
- 23 4. The parties shall each serve and file a pre-trial statement as described in this order on  
24 or before **November 21, 2005**;
- 25 5. Defendant shall submit with his pre-trial statement an additional copy on 3.5 inch  
26 computer disk formatted for WordPerfect 8.0 directly to the chambers of the  
27 undersigned (the disk will not be returned unless defendant so requests and provides  
28 a self-addressed stamped mailing container or envelope);

1           6.     If plaintiff intends to call incarcerated witnesses at time of trial, plaintiff shall serve  
2                     and file a motion for attendance of incarcerated witnesses as described in this order  
3                     on or before **October 31, 2005**;

4           7.     The opposition to the motion for the attendance of incarcerated witnesses, if any,  
5                     shall be filed on or before **November 21, 2005**;

6           8.     If plaintiff wishes to obtain the attendance of unincarcerated witnesses who refuse  
7                     to testify voluntarily, plaintiff must submit the money orders, as described in  
8                     subsection 4 of this order, to the Court on or before **November 21, 2005**;

9           9.     The deadline for filing motions in limine is **November 21, 2005**; and

10          10.    The deadline for filing oppositions to motions in limine is **December 19, 2005**.

11  
12 IT IS SO ORDERED.

13 **Dated: September 1, 2005**  
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/s/ Lawrence J. O'Neill  
UNITED STATES MAGISTRATE JUDGE