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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

Bobby James Williams, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
Roderick Hickman, et al, )  
 )  
Defendants. )  
 )  
\_\_\_\_\_ )

No. 1:05-cv-1649-GMS

**INFORMATIONAL ORDER, MOTION  
TO DISMISS NOTICE, AND SUMMARY  
JUDGMENT NOTICE**

Plaintiff, proceeding pro se, having filed a complaint pursuant to 42 U.S.C. § 1983 and Defendants having answered, Parties to this litigation shall take note of the following requirements:

1. Unless otherwise ordered, all motions to dismiss, motions for summary judgment, motions concerning discovery, motions pursuant to Rules 7, 11, 12, 15, 41, 55, 56, 59 and 60 of the Federal Rules of Civil Procedure, and motions pursuant to Local Rule 11-110 shall be briefed pursuant to Local Rule 78-230(m).

2. At some point in the litigation, Defendant may file a motion to dismiss this action on any number of grounds. Plaintiff is advised that he has the right to oppose the motion in writing. Written oppositions must be filed not more than 18 days, plus 3 days for mailing, after the date of service of the motion to dismiss. Local Rule 78-230(m) provides that the failure to oppose a motion “may be deemed a waiver of any opposition to the granting of the motion . . . .” This means that the Court may deem Plaintiff’s failure to

1 oppose Defendant's motion to dismiss as a waiver, and may recommend that the motion be  
2 granted on that basis.

3           3.       At some point in the litigation, Defendant may file a motion to dismiss for  
4 failure to exhaust administrative remedies as to one or more claims in the complaint. The  
5 failure to exhaust administrative remedies is subject to an unenumerated Rule 12(b) motion  
6 to dismiss. *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003) (citing *Ritza v. Int'l*  
7 *Longshoremen's & Warehousemen's Union*, 837 F.2d 365, 368 (9th Cir. 1988) (per  
8 curium)). In deciding a motion to dismiss for failure to exhaust nonjudicial remedies, the  
9 court may look beyond the pleadings and decide disputed issues of fact." *Wyatt*, 837 F.3d  
10 at 1119-20 (quoting *Ritza*, 837 F.2d at 368). If th district court concludes that the prisoner  
11 has not exhausted administrative remedies, the case will be dismissed without prejudice.  
12 *Wyatt*, 837 F.3d at 1120. This means that the case will end. If Plaintiff exhausts  
13 administrative remedies at a later date, he may file the case as a new action.

14           If Defendant makes an unenumerated 12(b) motion to dismiss for failure to exhaust  
15 administrative remedies, plaintiff may not simply rely on allegations in the complaint.  
16 Instead, Plaintiff must oppose the motion by setting forth specific facts in declaration(s) and  
17 other evidence regarding the exhaustion of administrative remedies. *See Fed. R. Civ.*  
18 *P. 43(e); Ritza*, 837 F.2d at 369. If Plaintiff does not submit his own evidence in  
19 opposition, the Court may conclude that Plaintiff has not exhausted administrative remedies  
20 and the case will be dismissed.

21           4.       At some point in the litigation, Defendant may move for summary judgment  
22 as to some or all of Plaintiff's claims. Pursuant to *Klinge v. Eikenberry*, 849 F.2d 409  
23 (9th Cir. 1988) and *Rand v. Rowland*, 154 F.3d 952 (9th Cir. 1998), Plaintiff is advised of  
24 the following requirements for opposing a motion for summary judgment made by  
25 Defendant pursuant to Rule 56 of the Federal Rules of Civil Procedure. Such a motion is  
26 a request for an order of judgment on some or all of Plaintiff's claims in favor of Defendant  
27 without trial. *See Rule 56(b)*. Defendant's motion will set forth the facts which Defendant  
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1 contends are not reasonably subject to dispute and that entitle Defendant to judgment as a  
2 matter of law. *See* Rule 56(c).

3 Plaintiff has the right to oppose a motion for summary judgment. To oppose the  
4 motion, Plaintiff must show proof of his claims. Plaintiff may agree with the facts set forth  
5 in Defendant's motion but argue that Defendant is not entitled to judgment as a matter of  
6 law. Plaintiff may show Defendant's facts are disputed in one or more of the following  
7 ways: (1) Plaintiff may rely upon statements made under the penalty of perjury in the  
8 complaint *if* the complaint shows that Plaintiff has personal knowledge of the matters stated  
9 and *if* Plaintiff calls to the Court's attention those parts of the complaint upon which  
10 Plaintiff relies; (2) Plaintiff may also serve and file affidavits or declarations<sup>1</sup> setting forth  
11 the facts which Plaintiff believes prove Plaintiff's claims (the persons who sign the affidavit  
12 or declaration must have personal knowledge of the facts stated; (3) Plaintiff may also rely  
13 upon written records but Plaintiff must prove that the records are what Plaintiff claims they  
14 are;<sup>2</sup> (4) Plaintiff may also rely upon all or any part of the transcript of one or more  
15 depositions, answers to interrogatories, or admissions obtained in this proceeding. Should  
16 Plaintiff fail to contradict Defendant's motion with affidavits, declarations, or other  
17 evidence, Defendant's evidence will be taken as truth, and final judgment may be entered  
18 without a full trial. *See* Rule 56(e).

19 If there is some good reason why such facts are not available to Plaintiff when  
20 required to oppose such a motion, the Court will consider a request to postpone considering  
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23 <sup>1</sup>An affidavit is a written declaration or statement of facts, made voluntarily, and confirmed by  
24 the oath or affirmation of the party making it, taken before an officer having authority to administer  
25 such oath. An unsworn declaration has the same effect as an affidavit, provided that it is dated and  
26 signed under penalty of perjury, as follows: "I declare under penalty of perjury that the foregoing is true  
27 and correct." 28 U.S.C. § 1746. Affidavits and declarations must be made on personal knowledge and  
28 must set forth facts as would be admissible in evidence. *See* Rule 56(e).

<sup>2</sup>Sworn or certified copies of all papers referred to in an affidavit must be attached to the  
affidavit and served on the opposing party. Rule 56(e).

1 Defendant's motion. *See* Rule 56(f). If Plaintiff does not serve and file a request to  
2 postpone consideration of Defendant's motion or written opposition to the motion, the  
3 Court may consider Plaintiff's failure to act as a waiver of opposition to Defendant's  
4 motion. Plaintiff's waiver of opposition to Defendant's motion may result in the entry of  
5 summary judgment against Plaintiff.

6 5. A motion supported by affidavits or declarations that are unsigned will be  
7 stricken.

8 6. The failure of any party to comply with this Order, the Federal Rules of Civil  
9 Procedure, or the Local Rules of Court, may result in the imposition of sanctions including,  
10 but not limited to, dismissal of the action or entry of default.

11 **IT IS SO ORDERED.**

12 DATED this 23rd day of September, 2009.

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G. Murray Snow  
United States District Judge

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