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4 **UNITED STATES DISTRICT COURT**
5 **EASTERN DISTRICT OF CALIFORNIA**
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9 **VALENTINE E. UNDERWOOD,**

10 Plaintiff,

11 vs.

1:08-CV-00986-GSA (PC)

12 **S. LANTZ, ET AL.,**

13 Defendant(s).
14 _____ /

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

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16 Plaintiff has submitted the required USM-285 forms
17 and a separate order transmits them to the United States Marshal for
18 service of process. Parties to this litigation shall take note of the
19 following requirements:

20 1. Defendants must reply to the complaint within the time provided
21 by the applicable provisions of Fed. R. Civ. P. 12(a).

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

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1 3. At some point in the litigation, defendants may file a motion
2 to dismiss this action on any number of grounds. Plaintiff is advised
3 that he has the right to oppose the motion in writing. Written oppositions
4 must be filed not more than 18 days, plus 3 days for mailing, after the
5 date of service of the motion to dismiss. Local Rule 78-230(m) provides
6 that the failure to oppose a motion "may be deemed a waiver of any
7 opposition to the granting of the motion . . ." This means that the court
8 may deem plaintiff's failure to oppose defendant's motion to dismiss as
9 a waiver, and may recommend that the motion be granted on that basis.

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

24 If defendants make an unenumerated 12(b) motion to dismiss for
25 failure to exhaust administrative remedies, plaintiff may not simply
26 rely on the allegations in the complaint. Instead, plaintiff must
27 oppose the motion by setting forth specific facts in declaration(s)
28 and other evidence regarding the exhaustion of administrative does be

1 remedies. See Fed. R. Civ. P. 43(e) Ritza v. Int'l Longshoremen's &
2 Warehousemen's Union, 837 F.2d 365, 369(9th Cir. 1988). If plaintiff does
3 not submit his own evidence in opposition, the court may conclude that
4 plaintiff has not exhausted administrative remedies and the case will
5 be dismissed.

6 5. At some point in the litigation, one or more defendants may
7 move for summary judgment as to some or all of plaintiff's claims.
8 Pursuant to Kligele v. Eikenberry, 849 F.2d 409(9th Cir. 1988) and
9 Rand v. Rowland, 154 F.3d 952(9th Cir. 1998), plaintiff is advised of
10 the following requirements for opposing a motion for summary judgment
11 made by defendants pursuant to Rule 56 of the Federal Rules of Civil
12 Procedure. Such a motion is request for an order for judgment on some or
13 all of plaintiff's claims in favor of defendants without trial. See
14 Rule 56(b). Defendant(s)' motion will set forth the facts which
15 defendants contend are not reasonably subject to dispute and that
16 entitle defendant to judgment as a matter of law. See Rule 56(c)

17 Plaintiff has the right to oppose a motion for summary judgment.
18 To oppose the motion, plaintiff must show proof of his or her claims.
19 Plaintiff may agree with the facts set forth in defendant(s) motion
20 but argue that defendant(s) are not entitled to judgment as a matter of
21 law. Plaintiff may show defendant(s) facts are disputed in one or more
22 of the following ways: (1) Plaintiff may rely upon statements made under
23 the penalty of perjury in the complaint if the complaint shows that
24 plaintiff has personal knowledge of the matters stated and if plaintiff
25 calls to the court's attention those parts of the complaint upon which
26 plaintiff relies; (2) Plaintiff may also serve and file affidavits or

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1 declaration¹ setting forth the facts which plaintiff believes prove
2 plaintiff's claims (the persons who signed the affidavit or declaration
3 must have personal knowledge of the facts stated); (3) Plaintiff may also
4 rely upon written records but plaintiff must prove that the records are
5 what plaintiff claims they are²; (4) Plaintiff may also rely upon all or
6 any part of the transcript of one or more depositions, answers to
7 interrogatories, or admissions obtained in this proceeding. Should
8 plaintiff fail to contradict defendants motion with affidavits,
9 declarations, or other evidence, defendants evidence will be taken as
10 truth, and final judgment may be entered without a full trial. See
11 Rule 56(e).

12 If there is some good reason why such facts are not available to
13 plaintiff when required to oppose such a motion, the court will consider
14 a request to postpone considering defendant(s) motion. See Rule 56(f).
15 If plaintiff does not serve and file a request to postpone consideration
16 of defendant(s) motion or written opposition to the motion, the court
17 may consider plaintiffs failure to act as a waiver of opposition to
18 defendant(s) motion. Plaintiff's waiver of opposition to defendant(s)'
19 motion may result in the entry of summary judgment against plaintiff.

21 ¹An affidavit is a written declaration or statement of facts, made
22 voluntarily, and confirmed by the oath or affirmation of the party
23 making it, taken before an officer having authority to administer such
24 oath. An unsworn declaration has the same effect as an affidavit,
25 provided that it is dated and signed under penalty of perjury, as
26 follows: "I declare under penalty of perjury that the foregoing is
true and correct." 28 U.S.C. § 1746. Affidavits and declarations must
be made on personal knowledge and must set forth facts as would be
admissible in evidence. See Rule 56(e).

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

1 6. A motion supported by affidavits or declarations that are
2 unsigned will be stricken.
3 7. The failure of any party to comply with this order, the Federal
4 Rules of Civil Procedure, or the Local Rules of Court, may result in
5 the imposition of sanctions including, but not limited to, dismissal of
6 the action or entry of default.

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8 IT IS SO ORDERED.

9 DATED: 11/25/09

UNITED STATES MAGISTRATE JUDGE

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