

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

DON VALENCIA,

Plaintiff,

v.

HARRIS et al.,

Defendants.

Case No. 1:10cv-01725-AWI-MJS (PC)

**ORDER REQUIRING PLAINTIFF TO
FILE OPPOSITION TO DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT****(ECF No. 40)****TWENTY-ONE (21) DAY DEADLINE****NOTICE AND WARNING OF
REQUIREMENTS FOR OPPOSING
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

Plaintiff is a former state prisoner proceeding pro se and in forma pauperis in this civil rights action filed pursuant to 42 U.S.C. § 1983. The matter proceeds on a failure to protect claim against Defendants Harris, Fell, Riggs, Webb, Hittle, Anderson, Dean, and Scott. On August 1, 2014, Defendants filed a motion for summary judgment which notified Plaintiff of his rights, obligations and methods for opposing Defendants' motion.

Plaintiff's opposition or statement of non-opposition was due by not later than

1 August 26, 2014. Local Rule 230(/). The August 26, 2014, deadline passed without
2 Plaintiff responding or seeking an extension of time to do so.

3 The Court will give Plaintiff one further opportunity to respond to the motion:
4 Plaintiff must file an opposition or a statement of non-opposition to Defendants' motion
5 for summary judgment within twenty-one (21) days from the date of service of this
6 Order.

8 Pursuant to *Woods v. Carey*, 684 F.3d 934 (9th Cir. 2012), *Rand v. Rowland*,
9 154 F.3d 952 (9th Cir. 1998), and *Klinge v. Eikenberry*, 849 F.2d 409 (9th Cir. 1988),
10 the Court hereby notifies Plaintiff of the following rights and requirements for opposing
11 the motion:

12 1. Unless otherwise ordered, all motions for summary judgment are briefed
13 pursuant to Local Rule 230(/).

14 2. Plaintiff is required to file an opposition or a statement of non-opposition to
15 Defendants' motion for summary judgment. Local Rule 230(/). If Plaintiff fails to file an
16 opposition or a statement of non-opposition to the motion, this action may be dismissed,
17 with prejudice, for failure to prosecute. The opposition or statement of non-opposition
18 must be filed not more twenty one (21) days from the date of service of this Order. Id.

19 3. A motion for summary judgment is a request for judgment on some or all of
20 Plaintiff's claims in favor of Defendants without trial. Fed. R. Civ. P. 56(a). Defendants'
21 motion sets forth the facts which they contend are not reasonably subject to dispute and
22 that entitle them to judgment as a matter of law. Fed. R. Civ. P. 56(c). This is called the
23 statement of undisputed facts. Local Rule 260(a).

24 Plaintiff has the right to oppose the motion for summary judgment. To oppose the
25 motion, Plaintiff must show proof of his claims. Plaintiff may agree with the facts set
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1 forth in Defendants' motion but argue that Defendants are not entitled to judgment as a
2 matter of law. In the alternative, if Plaintiff does not agree with the facts set forth in
3 Defendants' motion, he may show that Defendants' facts are disputed in one or more of
4 the following ways: (1) Plaintiff may rely upon statements made under the penalty of
5 perjury in the complaint or the opposition if (a) the complaint or opposition shows that
6 Plaintiff has personal knowledge of the matters stated and (b) Plaintiff calls to the
7 Court's attention those parts of the complaint or opposition upon which Plaintiff relies;
8 (2) Plaintiff may serve and file declarations setting forth the facts which Plaintiff believes
9 prove his claims;¹ (3) Plaintiff may rely upon written records but Plaintiff must prove that
10 the records are what he claims they are;² or (4) Plaintiff may rely upon all or any part of
11 the transcript of one or more depositions, answers to interrogatories, or admissions
12 obtained in this proceeding. Should Plaintiff fail to contradict Defendants' motion with
13 declarations or other evidence, Defendants' evidence will be taken as truth, and final
14 judgment may be entered without a full trial. Fed. R. Civ. P. 56(e).

17 In opposing Defendants' motion for summary judgment, Local Rule 260(b)
18 requires Plaintiff to reproduce Defendants' itemized facts in the statement of undisputed
19 facts and admit those facts which are undisputed and deny those which are disputed. If
20 Plaintiff disputes (denies) a fact, Plaintiff must cite to the evidence used to support that
21 denial (e.g., pleading, declaration, deposition, interrogatory answer, admission, or other
22 document). Local Rule 260(b).

25 ¹ A declaration is a written statement setting forth facts (1) which are admissible in evidence, (2)
26 which are based on the personal knowledge of the person giving the statement, and (3) to which the
27 person giving the statement is competent to testify. 28 U.S.C. § 1746; Fed. R. Civ. P. 56(c)(4). A
28 declaration must be dated and signed under penalty of perjury as follows: "I declare (or certify, verify or
state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)." 28
U.S.C. § 1746.

² Sworn or certified copies of all papers referred to in the declaration must be included and served
on the opposing party. Fed. R. Civ. P. 56(c).

1 4. If discovery has not yet been opened or if discovery is still open and Plaintiff is
2 not yet able to present facts to justify the opposition to the motion, the Court will
3 consider a request to postpone consideration of Defendants' motion. Fed. R. Civ. P.
4 56(d). Any request to postpone consideration of Defendants' motion for summary
5 judgment must include the following: (1) a declaration setting forth the specific facts
6 Plaintiff hopes to elicit from further discovery, (2) a showing that the facts exist, and (3)
7 a showing that the facts are essential to opposing the motion for summary judgment.
8 *Blough v. Holland Realty, Inc.*, 574 F.3d 1084, 1091 n.5 (9th Cir. 2009); *Tatum v. City*
9 *and County of San Francisco*, 441 F.3d 1090, 1100-01 (9th Cir. 2006); *State of*
10 *California v. Campbell*, 138 F.3d 772, 779 (9th Cir. 1998). The request to postpone the
11 motion for summary judgment must identify what information is sought and how it would
12 preclude summary judgment. *Blough*, 574 F.3d at 1091 n.5; *Tatum*, 441 F.3d at 1100-
13 01; *Margolis v. Ryan*, 140 F.3d 850, 853 (9th Cir. 1998); Local Rule 260(b).

14 5. Unsigned declarations will be stricken, and declarations not signed under penalty
15 of perjury have no evidentiary value.

16 6. The failure of any party to comply with this Order, the Federal Rules of Civil
17 Procedure, or the Local Rules of the Eastern District of California may result in the
18 imposition of sanctions including but not limited to dismissal of the action or entry of
19 default.
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24 IT IS SO ORDERED.

25 Dated: November 7, 2014

26 /s/ Michael J. Seng
27 UNITED STATES MAGISTRATE JUDGE
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