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8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA
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11 DAMIEN DWAYNE OLIVE,

12 Plaintiff,

13 vs.

14 PRATAP LAKSHMI NARAYAN,

15 Defendant.
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1:15-cv-01645-GSA-PC

ORDER PERMITTING PLAINTIFF
OPPORTUNITY TO WITHDRAW
OPPOSITION AND FILE AMENDED
OPPOSITION IN LIGHT OF RAND NOTICE

TWENTY-ONE DAY DEADLINE

19 **I. BACKGROUND**

20 Damien Dwayne Olive (“Plaintiff”) is a state prisoner proceeding pro se and in forma
21 pauperis with this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff filed the Complaint
22 commencing this action on October 30, 2015. (ECF No. 1.) This action now proceeds with the
23 First Amended Complaint filed on April 28, 2016, against sole defendant Dr. Pratap Lakshmi
24 Narayan (“Defendant”), on Plaintiff’s Eighth Amendment medical claim. (ECF No. 11.)

25 On January 26, 2017, Defendant filed a motion to dismiss this case for failure to state a
26 claim and failure to exhaust administrative remedies before filing suit. (ECF No. 17.) On
27 February 28, 2017, Plaintiff filed an opposition to the motion. (ECF No. 20.) On March 7,
28 2017, Defendant filed a reply to the opposition. (ECF No. 22.)

1 Defendant did not provide Plaintiff with a Rand² Notice and Warning, pursuant to the
2 Ninth Circuit's requirement in Woods v. Carey, 684 F.3d 934 (9th Cir. 2012), informing
3 Plaintiff of his rights and responsibilities in opposing Defendant's motion to dismiss.
4 Therefore, the court shall, by this order, provide Plaintiff with a Rand Notice and Warning and
5 allow him an opportunity to withdraw his opposition to Defendant's pending motion and file an
6 amended opposition.

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8 **II. RAND NOTICE AND WARNING OF REQUIREMENTS FOR OPPOSING
DEFENDANT'S MOTION TO DISMISS**

9 In the Ninth Circuit, when the plaintiff is a prisoner proceeding pro se in a civil rights
10 case, and a defendant files a motion for summary judgment or a motion to dismiss for failure to
11 exhaust administrative remedies, the defendant or the court is required to provide plaintiff with
12 a Notice and Warning informing the plaintiff of his or her rights and responsibilities in
13 opposing the motion. Woods v. Carey, 684 F.3d 934 (9th Cir. 2012). The court shall, by this
14 notice, notify Plaintiff of the following rights and requirements for opposing Defendant's
15 motion to dismiss:

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17 **NOTICE AND WARNING OF REQUIREMENTS FOR OPPOSING
DEFENDANT'S MOTION TO DISMISS**

18 Pursuant to Woods v. Carey, the Court now hereby notifies Plaintiff of the following
19 rights and requirements for opposing Defendant's motion to dismiss. Woods v. Carey, 684
20 F.3d 934 (9th Cir. 2012) (Fair notice of the requirements needed to defeat a defendant's motion
21 to dismiss for failure to exhaust administrative remedies must be provided to a pro se prisoner
22 litigant in a civil rights case.) If . . . defendants fail to provide appropriate notice, "the
23 ultimate responsibility of assuring that the prisoner receives fair notice remains with the district
24 court." Woods, 684 F.3d at 940.

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28 ²Rand v. Rowland, 154 F.3d 952 (9th Cir. 1998) (en banc).

1 **If responding to Defendant’s’ motion to dismiss for failure to**
2 **exhaust the administrative remedies, Plaintiff may not simply rely on**
3 **allegations in the complaint. Instead, Plaintiff must oppose the motion by**
4 **setting forth specific facts in declaration(s) and/or by submitting other**
5 **evidence regarding the exhaustion of administrative remedies. See Fed. R.**
6 **Civ. P. 43(c). Unsigned declarations will be stricken, and declarations not**
7 **signed under penalty of perjury have no evidentiary value. If Plaintiff does**
8 **not submit his own evidence in opposition, the Court may conclude that**
9 **Plaintiff has not exhausted the administrative remedies and the case will be**
10 **dismissed in whole or in part.**

11 **III. CONCLUSION AND ORDER**

12 Pursuant to the Ninth Circuit’s decision in Woods, Plaintiff has now been provided with
13 “fair notice” of the requirements for opposing Defendant’s motion to dismiss for failure to
14 exhaust remedies. In light of this notice, the court finds good cause at this juncture to open a
15 twenty-one-day time period for Plaintiff to file further opposition to Defendant’s motion to
16 dismiss, if he so wishes. The court will not consider multiple oppositions, however, and
17 Plaintiff has two options upon receipt of this order. Plaintiff may either (1) stand on his
18 previously-filed opposition or (2) withdraw it and file an amended opposition. The amended
19 opposition, if any, must be complete in itself and must not refer back to any of the opposition
20 documents Plaintiff filed on February 28, 2017. L.R. 220.⁵

21 Accordingly, it is HEREBY ORDERED that:

- 22 1. Plaintiff may, within **thirty (30) days** from the date of service of this order,
23 withdraw his opposition and file an Amended Opposition to Defendant’s motion
24 to dismiss of January 26, 2017;

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26 ⁵Local Rule 220 provides, in part: “Unless prior approval to the contrary is obtained from the
27 Court, every pleading to which an amendment or supplement is permitted as a matter of right or has been allowed
28 by court order shall be retyped and filed so that it is complete in itself without reference to the prior or superseded
pleading. No pleading shall be deemed amended or supplemented until this Rule has been complied with. All
changed pleadings shall contain copies of all exhibits referred to in the changed pleading.”

