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

ROBERT MARTINEZ,

Plaintiff,

No. CIV S-06-0088 FCD DAD P

vs.

LOU BLANAS,

Defendant.

ORDER AND ORDER DIRECTING SERVICE

BY THE UNITED STATES MARSHAL

WITHOUT PREPAYMENT OF COSTS

Plaintiff is proceeding in forma pauperis pursuant to 28 U.S.C. § 1915. The court previously determined that plaintiff’s amended complaint states a cognizable claim for relief against defendant Blanas. However, the Marshal was unable to effect service on defendant Blanas based on the information plaintiff provided to the court on form USM-285. On October 1, 2009, the court ordered plaintiff to provide the court with additional information that would enable the United States Marshal to serve this defendant. After granting plaintiff two extensions of time, he has submitted additional information for service of process on form USM-285. He has also submitted sufficient copies of his amended complaint and a completed summons.

Accordingly, IT IS HEREBY ORDERED that:

1. The Clerk of the Court is directed to forward plaintiff’s instructions for service of process, the completed summons, copies of the amended complaint, copies of the form

1 regarding consent or request for reassignment, and copies of this order to the United States  
2 Marshal.

3           2. Within ten days from the date of this order, the United States Marshal is  
4 directed to notify defendant Lou Blanas of the commencement of this action and to request a  
5 waiver of service of summons from each defendant in accordance with the provisions of Fed. R.  
6 Civ. P. 4(d) and 28 U.S.C. § 566(c).

7           3. The United States Marshal is directed to retain the sealed summons and a copy  
8 of the amended complaint in their file for future use.

9           4. The United States Marshal shall file returned waivers of service of summons as  
10 well as any requests for waivers that are returned as undelivered as soon as they are received.

11           5. If a waiver of service of summons is not returned by a defendant within sixty  
12 days from the date of mailing the request for waiver, the United States Marshal shall:

13           a. Personally serve process and a copy of this order upon the defendant  
14 pursuant to Rule 4 of the Federal Rules of Civil Procedure and 28 U.S.C.  
15 § 566(c) and shall command all necessary assistance from the California  
16 Department of Corrections and Rehabilitation (CDCR) to execute this  
17 order. The United States Marshal shall maintain the confidentiality of all  
18 information provided by the CDCR pursuant to this order.

19           b. Within ten days after personal service is effected, the United States  
20 Marshal shall file the return of service for the defendant, along with  
21 evidence of any attempts to secure a waiver of service of summons and of  
22 the costs subsequently incurred in effecting service on said defendant. The  
23 costs shall be enumerated on the USM-285 form and shall include the  
24 costs incurred by the Marshal's office for photocopying additional copies  
25 of the summons and amended complaint and for preparing new USM-285  
26 forms, if required. Costs of service will be taxed against the personally

1 served defendant in accordance with the provisions of Fed. R. Civ. P.  
2 4(d)(2).

3 6. Defendants shall reply to the amended complaint within the time provided by  
4 the applicable provisions of Fed. R. Civ. P. 12(a).

5 7. Unless otherwise ordered, all motions to dismiss, motions for summary  
6 judgment, motions concerning discovery, motions pursuant to Rules 7, 11, 12, 15, 41, 55, 56, 59  
7 and 60 of the Federal Rules of Civil Procedure, and motions pursuant to Local Rule 110 shall be  
8 briefed pursuant to Local Rule 230(l). Failure to oppose such a motion timely may be deemed a  
9 waiver of opposition to the motion. Opposition to all other motions need be filed only as  
10 directed by the court.

11 8. If plaintiff is released from prison at any time during the pendency of this case,  
12 any party may request application of other provisions of Local Rule 230 in lieu of Local Rule  
13 230(l). In the absence of a court order granting such a request, the provisions of Local Rule  
14 230(l) will govern all motions described in #7 above regardless of plaintiff's custodial status.  
15 See Local Rule 102(d).

16 9. Pursuant to Wyatt v. Terhune, 315 F.3d 1108, 1120 n.14 (9th Cir. 2003),  
17 plaintiff is advised of the following requirements for opposing a motion to dismiss for failure to  
18 exhaust administrative remedies made by defendant pursuant to non-enumerated Rule 12(b) of  
19 the Federal Rules of Civil Procedure. Such a motion is a request for dismissal of unexhausted  
20 claims without prejudice. The defendant may submit affidavits or declarations under penalty of  
21 perjury and admissible documentation to support the motion to dismiss. To oppose the motion,  
22 plaintiff may likewise file declarations under penalty of perjury and admissible documentation.  
23 Plaintiff may rely upon statements made under the penalty of perjury in the complaint if the  
24 complaint shows that plaintiff has personal knowledge of the matters stated and plaintiff calls to  
25 the court's attention those parts of the complaint upon which plaintiff relies. Plaintiff may serve  
26 and file one or more affidavits or declarations by other persons who have personal knowledge of

1 relevant matters. Plaintiff may also rely upon written records, but plaintiff must prove that the  
2 records are what plaintiff claims they are. If plaintiff fails to contradict defendant's evidence  
3 with admissible evidence, the court may rely on the defendant's evidence. In the event both sides  
4 submit matters outside the pleadings, the court may look beyond the pleadings and decide  
5 disputed issues of fact. If plaintiff does not serve and file a written opposition to the motion, the  
6 court may consider the failure to act as a waiver of opposition to the defendant's motion. If the  
7 defendant's motion to dismiss, whether opposed or unopposed, is granted, plaintiff's  
8 unexhausted claims will be dismissed without prejudice.

9           10. Pursuant to Rand v. Rowland, 154 F.3d 952, 957 (9th Cir. 1998) (en banc),  
10 and Klinge v. Eikenberry, 849 F.2d 409 (9th Cir. 1988), plaintiff is advised of the following  
11 requirements for opposing a motion for summary judgment made by defendants pursuant to Rule  
12 56 of the Federal Rules of Civil Procedure. Such a motion is a request for an order for judgment  
13 in favor of defendants without trial. A defendant's motion for summary judgment will set forth  
14 the facts that the defendants contend are not reasonably subject to dispute and that entitle the  
15 defendants to judgment. To oppose a motion for summary judgment, plaintiff must show proof  
16 of his or her claims. Plaintiff may do this in one or more of the following ways. Plaintiff may  
17 rely upon statements made under the penalty of perjury in the complaint if the complaint shows  
18 that plaintiff has personal knowledge of the matters stated and plaintiff calls to the court's  
19 attention those parts of the complaint upon which plaintiff relies. Plaintiff may serve and file one  
20 or more affidavits or declarations setting forth the facts that plaintiff believes prove plaintiff's  
21 claims; the person who signs an affidavit or declaration must have personal knowledge of the  
22 facts stated. Plaintiff may rely upon written records, but plaintiff must prove that the records are  
23 what plaintiff claims they are. Plaintiff may rely upon all or any part of the transcript of one or  
24 more depositions, answers to interrogatories, or admissions obtained in this proceeding. If  
25 plaintiff fails to contradict the defendants' evidence with counteraffidavits or other admissible  
26 evidence, the defendants' evidence may be taken as the truth and the defendants' motion for

1 summary judgment granted. If there is some good reason why such facts are not available to  
2 plaintiff when required to oppose a motion for summary judgment, the court will consider a  
3 request to postpone considering the defendants' motion. If plaintiff does not serve and file a  
4 written opposition to the motion or a request to postpone consideration of the motion, the court  
5 may consider the failure to act as a waiver of opposition to the defendants' motion. If the  
6 defendants' motion for summary judgment, whether opposed or unopposed, is granted, judgment  
7 will be entered for the defendants without a trial and the case will be closed.

8           11. A motion or opposition supported by unsigned affidavits or declarations will  
9 be stricken.

10           12. Each party shall keep the court informed of a current address at all times  
11 while the action is pending. Any change of address must be reported promptly to the court in a  
12 separate document captioned for this case and entitled "Notice of Change of Address." A notice  
13 of change of address must be properly served on other parties. Pursuant to Local Rule 182(f),  
14 service of documents at the record address of a party is fully effective. Failure to inform the  
15 court of a change of address may result in the imposition of sanctions including dismissal of the  
16 action.

17           13. The Clerk of the Court shall serve upon plaintiff a copy of the Local Rules of  
18 Court.

19           14. The failure of any party to comply with this order, the Federal Rules of Civil  
20 Procedure, or the Local Rules of Court may result in the imposition of sanctions including, but  
21 not limited to, dismissal of the action or entry of default.

22 DATED: February 12, 2010.

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DALE A. DROZD  
UNITED STATES MAGISTRATE JUDGE