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

CURTIS HIGHTOWER,)	No. 2:08-cv-00228-SPK
Plaintiff,)	
v.)	
W. PATTON,)	
Defendant.)	

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. By order of February 24, 2010, the court determined that Plaintiff’s Amended Complaint appears to state a cognizable claim for relief against Defendant W. Patton. The court ordered Plaintiff to provide information for service of process on forms USM-285, a completed summons, sufficient copies of the complaint for service, and a notice of compliance. Plaintiff has filed the required papers.

Accordingly, IT IS HEREBY ORDERED that:

1. The Clerk of the Court is directed to forward the instructions for service of process, the completed summons, copies of the Amended Complaint, and copies of this order to the United States Marshal.

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

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

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

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

13 a. Personally serve process and a copy of this order upon the
14 defendant pursuant to Rule 4 of the Federal Rules of Civil
15 Procedure and 28 U.S.C. § 566(c) and shall command all
16 necessary assistance from the California Department of
17 Corrections and Rehabilitation (CDC) to execute this order.

18 The United States Marshal shall maintain the confidentiality of
19 all information provided by the CDC pursuant to this order.

20 b. Within ten days after personal service is effected, the United
21 States Marshal shall file the return of service for the defendant,
22 along with evidence of any attempts to secure a waiver of
23 service of summons and of the costs subsequently incurred in
24 effecting service on said defendant. Said costs shall be
25 enumerated on the USM-285 form and shall include the costs
26 incurred by the Marshal's office for photocopying additional
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1 copies of the summons and complaint and for preparing new
2 USM-285 forms, if required. Costs of service will be taxed
3 against the personally served defendant in accordance with the
4 provisions of Fed. R. Civ. P. 4(d)(2).

5 6. Defendant shall reply to the complaint within the time provided by
6 the applicable provisions of Fed. R. Civ. P. 12(a).

7 7. Unless otherwise ordered, all motions to dismiss, motions for
8 summary judgment, motions concerning discovery, motions pursuant to Rules 7,
9 11, 12, 15, 41, 55, 56, 59 and 60 of the Federal Rules of Civil Procedure, and
10 motions pursuant to Local Rule 11-110 shall be briefed pursuant to Local Rule 78-
11 230(m). Failure to oppose such a motion timely may be deemed a waiver of
12 opposition to the motion. Opposition to all other motions need be filed only as
13 directed by the court.

14 8. If plaintiff is released from prison at any time during the pendency
15 of this case, any party may request application of other provisions of Local Rule
16 78-230 in lieu of Local Rule 78-230(m). In the absence of a court order granting
17 such a request, the provisions of Local Rule 78-230(m) will govern all motions
18 described in #7 above regardless of plaintiff's custodial status. See Local Rule 1-
19 102(d).

20 9. Pursuant to Wyatt v. Terhune, 315 F.3d 1108, 1120 n.14 (9th Cir.
21 2003), plaintiff is advised of the following requirements for opposing a motion to
22 dismiss for failure to exhaust administrative remedies made by defendant pursuant
23 to non-enumerated Rule 12(b) of the Federal Rules of Civil Procedure. Such a
24 motion is a request for dismissal of unexhausted claims without prejudice. The
25 defendant may submit affidavits or declarations under penalty of perjury and
26 admissible documentation to support the motion to dismiss. To oppose the motion,
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1 plaintiff may likewise file declarations under penalty of perjury and admissible
2 documentation. Plaintiff may rely upon statements made under the penalty of
3 perjury in the complaint if the complaint shows that plaintiff has personal
4 knowledge of the matters stated and plaintiff calls to the court's attention those
5 parts of the complaint upon which plaintiff relies. Plaintiff may serve and file one
6 or more affidavits or declarations by other persons who have personal knowledge
7 of relevant matters. Plaintiff may also rely upon written records, but plaintiff must
8 prove that the records are what plaintiff claims they are. If plaintiff fails to
9 contradict defendant's evidence with admissible evidence, the court may rely on
10 the defendant's evidence. In the event both sides submit matters outside the
11 pleadings, the court may look beyond the pleadings and decide disputed issues of
12 fact. If plaintiff does not serve and file a written opposition to the motion, the
13 court may consider the failure to act as a waiver of opposition to the defendant's
14 motion. If the defendant's motion to dismiss, whether opposed or unopposed, is
15 granted, plaintiff's unexhausted claims will be dismissed without prejudice.

16 10. Pursuant to Rand v. Rowland, 154 F.3d 952, 957 (9th Cir. 1998)
17 (en banc), cert. denied, 527 U.S. 1035 (1999), and Klinge v. Eikenberry, 849
18 F.2d 409 (9th Cir. 1988), plaintiff is advised of the following requirements for
19 opposing a motion for summary judgment made by defendants pursuant to Rule 56
20 of the Federal Rules of Civil Procedure. Such a motion is a request for an order for
21 judgment in favor of defendants without trial. A defendant's motion for summary
22 judgment will set forth the facts that the defendants contend are not reasonably
23 subject to dispute and that entitle the defendants to judgment. To oppose a motion
24 for summary judgment, plaintiff must show proof of his or her claims. Plaintiff
25 may do this in one or more of the following ways. Plaintiff may rely upon
26 statements made under the penalty of perjury in the complaint if the complaint

1 shows that plaintiff has personal knowledge of the matters stated and plaintiff calls
2 to the court’s attention those parts of the complaint upon which plaintiff relies.
3 Plaintiff may serve and file one or more affidavits or declarations setting forth the
4 facts that plaintiff believes prove plaintiff’s claims; the person who signs an
5 affidavit or declaration must have personal knowledge of the facts stated. Plaintiff
6 may rely upon written records, but plaintiff must prove that the records are what
7 plaintiff claims they are. Plaintiff may rely upon all or any part of the transcript of
8 one or more depositions, answers to interrogatories, or admissions obtained in this
9 proceeding. If plaintiff fails to contradict the defendants’ evidence with
10 counteraffidavits or other admissible evidence, the defendants’ evidence may be
11 taken as the truth and the defendants’ motion for summary judgment granted. If
12 there is some good reason why such facts are not available to plaintiff when
13 required to oppose a motion for summary judgment, the court will consider a
14 request to postpone considering the defendants’ motion. If plaintiff does not serve
15 and file a written opposition to the motion or a request to postpone consideration of
16 the motion, the court may consider the failure to act as a waiver of opposition to
17 the defendants’ motion. If the defendants’ motion for summary judgment, whether
18 opposed or unopposed, is granted, judgment will be entered for the defendants
19 without a trial and the case will be closed.

20 11. A motion or opposition supported by unsigned affidavits or
21 declarations will be stricken.

22 12. Each party shall keep the court informed of a current address at
23 all times while the action is pending. Any change of address must be reported
24 promptly to the court in a separate document captioned for this case and entitled
25 “Notice of Change of Address.” A notice of change of address must be properly
26 served on other parties. Pursuant to Local Rule 83-182(f), service of documents at
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1 the record address of a party is fully effective. Failure to inform the court of a
2 change of address may result in the imposition of sanctions including dismissal of
3 the action.

4 13. The Clerk of the Court shall serve upon plaintiff a copy of the
5 Local Rules of Court.

6 14. The failure of any party to comply with this order, the Federal
7 Rules of Civil Procedure, or the Local Rules of Court may result in the imposition
8 of sanctions including, but not limited to, dismissal of the action or entry of
9 default. Fed. R. Civ. P. 11; Local Rule 11-110.

10 IT IS SO ORDERED:

11 DATED: March 31, 2010.



Samuel P. King

Samuel P. King
Senior United States District Judge