

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

1 VERNON D. CARROLL,) 2:08-CV-408 SOM
2)
3 Plaintiff,) ORDER DIRECTING SERVICE BY
4 vs.) UNITED STATES MARSHAL WITHOUT
5) PREPAYMENT OF COSTS
6 S. SURY ADEVARA, E. MAZIN)
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8 Defendants.)
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ORDER DIRECTING SERVICE BY UNITED STATES
MARSHAL WITHOUT PREPAYMENT OF COSTS

Plaintiff is proceeding in forma pauperis pursuant to 28 U.S.C. § 1915. By order filed December 22, 2009, the court determined that Plaintiff's Complaint states a cognizable claim for relief against the following Defendants in their individual capacities only: S. SURY ADEVARA AND E. MAZIN. The court further ordered Plaintiff to provide information for service of process on form USM-285, a completed summons, and sufficient copies of the complaint for service. Plaintiff filed the required papers on January 4, 2010. 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 Complaint, and copies of this order to the United States Marshal.

2. Within ten days from the date of this order, the United States Marshal is directed to notify Defendants listed above (Adevara and Mazin) of the commencement of this action and to request a waiver of service of summons in accordance with the

provisions of Fed. R. Civ. P. 4(d) and 28 U.S.C. § 566(c).

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

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

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

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

19 b. Within ten days after personal service is
20 effected, the United States Marshal shall file the
21 return of service for the Defendant, along with
22 evidence of any attempts to secure a waiver of
23 service of summons and of the costs subsequently
24 incurred in effecting service on said Defendant.
25 Said costs shall be enumerated on the USM-285 form

1 and shall include the costs incurred by the
2 Marshal's office for photocopying additional
3 copies of the summons and complaint and for
4 preparing new USM-285 forms, if required. Costs
5 of service will be taxed against the personally
6 served Defendant in accordance with the provisions
7 of Fed. R. Civ. P. 4(d)(2).

8 6. Defendants shall reply to the Complaint within the
9 time provided by the applicable provisions of Fed. R. Civ. P.
10 12(a).

11 7. Unless otherwise ordered, all motions to dismiss,
12 motions for summary judgment, motions concerning discovery,
13 motions pursuant to Rules 7, 11, 12, 15, 41, 55, 56, 59, and 60
14 of the Federal Rules of Civil Procedure, and motions pursuant to
15 Local Rule 11-110 shall be briefed pursuant to Local Rule 78-
16 230(m). Failure to oppose such a motion timely may be deemed a
17 waiver of opposition to the motion. Opposition to all other
18 motions need be filed only as directed by the court.

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

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

1 Defendant's motion. If the Defendant's motion to dismiss,
2 whether opposed or unopposed, is granted, Plaintiff's unexhausted
3 claims will be dismissed without prejudice.

4 10. Pursuant to Rand v. Rowland, 154 F.3d 952, 957
5 (9th Cir. 1998) (en banc), cert. denied, 527 U.S. 1035 (1999),
6 and Klinge v. Eikenberry, 849 F.2d 409 (9th Cir. 1988),
7 Plaintiff is advised of the following requirements for opposing a
8 motion for summary judgment made by Defendants pursuant to Rule
9 56 of the Federal Rules of Civil Procedure. Such a motion is a
10 request for an order for judgment in favor of Defendants without
11 trial. A Defendant's motion for summary judgment will set forth
12 the facts that the Defendants contend are not reasonably subject
13 to dispute and that entitle the Defendants to judgment. To
14 oppose a motion for summary judgment, Plaintiff must show proof
15 of his or her claims. Plaintiff may do this in one or more of
16 the following ways. Plaintiff may rely upon statements made
17 under the penalty of perjury in the complaint if the complaint
18 shows that Plaintiff has personal knowledge of the matters stated
19 and Plaintiff calls to the court's attention those parts of the
20 complaint upon which Plaintiff relies. Plaintiff may serve and
21 file one or more affidavits or declarations setting forth the
22 facts that Plaintiff believes prove Plaintiff's claims; the
23 person who signs an affidavit or declaration must have personal
24 knowledge of the facts stated. Plaintiff may rely upon written
25 records, but Plaintiff must prove that the records are what
Plaintiff claims they are. Plaintiff may rely upon all or any

1 part of the transcript of one or more depositions, answers to
2 interrogatories, or admissions obtained in this proceeding. If
3 Plaintiff fails to contradict the Defendants' evidence with
4 counteraffidavits or other admissible evidence, the Defendants'
5 evidence may be taken as the truth and the Defendants' motion for
6 summary judgment granted. If there is some good reason why such
7 facts are not available to Plaintiff when required to oppose a
8 motion for summary judgment, the court will consider a request to
9 postpone considering the Defendants' motion. If Plaintiff does
10 not serve and file a written opposition to the motion or a
11 request to postpone consideration of the motion, the court may
12 consider the failure to act as a waiver of opposition to the
13 Defendants' motion. If the Defendants' motion for summary
14 judgment, whether opposed or unopposed, is granted, judgment will
15 be entered for the Defendants without a trial and the case will
16 be closed.

17 11. A motion or opposition supported by unsigned
18 affidavits or declarations will be stricken.

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

address may result in the imposition of sanctions including
dismissal of the action.

13. The Clerk of the Court shall serve upon Plaintiff
a copy of the Local Rules of Court.

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

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, January 15, 2010



/s/ Susan Oki Mollway

Susan Oki Mollway
Chief United States District Judge

Carroll v. Adevara et al., Civil No. 2:08-00408 SOM; ORDER DIRECTING SERVICE
BY UNITED STATES MARSHAL WITHOUT PREPAYMENT OF COSTS.