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

DON L. JEFFERSON,

Plaintiff,

No. 2:08-cv-1747 WBS EFB P

vs.

L. FLOHR, et al.,

Defendants.

ORDER AND
FINDINGS AND RECOMMENDATIONS

_____ /

Plaintiff is a state prisoner proceeding without counsel in an action brought under 42 U.S.C. § 1983. On September 28, 2010, the district judge granted defendant Flohr’s motion for summary judgment and on July 12, 2012, the undersigned recommended that defendant Swanson’s motion for summary judgment be granted. Dckt. Nos. 38, 64. On August 3, 2012, however, the undersigned granted defendant Swanson’s request for supplemental briefing in light of the recent Ninth Circuit decision requiring that all prisoners proceeding pro se be provided contemporaneous notice of certain requirements for opposing a motion for summary judgment. *Woods v. Carey*, 684 F.3d 934 (9th Cir. 2012). The undersigned noted that neither defendant Flohr’s nor defendant Swanson’s motion included the requisite notice and ordered plaintiff to inform the court if he wanted defendants to re-serve their motions with the requisite notice, and to have the opportunity to file a new opposition to either or both of the motions. Dckt. No. 66. On August 14, 2012, plaintiff

1 requested that the motions for summary judgment be re-opened to allow him the opportunity to file
2 new oppositions to both motions. Dckt. No. 68.

3 Accordingly, the undersigned will recommend that the September 28, 2010 order granting
4 defendant Flohr's February 5, 2010 motion for summary judgment be vacated, and that the motion
5 be denied without prejudice instead. The undersigned will also vacate the July 12, 2012 findings
6 and recommendations to grant defendant Swanson's November 8, 2011 motion for summary
7 judgment, and instead, will deny that motion without prejudice. Additionally, the undersigned will
8 recommend that defendants Flohr and Swanson be permitted to file a single motion for summary
9 judgment, along with the notice to plaintiff required by *Woods*.¹

10 Accordingly, IT IS HEREBY ORDERED that:

- 11 1. The July 12, 2012 findings and recommendations (Dckt. No. 64) are vacated; and
- 12 2. Defendant Swanson's motion for summary judgment (Dckt. No. 60) is denied without
13 prejudice.

14 Further, IT IS HEREBY RECOMMENDED that:

- 15 1. The September 28, 2010 order granting defendant Flohr's motion for summary judgment
16 (Dckt. No. 42) be vacated;
- 17 2. Defendant Flohr's motion for summary judgment (Dckt. No. 26) be denied without
18 prejudice; and
- 19 3. Within fourteen days of any order adopting these findings and recommendations,
20 defendants be allowed to file and serve a single motion for summary judgment that includes the
21 notice to plaintiff required by *Woods*, and that thereafter, plaintiff must file and serve an opposition
22

23 ¹ Defendants Flohr and Swanson are represented by the same counsel and appear to have
24 filed separate motions for summary judgment because Swanson had not yet appeared in this action
25 at the time Flohr moved for summary judgment. *See* Dckt. Nos. 26, 52. The court notes that
26 Swanson's motion for summary judgment relied, in part, on the order granting defendant Flohr's
motion for summary judgment, which the undersigned now recommends be vacated. In light of this
background, the undersigned finds that an amended motion for summary judgment, filed on behalf
of both defendants, is appropriate.

1 within thirty days, and defendants may thereafter file a reply within fourteen days.

2 These findings and recommendations are submitted to the United States District Judge
3 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days after
4 being served with these findings and recommendations, any party may file written objections with
5 the court and serve a copy on all parties. Such a document should be captioned “Objections to
6 Magistrate Judge’s Findings and Recommendations.” Failure to file objections within the specified
7 time may waive the right to appeal the District Court’s order. *Turner v. Duncan*, 158 F.3d 449, 455
8 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

9 Dated: September 7, 2012.

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11 EDMUND F. BRENNAN
12 UNITED STATES MAGISTRATE JUDGE
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