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

JAMES KELLY,  
Plaintiff,

No. CV 08-01823 CTB

v.

ORDER DIRECTING SERVICE BY  
THE UNITED STATES MARSHAL  
WITHOUT PREPAYMENT OF COSTS

DR. SOGGE; et al.,  
Defendants.

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Plaintiff Kelly is proceeding in forma pauperis pursuant to 28 U.S.C. § 1915. By order filed January 8, 2010, the court determined that Plaintiff's complaint states a cognizable claim for relief against Defendants Sogge, Bakewell, Edmondson and Dunn, and ordered Plaintiff to provide information for service of process on form 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 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 Sogge, Bakewell, Edmondson and Dunn 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 sealed summons  
2 and a copy of the complaint in their file for future use.

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

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

- 9                   a. Personally serve process and a copy of this order upon  
10 Defendants pursuant to Rule 4 of the Federal Rules of Civil  
11 Procedure and 28 U.S.C. § 566(c) and shall command all  
12 necessary assistance from the California Department of  
13 Corrections and Rehabilitation (CDC) to execute this order.  
14 The United States Marshal shall maintain the confidentiality of  
15 all information provided by the CDC pursuant to this order.
- 16                   b. Within ten days after personal service is effected, the United  
17 States Marshal shall file the return of service for Defendants,  
18 along with evidence of any attempts to secure a waiver of  
19 service of summons and of the costs subsequently incurred in  
20 effecting service on said Defendant. Said costs shall be  
21 enumerated on the USM-285 form and shall include the costs  
22 incurred by the Marshal's office for photocopying additional  
23 copies of the summons and complaint and for preparing new  
24 USM-285 forms, if required. Costs of service will be taxed  
25 against the personally served Defendant in accordance with the  
26 provisions of Fed. R. Civ. P. 4(d)(2).

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

3           7. Unless otherwise ordered, all motions to dismiss, motions for  
4 summary judgment, motions concerning discovery, motions pursuant to Rules 7,  
5 11, 12, 15, 41, 55, 56, 59 and 60 of the Federal Rules of Civil Procedure, and  
6 motions pursuant to Local Rule 11-110 shall be briefed pursuant to Local Rule 78-  
7 230(m). Failure to oppose such a motion timely may be deemed a waiver of  
8 opposition to the motion. Opposition to all other motions need be filed only as  
9 directed by the court.

10           8. If Plaintiff is released from prison at any time during the pendency  
11 of this case, any party may request application of other provisions of Local Rule  
12 78-230 in lieu of Local Rule 78-230(m). In the absence of a court order granting  
13 such a request, the provisions of Local Rule 78-230(m) will govern all motions  
14 described in #7 above regardless of Plaintiff's custodial status. See Local Rule 1-  
15 102(d).

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

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

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

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

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

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

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

1 Local Rules of Court.

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

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7 DATED: February 1, 2010

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A handwritten signature in cursive script that reads "Carlos Bea". The signature is written in black ink and is positioned above a solid horizontal line.

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**Hon. Carlos T. Bea**  
U.S. Court of Appeals for the Ninth  
Circuit, sitting by designation

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