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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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JAMES EVANS, JR.,

Plaintiff,

NO. CIV. 2:09-292 WBS JFM

v.

ORDER

D.K. SISTO, et al.,

Defendants.

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On July 6, 2012, the Ninth Circuit issued a decision addressing the timing of notices to pro se prisoners pursuant to Rand v. Rowland, 154 F.3d 952 (9th Cir. 1998) (en banc) and Wyatt v. Terhune, 315 F.3d 1108 (9th Cir. 2003). Woods v. Carey, --- F.3d ----, 2012 WL 2626912 (9th Cir. 2012). The Ninth Circuit held that Rand and Wyatt notices, which instruct a pro se prisoner about how to properly respond to a motion to dismiss or motion for summary judgment, "must be provided to pro se prisoner plaintiffs at the time the defendants' motions are filed." Woods v. Carey, 2012 WL 2626912, at \*1. In Woods v. Carey, the Ninth

1 Circuit rejected this district's practice of providing Rand and  
2 Wyatt notices at the time the court issues the order directing  
3 service on defendants. The court held that "[t]he failure to  
4 provide adequate Rand notice is a ground for reversal unless it  
5 is clear from the record that there are no facts that would  
6 permit the inmate to prevail." Id. at \*6.

7 While plaintiff has been appointed pro bono counsel for  
8 his upcoming trial, he represented himself at the time defendants  
9 filed a motion to dismiss, (Docket No. 32), and a motion for  
10 summary judgment, (Docket No. 82). This court provided the Rand  
11 and Wyatt notices at the time it ordered service on defendants,  
12 (Docket No. 25), but did not provide the requisite notice at the  
13 time defendants filed their motions,<sup>1</sup> and the court ruled in  
14 favor of defendants on some of plaintiff's claims, (Docket Nos.  
15 51, 57, 99, 104.)

16 To comply with Woods v. Carey, the court wishes to give  
17 plaintiff the opportunity to reopen either or both motions and  
18 present evidence, declarations, or affidavits that were not  
19 presented in opposition to the motions. If plaintiff so  
20 requests, the court will set aside its orders and the magistrate  
21 judge's findings and recommendations on the motion to dismiss  
22 and/or motion for summary judgment and allow plaintiff whatever  
23 time is required to file new oppositions.

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25 <sup>1</sup> In defendants' motion for summary judgment, defendants  
26 directed plaintiff to the court's previously issued Rand and  
27 Wyatt notices. (See Docket No. 82 at 2:5-6.) Given the Ninth  
28 Circuit's concern that prisoners will often be unable to access  
or will have misplaced Rand and Wyatt notices given well-before  
motions are filed, see Woods, 2012 WL 2626912, at \*5, it is  
unlikely that defendants' reference to the court's premature  
notices would comply with Woods v. Carey.

1           The following two paragraphs are inserted herein to  
2 help plaintiff decide whether he wants to reopen the motions and,  
3 in the event he reopens the motions, to provide plaintiff with  
4 timely notice under Rand and Wyatt:

5           Pursuant to Wyatt v. Terhune, 315 F.3d 1108, 1120 n.14  
6 (9th Cir. 2003), plaintiff is advised of the following  
7 requirements for opposing a motion to dismiss for failure to  
8 exhaust administrative remedies made by defendant pursuant to  
9 non-enumerated Rule 12(b) of the Federal Rules of Civil  
10 Procedure. Such a motion is a request for dismissal of  
11 unexhausted claims without prejudice. The defendant may submit  
12 affidavits or declarations under penalty of perjury and  
13 admissible documentation to support the motion to dismiss. To  
14 oppose the motion, plaintiff may likewise file declarations under  
15 penalty of perjury and admissible documentation. Plaintiff may  
16 rely upon statements made under the penalty of perjury in the  
17 complaint if the complaint shows that plaintiff has personal  
18 knowledge of the matters stated and plaintiff calls to the  
19 court's attention those parts of the complaint upon which  
20 plaintiff relies. Plaintiff may serve and file one or more  
21 affidavits or declarations by other persons who have personal  
22 knowledge of relevant matters. Plaintiff may also rely upon  
23 written records, but plaintiff must prove that the records are  
24 what plaintiff claims they are. If plaintiff fails to contradict  
25 defendant's evidence with admissible evidence, the court may rely  
26 on the defendant's evidence. In the event both sides submit  
27 matters outside the pleadings, the court may look beyond the  
28 pleadings and decide disputed issues of fact. If plaintiff does

1 not serve and file a written opposition to the motion, the  
2 court may consider the failure to act as a waiver of opposition  
3 to the defendant's motion. If the defendant's motion to dismiss,  
4 whether opposed or unopposed, is granted, plaintiff's unexhausted  
5 claims will be dismissed without prejudice.

6 Pursuant to Rand v. Rowland, 154 F.3d 952, 957 (9th  
7 Cir. 1998) (en banc), cert. denied, 527 U.S. 1035 (1999), and  
8 Klinge v. Eikenberry, 849 F.2d 409 (9th Cir. 1988), plaintiff  
9 is advised of the following requirements for opposing a motion  
10 for summary judgment made by defendants pursuant to Rule 56 of  
11 the Federal Rules of Civil Procedure. Such a motion is a request  
12 for an order for judgment in favor of defendants without trial.  
13 A defendant's motion for summary judgment will set forth the  
14 facts that the defendants contend are not reasonably subject to  
15 dispute and that entitle the defendants to judgment. To oppose a  
16 motion for summary judgment, plaintiff must show proof of his or  
17 her claims. Plaintiff may do this in one or more of the  
18 following ways. Plaintiff may rely upon statements made under  
19 the penalty of perjury in the complaint if the complaint shows  
20 that plaintiff has personal knowledge of the matters stated and  
21 plaintiff calls to the court's attention those parts of the  
22 complaint upon which plaintiff relies. Plaintiff may serve and  
23 file one or more affidavits or declarations setting forth the  
24 facts that plaintiff believes prove plaintiff's claims; the  
25 person who signs an affidavit or declaration must have personal  
26 knowledge of the facts stated. Plaintiff may rely upon written  
27 records, but plaintiff must prove that the records are what  
28 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  
13 the defendants' motion. If the defendants' motion for summary  
14 judgment, whether opposed or unopposed, is granted on any of  
15 plaintiff's claims, judgment will be entered for the defendants  
16 without a trial on those claims.

17 IT IS THEREFORE ORDERED that plaintiff shall be  
18 prepared to inform the court on the first day of trial (August 7,  
19 2012) whether he wants to proceed with trial and waives the  
20 defect in the timing of the Rand and Wyatt notices or wants to  
21 continue the trial to reopen the motions or have additional time  
22 to decide whether to reopen the motions. If plaintiff elects to  
23 waive the defects in the timing of the notices and proceed to  
24 trial, the jury will be brought in on the second day of trial.

25 DATED: July 30, 2012

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28 WILLIAM B. SHUBB  
UNITED STATES DISTRICT JUDGE