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

K. JAMEL WALKER,

Plaintiff,

No. 2:09-cv-0569 WBS KJN P

vs.

CALIFORNIA DEPARTMENT OF
CORRECTIONS, et al.,

Defendants.

ORDER

_____ /

Plaintiff is a state prisoner proceeding in forma pauperis and without counsel in this civil rights action. On March 22, 2012, this court issued an order which, in part, dismissed some of plaintiff's claims for failure to exhaust administrative remedies. (See Dkt. No. 35; see also Dkt. No. 34 at 9-10.) Thereafter, the magistrate judge directed defendants to file a responsive pleading to plaintiff's First Amended Complaint. (Dkt. No. 38.) Defendants did not file a responsive pleading, although the time for doing so has expired. Normally, the court would issue an order to show cause directing defendants to explain their dilatory conduct. However, due to a recent decision of the Ninth Circuit Court of Appeals, plaintiff must be accorded an additional opportunity to address the substance of this court's dismissal of his claims based on a failure to exhaust administrative remedies, before requiring defendants to file a responsive pleading.

1 The Ninth Circuit Court of Appeals recently held that all prisoners proceeding pro
2 se must be provided *contemporaneous* notice of the requirements for opposing a motion to
3 dismiss for failure to exhaust administrative remedies, as set forth in Wyatt v. Terhune, 315 F.3d
4 1108 (9th Cir. 2003). See Woods v. Carey, 684 F.3d 934, 936 (9th Cir. July 6, 2012). The
5 Ninth Circuit rejected this district’s practice of providing the Wyatt notice at the time the court
6 issues an order directing the United States Marshal to serve process on defendants. Woods v.
7 Carey, 684 F.3d at 940-41.

8 In the instant action, a Wyatt notice was never provided. Because this action was
9 removed by defendants from state court, this court had no occasion to order service of process on
10 defendants. Moreover, defendants did not provide a Wyatt notice when they filed their motion to
11 dismiss.

12 To comply with Woods v. Carey, the court now provides plaintiff with the
13 requisite notice, and accords plaintiff the opportunity to re-open defendant’s motion to dismiss,
14 and the court’s order thereon, for the limited purpose of re-assessing the dismissal of some of
15 plaintiff’s claims for failure to exhaust administrative remedies. Plaintiff should pursue this
16 option only if he has pertinent evidence, declarations, or affidavits that were not previously
17 presented in opposition to the motion to dismiss relevant to the issue of administrative
18 exhaustion. If plaintiff requests that this issue be re-opened, the court will allow plaintiff
19 additional time to file a new opposition, and defendants the opportunity to file a reply. If
20 plaintiff decides not to pursue this option, the court’s March 22, 2012 order will remain intact,
21 and the court will order defendants to serve and file a pleading responsive to plaintiff’s First
22 Amended Complaint.

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1 In accordance with Woods v. Carey, plaintiff is now provided the following notice
2 regarding the requirements for opposing a motion to dismiss for failure to exhaust administrative
3 remedies:

4 **Wyatt Notice to Plaintiff**

5 This notice is provided to ensure that you, a pro se prisoner plaintiff, “have fair,
6 timely and adequate notice of what is required” to oppose a motion to dismiss for failure
7 to exhaust administrative remedies. See Woods v. Carey, 684 F.3d 934 (9th Cir. 2012);
8 Wyatt v. Terhune, 315 F.3d 1108, 1115, 1120 n.14 (9th Cir. 2003). The court requires
9 that you be provided with this notice regarding the requirements for opposing a motion to
10 dismiss for failure to exhaust administrative remedies.

11 When a defendant moves to dismiss some or all of your claims for failure to
12 exhaust administrative remedies, the defendant is requesting that the court dismiss claims
13 for which you did not exhaust available administrative remedies. A “motion to dismiss
14 for failure to exhaust administrative remedies is similar to a motion for a summary
15 judgment in that the district court will consider materials beyond the pleadings.”
16 Stratton v. Buck, 2012 WL 4094937, at *3 (9th Cir. Sept. 19, 2012). The defendant may
17 submit affidavits or declarations under penalty of perjury and admissible documents in
18 support of the motion.

19 To oppose the motion, you must submit proof of specific facts regarding the
20 exhaustion of administrative remedies. To do this, you may refer to specific statements
21 made in your complaint if you signed your complaint under penalty of perjury and if
22 your complaint shows that you have personal knowledge of the matters stated. You
23 may also submit declarations setting forth facts regarding exhaustion of your claims, as long
24 as the person who signs the declaration has personal knowledge of the facts stated. You
25 may also submit all or part of deposition transcripts, answers to interrogatories,
26 admissions, and other authenticated documents. If you fail to contradict the defendant’s
evidence with your own evidence, the court may accept the defendant’s evidence as the
truth and grant the motion. If you do not respond to the motion, the court may consider
your failure to act as a waiver of your opposition. See L.R. 230(l).

If the court grants the defendant’s motion, whether opposed or unopposed, your
unexhausted claims will be dismissed. If you exhaust administrative remedies for your
claims at a later date, you may raise those claims in a new action.

20 In deciding whether to re-open the motion to dismiss, plaintiff should consider
21 whether he previously submitted, and the court previously considered, the materials identified in
22 the Wyatt notice. If plaintiff chooses to re-open the motion to dismiss, a briefing order will issue
23 on the question of administrative exhaustion only.

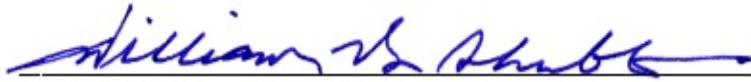
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1 Accordingly, IT IS HEREBY ORDERED that, within thirty days after the filing
2 date of this order, plaintiff shall file the attached notice of election form indicating whether he
3 wishes to re-open the court's decision on defendants' motion to dismiss, on the question of
4 administrative exhaustion only. Plaintiff's express election to forego this option, or failure to
5 timely respond to this order, shall be construed as plaintiff's waiver to the defects in the timing of
6 the Wyatt notice, and defendants will be ordered to file a pleading responsive to plaintiff's First
7 Amended Complaint.

8 DATED: November 14, 2012

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11 WILLIAM B. SHUBB
12 UNITED STATES DISTRICT JUDGE
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1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF CALIFORNIA

3 K. JAMEL WALKER,
4 Plaintiff,

No. 2:09-cv-0569 WBS KJN P

5 vs.

6 CALIFORNIA DEPARTMENT OF
7 CORRECTIONS, et al.,

8 Defendants.

NOTICE OF ELECTION

9
10 Plaintiff responds as follows to the court's order concerning the notice requirements set
11 forth in Woods v. Carey, 684 F.3d 934 (9th Cir. 2012), and Wyatt v. Terhune, 315 F.3d 1108
12 (9th Cir. 2003):

13 _____ Plaintiff chooses to reopen the May 2, 2011 motion to dismiss
14 (Dkt. No. 22), and the court's order thereon (Dkt. No. 35), for the
15 limited purpose of reassessing the exhaustion of plaintiff's
16 administrative remedies

17 OR

18 _____ Plaintiff waives the notice requirements set forth in the above-
19 noted cases, and chooses to proceed on his First Amended
20 Complaint (Dkt. No. 36)

21 _____
22 Date

23 _____
24 Plaintiff