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

Mike J. Moreno,

Plaintiff,

No. 2:09-CV-1362-SRT

vs.

California Department of  
Corrections, et. al.,

Defendants.

ORDER AND ORDER DIRECTING SERVICE

BY THE UNITED STATES MARSHAL

WITHOUT PREPAYMENT OF COSTS

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Plaintiff is proceeding in forma pauperis pursuant to 28 U.S.C. § 1915. By order filed June 22, 2009, the court determined that plaintiff's complaint states a cognizable claim for relief against defendants Corrections Officer D. Galindo, Corrections Officer V. Franco, Corrections Officer Aldana, Sergeant P. Sullivan, Sergeant M. Valenzuela, Lieutenant R. Fritz, Nurse T. Sumblin, Nurse R. Kahn, Nurse B. Miller, and Nurse L. Turner, 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

1 States Marshal.

2 2. Within ten days from the date of this order, the United States Marshal is  
3 directed to notify defendants Corrections Officer D. Galindo, Corrections Officer V. Franco,  
4 Corrections Officer Aldana, Sergeant P. Sullivan, Sergeant M. Valenzuela, Lieutenant R. Fritz,  
5 Nurse T. Sumblin, Nurse R. Kahn, Nurse B. Miller, and Nurse L. Turner, of the commencement  
6 of this action and to request a waiver of service of summons in accordance with the provisions of  
7 Fed. R. Civ. P. 4(d) and 28 U.S.C. § 566(c).

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

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

12 5. If a waiver of service of summons is not returned by a defendant within sixty  
13 days from the date of mailing the request for waiver, the United States Marshal shall:

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

20 b. Within ten days after personal service is effected, the United States  
21 Marshal shall file the return of service for the defendant, along with  
22 evidence of any attempts to secure a waiver of service of summons and of  
23 the costs subsequently incurred in effecting service on said defendant. Said  
24 costs shall be enumerated on the USM-285 form and shall include the costs  
25 incurred by the Marshal's office for photocopying additional copies of the  
26 summons and complaint and for preparing new USM-285 forms, if

1 required. Costs of service will be taxed against the personally served  
2 defendant in accordance with the provisions of Fed. R. Civ. P. 4(d)(2).

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

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

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

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

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

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

