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

CLARENCE SARGENT,

Plaintiff,

No. CIV S-09-1472 GGH P

vs.

P. STATTI, et al.,

Defendants.

ORDER

_____/

Plaintiff, a state prisoner, is proceeding pro se with a civil rights action pursuant to 42 U.S.C. § 1983. On August 7, 2009, by Order (docket # 22), the court found plaintiff's amended complaint conditionally appropriate for service, the condition being that plaintiff must file a completed application to proceed in forma pauperis within thirty days of the date of that order, after which it could be determined whether plaintiff might proceed in forma pauperis. Plaintiff has timely submitted a declaration that makes the showing required by 28 U.S.C. § 1915(a). Accordingly, the request to proceed in forma pauperis will be granted.

Plaintiff is required to pay the statutory filing fee of \$350.00 for this action. 28 U.S.C. §§ 1914(a), 1915(b)(1). An initial partial filing fee of \$ 5.63 will be assessed by this order. 28 U.S.C. § 1915(b)(1). By separate order, the court will direct the appropriate agency to collect the initial partial filing fee from plaintiff's trust account and forward it to the Clerk of the

1 Court. Thereafter, plaintiff will be obligated for monthly payments of twenty percent of the
2 preceding month's income credited to plaintiff's prison trust account. These payments will be
3 forwarded by the appropriate agency to the Clerk of the Court each time the amount in plaintiff's
4 account exceeds \$10.00, until the filing fee is paid in full. 28 U.S.C. § 1915(b)(2).

5 On August 24, 2009, plaintiff filed a motion for leave to file an amended
6 complaint, construed as a motion for leave to file a second amended complaint, as this matter is
7 currently proceeding on plaintiff's first amended complaint. Plaintiff was permitted to proceed
8 upon a first amended complaint as of right. See Fed. R. Civ. P. 15(a). In the Order, filed on
9 August 7, 2009 (dkt # 22), referenced above, the court struck various plaintiff's subsequent
10 supplements and addenda to the first amended complaint as violative of L.R. 15-220, but also
11 informed plaintiff that he must file any motion for leave to amend and a proposed second
12 amended complaint, incorporating all claims upon which he wished to proceed within thirty days.
13 Although plaintiff's filing was timely, the court, upon review of the proposed second amended
14 complaint, which includes additional allegations and newly named defendants, will strike it
15 without prejudice at this time. The undersigned has determined that defendants should be
16 permitted to respond to plaintiff's motion to proceed upon a second amended complaint, which
17 requires that they first be served with the pending first amended complaint. In addition, some of
18 the allegations of the proposed second amended complaint appear, on the face of it, to be
19 administratively unexhausted. For example, in the proposed second amended complaint,
20 plaintiff recounts the August 2009, incident (or a version of it) that is the subject of plaintiff's
21 recent request for a TRO, a claim which necessarily cannot have been exhausted
22 administratively. Motion for leave to amend (dkt # 31), pp. 8-9.

23 Exhaustion of prison administrative procedures is mandated regardless of the
24 relief offered through such procedures. Booth v. Churner, 532 U.S. 731, 741, 121 S. Ct. 1819,
25 1825 (2001). A remedy is available for purposes of § 1997e(a) as long as the administrative
26 process has authority to take some action in response to the prisoner's grievance, even if the

1 action that might be taken is not the remedial action sought by the prisoner. Id. at 736 & n. 4,
2 121 S. Ct. at 1823 & n.4. Courts may not read futility or other exceptions into the statutory
3 exhaustion requirement of the PLRA. Id. at 741 n.6, 121 S. Ct. at 1825.

4 A prisoner's concession to nonexhaustion is a valid ground for dismissal of an
5 action. Wyatt v. Terhune, 315 F.3d 1108, 1120 (9th Cir. 2003); McKinney v. Carey, 311 F.3d
6 1198, 1200-01 (9th Cir. 2002) (per curiam). It is clear that under 42 U.S.C. § 1997e(a) no action
7 shall be brought with respect to prison conditions *until* such administrative remedies as are
8 available are exhausted. McKinney v. Carey, 311 F.3d 1198. If the court concludes that the
9 prisoner has not exhausted administrative remedies, "the proper remedy is dismissal of the claim
10 without prejudice." Wyatt, supra, 315 F.3d at 1120. In the present case, plaintiff's complaint
11 contains at minimum an implicit concession of nonexhaustion when he seeks to incorporate
12 allegations arising from events alleged to have occurred a matter of days prior (and certainly
13 within the same month) as the date of the filing of the proposed second amended complaint.

14 In the August 7, 2009 (dkt # 22), Order, plaintiff was also directed to complete
15 and return to the court, within thirty days, the USM-285 forms and copies of his complaint which
16 are required to effect service on the defendants. On September 3, 2009, plaintiff submitted the
17 USM-285 forms and copies but failed to file the USM-285 form for defendant Statti.

18 Accordingly, IT IS HEREBY ORDERED that:

19 1. Plaintiff's August 31, 2009 (docket # 34), request for leave to proceed in forma
20 pauperis is granted.

21 2. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action.
22 Plaintiff is assessed an initial partial filing fee of \$ 5.63. All fees shall be collected and paid in
23 accordance with this court's order to the Director of the California Department of Corrections
24 and Rehabilitation filed concurrently herewith.

25 3. The Clerk of the Court is directed to return the copy of the complaint
26 submitted by plaintiff on June 10, 2009; and

