

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

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

RUFUS A. AVENT,

Plaintiff,

No. CIV S-09-3482 JAM DAD P

vs.

M. CATE, et al.,

Defendants.

ORDER AND ORDER DIRECTING SERVICE

BY THE UNITED STATES MARSHAL

WITHOUT PREPAYMENT OF COSTS

\_\_\_\_\_/

Plaintiff is proceeding in forma pauperis pursuant to 28 U.S.C. § 1915. By order filed February 22, 2010, the court previously determined that plaintiff's complaint states cognizable claims for relief against defendant Lesane and ordered plaintiff to provide information for service of process on form USM-285, sufficient copies of the complaint for service, a completed summons, and a notice of compliance. Plaintiff has submitted the required papers.

Accordingly, IT IS HEREBY ORDERED that:

1. The Clerk of the Court is directed to forward plaintiff's instructions for service of process, the completed summons, copies of the complaint, copies of the form regarding consent or request for reassignment, 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 Lesane of the commencement of this action and to request a waiver

1 of service of summons from each defendant in accordance with the provisions of Fed. R. Civ. P.  
2 4(d) and 28 U.S.C. § 566(c).

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

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

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

9 a. Personally serve process and a copy of this order upon the defendant  
10 pursuant to Rule 4 of the Federal Rules of Civil Procedure and 28 U.S.C.  
11 § 566(c) and shall command all necessary assistance from the California  
12 Department of Corrections and Rehabilitation (CDCR) to execute this  
13 order. The United States Marshal shall maintain the confidentiality of all  
14 information provided by the CDCR pursuant to this order.

15 b. Within ten days after personal service is effected, the United States  
16 Marshal shall file the return of service for the defendant, along with  
17 evidence of any attempts to secure a waiver of service of summons and of  
18 the costs subsequently incurred in effecting service on said defendant. The  
19 costs shall be enumerated on the USM-285 form and shall include the  
20 costs incurred by the Marshal's office for photocopying additional copies  
21 of the summons and complaint and for preparing new USM-285 forms, if  
22 required. Costs of service will be taxed against the personally served  
23 defendant in accordance with the provisions of Fed. R. Civ. P. 4(d)(2).

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

26 ////

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

7           8. If plaintiff is released from prison at any time during the pendency of this case,  
8 any party may request application of other provisions of Local Rule 230 in lieu of Local Rule  
9 230(l). In the absence of a court order granting such a request, the provisions of Local Rule  
10 230(l) will govern all motions described in #7 above regardless of plaintiff's custodial status.  
11 See Local Rule 102(d).

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

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

5           10. Pursuant to Rand v. Rowland, 154 F.3d 952, 957 (9th Cir. 1998) (en banc),  
6 and Klinge v. Eikenberry, 849 F.2d 409 (9th Cir. 1988), plaintiff is advised of the following  
7 requirements for opposing a motion for summary judgment made by defendants pursuant to Rule  
8 56 of the Federal Rules of Civil Procedure. Such a motion is a request for an order for judgment  
9 in favor of defendants without trial. A defendant's motion for summary judgment will set forth  
10 the facts that the defendants contend are not reasonably subject to dispute and that entitle the  
11 defendants to judgment. To oppose a motion for summary judgment, plaintiff must show proof  
12 of his or her claims. Plaintiff may do this in one or more of the following ways. Plaintiff may  
13 rely upon statements made under the penalty of perjury in the complaint if the complaint shows  
14 that plaintiff has personal knowledge of the matters stated and plaintiff calls to the court's  
15 attention those parts of the complaint upon which plaintiff relies. Plaintiff may serve and file one  
16 or more affidavits or declarations setting forth the facts that plaintiff believes prove plaintiff's  
17 claims; the person who signs an affidavit or declaration must have personal knowledge of the  
18 facts stated. Plaintiff may rely upon written records, but plaintiff must prove that the records are  
19 what plaintiff claims they are. Plaintiff may rely upon all or any part of the transcript of one or  
20 more depositions, answers to interrogatories, or admissions obtained in this proceeding. If  
21 plaintiff fails to contradict the defendants' evidence with counteraffidavits or other admissible  
22 evidence, the defendants' evidence may be taken as the truth and the defendants' motion for  
23 summary judgment granted. If there is some good reason why such facts are not available to  
24 plaintiff when required to oppose a motion for summary judgment, the court will consider a  
25 request to postpone considering the defendants' motion. If plaintiff does not serve and file a  
26 written opposition to the motion or a request to postpone consideration of the motion, the court

1 may consider the failure to act as a waiver of opposition to the defendants' motion. If the  
2 defendants' motion for summary judgment, whether opposed or unopposed, is granted, judgment  
3 will be entered for the defendants without a trial and the case will be closed.

4 11. A motion or opposition supported by unsigned affidavits or declarations will  
5 be stricken.

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

13 13. The Clerk of the Court shall serve upon plaintiff a copy of the Local Rules of  
14 Court.

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

18 DATED: March 25, 2010.

19  
20   
21 \_\_\_\_\_  
DALE A. DROZD  
UNITED STATES MAGISTRATE JUDGE

22 DAD:sj  
23 aven3482.8  
24  
25  
26