

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**

KRZYSZTOF F. WOLINSKI,

No. CIV S-11-1932-GEB-CMK-P

Plaintiff,

vs.

ORDER

MIKE D. McDONALD, et al.,

Defendants.

_____ /

Plaintiff, a state prisoner proceeding pro se, brings this civil rights action pursuant to 42 U.S.C. § 1983. Pending before the court is plaintiff’s motion for an extension of time (Doc. 53) to file a response to the defendants’ motion to dismiss. Good cause appearing therefor, the request is granted. Plaintiff may file a response within 30 days of the date of this order.

In addition, it has come to the court’s attention that defendants’ motion does not include the contemporaneous notice to plaintiff advising him as to his obligations in opposing such a motion, as the Ninth Circuit has required. See Woods v. Carey, ___ F.3d ___, 2012 WL 2626912 (9th Cir. 2012). The court therefore provides this notice herein, as well as allowing time for plaintiff to oppose the motion.

////

1 Pursuant to Wyatt v. Terhune, 315 F.3d 1108, 1120 n.14 (9th Cir. 2003), plaintiff
2 is advised of the following requirements for opposing a motion to dismiss for failure to exhaust
3 administrative remedies made by defendants pursuant to non-enumerated Rule 12(b) of the
4 Federal Rules of Civil Procedure: Such a motion is a request for dismissal of unexhausted
5 claims without prejudice. The defendant may submit affidavits or declarations under penalty of
6 perjury and admissible documentation to support the motion to dismiss. To oppose the motion,
7 plaintiff may likewise file declarations under penalty of perjury and admissible documentation.
8 Plaintiff may rely upon statements made under the penalty of perjury in the complaint if the
9 complaint shows that plaintiff has personal knowledge of the matters stated and plaintiff calls to
10 the court's attention those parts of the complaint upon which plaintiff relies. Plaintiff may serve
11 and file one or more affidavits or declarations by other persons who have personal knowledge of
12 relevant matters. Plaintiff may also rely upon written records, but plaintiff must prove that the
13 records are what plaintiff claims they are. If plaintiff fails to contradict defendant's evidence
14 with admissible evidence, the court may rely on the defendant's evidence. In the event both sides
15 submit matters outside the pleadings, the court may look beyond the pleadings and decide
16 disputed issues of fact. If plaintiff does not serve and file a written opposition to the motion, the
17 court may consider the failure to act as a waiver of opposition to the defendant's motion. If the
18 defendant's motion to dismiss, whether opposed or unopposed, is granted, plaintiff's
19 unexhausted claims will be dismissed without prejudice.

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

1 Accordingly, IT IS HEREBY ORDERED that plaintiff's motion for additional
2 time to respond to defendants' motion to dismiss is granted and any such response shall be filed
3 within 30 days of the date of this order.

4
5 DATED: July 27, 2012

6 
7 **CRAIG M. KELLISON**
8 UNITED STATES MAGISTRATE JUDGE

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26