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NOT FOR CITATION  
IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JESSE GRANT III,	)	No. C 07-06191 JF (PR)
	)	
Plaintiff,	)	ORDER SETTING NEW
	)	BRIEFING SCHEDULE FOR
vs.	)	DEFENDANT CHEA TO FILE
	)	DISPOSITIVE MOTION OR
W. CHEA, et al.,	)	NOTICE REGARDING SUCH
	)	MOTION
Defendants.	)	
_____	)	

Plaintiff, a state prisoner proceeding pro se, filed a civil rights complaint pursuant to 42 U.S.C. § 1983. Finding the amended complaint stated cognizable claims, when liberally construed, the Court ordered service of the complaint on Defendants Chea and Varela. Defendant Varela filed a motion for summary judgment. (Docket No. 18.) Defendant Chea’s counsel has filed a request for a new briefing schedule in light of the fact that counsel did not receive the file until well beyond the deadline set forth in the original order of service. (See Docket Nos. 24 & 26.) Good cause appearing, the request is GRANTED. Defendant Chea will file a dispositive motion or notice regarding such motion in accordance with the schedule set forth below.

///

1 **CONCLUSION**

2 For the reasons stated above, the Court orders as follows:

3 1. No later than **sixty (60) days** from the date of this order, Defendants shall  
4 file a motion for summary judgment or other dispositive motion with respect to the claim  
5 in the complaint as set forth above.

6 a. If Defendants elect to file a motion to dismiss on the grounds that  
7 Plaintiff failed to exhaust his available administrative remedies as required by 42 U.S.C.  
8 § 1997e(a), Defendants shall do so in an unenumerated Rule 12(b) motion pursuant to  
9 Wyatt v. Terhune, 315 F.3d 1108, 1119-20 (9th Cir. 2003), cert. denied Alameida v.  
10 Terhune, 540 U.S. 810 (2003).

11 b. Any motion for summary judgment shall be supported by adequate  
12 factual documentation and shall conform in all respects to Rule 56 of the Federal Rules of  
13 Civil Procedure. **Defendants are advised that summary judgment cannot be granted,**  
14 **nor qualified immunity found, if material facts are in dispute. If any Defendant is of**  
15 **the opinion that this case cannot be resolved by summary judgment, he shall so**  
16 **inform the Court prior to the date the summary judgment motion is due.**

17 2. Plaintiff’s opposition to the dispositive motion shall be filed with the Court  
18 and served on Defendants no later than **thirty (30) days** from the date Defendants’  
19 motion is filed.

20 a. In the event Defendants file an unenumerated motion to dismiss  
21 under Rule 12(b), Plaintiff is hereby cautioned as follows:<sup>1</sup>

22 The Defendants have made a motion to dismiss pursuant to Rule  
23 12(b) of the Federal Rules of Civil Procedure, on the ground you have not  
24 exhausted your administrative remedies. The motion will, if granted, result  
25 in the dismissal of your case. When a party you are suing makes a motion  
26 to dismiss for failure to exhaust, and that motion is properly supported by  
27 declarations (or other sworn testimony) and/or documents, you may not  
28 simply rely on what your complaint says. Instead, you must set out specific

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<sup>1</sup>The following notice is adapted from the summary judgment notice to be given to pro se prisoners as set forth in Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). See Wyatt v. Terhune, 315 F.3d at 1120 n.14.

1 facts in declarations, depositions, answers to interrogatories, or documents,  
2 that contradict the facts shown in the Defendant's declarations and  
3 documents and show that you have in fact exhausted your claims. If you do  
not submit your own evidence in opposition, the motion to dismiss, if  
appropriate, may be granted and the case dismissed.

4 b. In the event Defendants file a motion for summary judgment, the  
5 Ninth Circuit has held that the following notice should be given to Plaintiffs:

6 The defendants have made a motion for summary judgment by  
7 which they seek to have your case dismissed. A motion for summary  
8 judgment under Rule 56 of the Federal Rules of Civil Procedure will, if  
granted, end your case.

9 Rule 56 tells you what you must do in order to oppose a motion for  
10 summary judgment. Generally, summary judgment must be granted when  
11 there is no genuine issue of material fact--that is, if there is no real dispute  
12 about any fact that would affect the result of your case, the party who asked  
13 for summary judgment is entitled to judgment as a matter of law, which will  
14 end your case. When a party you are suing makes a motion for summary  
15 judgment that is properly supported by declarations (or other sworn  
16 testimony), you cannot simply rely on what your complaint says. Instead,  
you must set out specific facts in declarations, depositions, answers to  
interrogatories, or authenticated documents, as provided in Rule 56(e), that  
contradict the facts shown in the defendants' declarations and documents  
and show that there is a genuine issue of material fact for trial. If you do  
not submit your own evidence in opposition, summary judgment, if  
appropriate, may be entered against you. If summary judgment is granted  
in favor of defendants, your case will be dismissed and there will be no  
trial.

17 See Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). Plaintiff is advised to  
18 read Rule 56 of the Federal Rules of Civil Procedure and Celotex Corp. v. Catrett, 477  
19 U.S. 317 (1986) (holding party opposing summary judgment must come forward with  
20 evidence showing triable issues of material fact on every essential element of his claim).  
21 Plaintiff is cautioned that failure to file an opposition to Defendants' motion for summary  
22 judgment may be deemed to be a consent by Plaintiff to the granting of the motion, and  
23 granting of judgment against plaintiff without a trial. See Ghazali v. Moran, 46 F.3d 52,  
24 53-54 (9th Cir. 1995) (per curiam); Brydges v. Lewis, 18 F.3d 651, 653 (9th Cir. 1994).

25 3. Defendants shall file a reply brief no later than **fifteen (15) days** after  
26 Plaintiff's opposition is filed.

27 4. The motion shall be deemed submitted as of the date the reply brief is due.  
28 No hearing will be held on the motion unless the Court so orders at a later date.

1           5.       All communications by the Plaintiff with the Court must be served on  
2 Defendants, or Defendants' counsel once counsel has been designated, by mailing a true  
3 copy of the document to Defendants or Defendants' counsel.

4           6.       Discovery may be taken in accordance with the Federal Rules of Civil  
5 Procedure. No further Court order is required before the parties may conduct discovery.

6           7.       It is Plaintiff's responsibility to prosecute this case. Plaintiff must keep the  
7 Court informed of any change of address and must comply with the Court's orders in a  
8 timely fashion. Failure to do so may result in the dismissal of this action for failure to  
9 prosecute pursuant to Federal Rule of Civil Procedure 41(b).

10           IT IS SO ORDERED.

11 DATED: 8/20/09

  
\_\_\_\_\_  
JEREMY FOGEL  
United States District Judge

UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

JESSE GRANT III,  
Plaintiff,

Case Number: CV07-06191 JF

**CERTIFICATE OF SERVICE**

v.

W. CHEA, et al.,  
Defendants.

\_\_\_\_\_/

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on 9/2/09, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Jesse Grant G-25984  
Pelican Bay State Prison  
P.O. Box 7500  
B-8-121  
Crescent City, CA 95532

Dated: 9/2/09

Richard W. Wieking, Clerk