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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THOMAS DAVID RICE,)	NO. EDCV 12-1729-GHK (MAN)
)	
Plaintiff,)	ORDER RE: DEFENDANTS' MOTION
)	TO DISMISS; SETTING BRIEFING
v.)	SCHEDULE; AND PROVIDING NOTICE
)	TO PLAINTIFF
W.V.D.C FACILITY)	
COMMANDER, et al.,)	
)	
Defendants.)	
_____)	

On June 18, 2013, Defendants filed and served a "Motion To Dismiss Complaint Pursuant To FRCP 12(b)(6)" with supporting memorandum of points and authorities ("Motion"). In light of Plaintiff's incarcerated status and pursuant to Local Rule 7-15, the Court will dispense with oral argument and will take the Motion under submission, once briefing is completed. Accordingly, the July 23, 2013 hearing date set for the Motion is VACATED.

The following briefing schedule governs the Motion: **by no later than August 2, 2013**, Plaintiff shall file and serve his Opposition to the Motion; Defendants will have **14 days** from the date on which they receive the Opposition in which to file and serve a Reply.

1 By the Motion, Defendants contend, among other things, that this
2 action must be dismissed, because Plaintiff allegedly has failed to
3 exhaust his administrative remedies with respect to his claims. In
4 Wyatt v. Terhune, 315 F.3d 1108 (9th Cir. 2003), the Ninth Circuit held
5 that, when the defendant contends that a prisoner asserting civil rights
6 claims has failed to exhaust his administrative remedies, the defendant
7 may raise its challenge through a pretrial motion brought pursuant to
8 Rule 12(b) of the Federal Rules of Civil Procedure, rather than through
9 a motion for summary judgment. Such a motion is considered to be an
10 "unenumerated Rule 12(b) motion." *Id.* at 1119. The Ninth Circuit
11 indicated that, when such an unenumerated Rule 12(b) motion is brought,
12 the prisoner-plaintiff must receive fair notice of the procedure to be
13 employed in resolving the motion. *Id.* at 1120 n.14. Accordingly, with
14 respect to the Motion's contention that Plaintiff has failed to exhaust
15 his administrative remedies, Plaintiff is advised as follows:

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17 By the Motion, Defendants seek to have your case dismissed. In
18 particular, the Motion requests that Plaintiff's Complaint be dismissed.
19 **In other words, if the Court grants Defendants' Motion in full, the**
20 **Complaint may be dismissed in part or in its entirety, and this case may**
21 **be terminated.**

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23 In deciding the exhaustion issue raised by the Motion, the Court
24 may look beyond the pleadings and decide disputed issues of fact. This
25 means that the Court may consider not only the allegations of the
26 Complaint and any exhibits thereto but also any admissible declarations,
27 affidavits, or documentary evidence submitted by the parties in support
28 of or in opposition to the Motion, to the extent that they bear on the

1 exhaustion issue. If, in considering these matters, the Court concludes
2 that Plaintiff has not exhausted his administrative remedies with
3 respect to some or all of the claims, the proper remedy will be to grant
4 the Motion and to dismiss this action, in part if not in full, without
5 prejudice. Wyatt, 315 F.3d at 1120; see also Lira v. Herrera, 427 F.3d
6 1164, 1175-76 (9th Cir. 2005).

7
8 In addition, Plaintiff is reminded that he must comply with the
9 provisions of Rule 5 of the Federal Rules of Civil Procedure and Local
10 Rule 5-3 of the Court, concerning service on Defendants' counsel of all
11 papers filed with the Court. Plaintiff must append a proof of service
12 to any document submitted for filing. The Court will not consider any
13 document as to which a proof of service has not been filed.

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15 DATED: June 19, 2013.

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19 MARGARET A. NAGLE
20 UNITED STATES MAGISTRATE JUDGE
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