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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
Fresno Division**

MARK E. DORSEY,
CDCR #H-38301,

Plaintiff,

vs.

JAMES TILTON, et al.,

Defendants.

Civil No. 1:08cv00919 JAH (JMA)

**ORDER PROVIDING PLAINTIFF
NOTICE OF DEFENDANTS'
MOTION TO DISMISS
PURSUANT TO
WYATT v. TERHUNE
AND SETTING
BRIEFING SCHEDULE**

On August 19, 2009, Defendants filed a Motion to Dismiss Plaintiff’s Third Amended Complaint pursuant to FED.R.CIV.P. 12(b) and 12(b)(6) [Doc. No. 24]. Defendants move to dismiss, in part, on grounds that Plaintiff failed to exhaust administrative remedies prior to suit pursuant to 42 U.S.C. § 1997e(a).

“In deciding a motion to dismiss for a failure to exhaust nonjudicial remedies, the court may look beyond the pleadings and decide disputed issues of fact.” *Wyatt v. Terhune*, 315 F.3d 1108, 1119-20 (9th Cir. 2003) (citing *Ritza v. Int’l Longshoremen’s & Warehousemen’s Union*, 837 F.2d 365, 369 (9th Cir. 1988) (per curiam)). If the court looks beyond the pleadings when deciding a motion to dismiss for failure to exhaust, “a procedure closely analogous to summary judgment,” the Court “must assure that [the plaintiff] has fair notice of his opportunity to

1 develop a record.” *Id.* at 1120 n.14; *see also Marella v. Terhune*, 568 F.3d 1024, 1028 (9th Cir.
2 2009) (remanding case to district court where court failed to “effectively give [plaintiff] fair
3 notice that he should have submitted evidence regarding exhaustion of administrative
4 remedies.”)

5 Accordingly, Plaintiff is hereby provided with notice that Defendants have asked the
6 Court to dismiss his case in part because he failed to exhaust administrative remedies pursuant
7 to 42 U.S.C. § 1997e(a). Plaintiff is further advised of his opportunity to include in his
8 Opposition to Defendants’ Motion whatever arguments and documentary evidence he may have
9 to show that he did, in fact, exhaust all administrative remedies as were available to him prior
10 to filing suit. *See Wyatt*, 315 F.3d at 1119-21; *Marella*, 568 F.3d at 1028.

11 **Conclusion and Order**

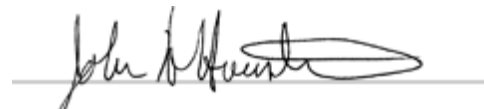
12 Accordingly, the Court sets the following briefing schedule:

- 13 1) Plaintiff, if he chooses, may file an Opposition to Defendants’ Motion to Dismiss
14 [Doc. No. 24], and serve it upon Defendants’ counsel of record no later than
15 **Monday, November 9, 2009.**
- 16 2) Defendants may file a Reply to Plaintiff’s Opposition, and serve it upon Plaintiff
17 no later than **Monday, November 16, 2009.**

18 The Court will consider the matter fully briefed as submitted on the papers as of **Monday,**
19 **November 23, 2009**, and will thereafter issue a written Order ruling on Defendants’ Motion
20 without requiring any appearances or holding any oral argument.

21 **IT IS SO ORDERED.**

22
23 DATED: October 8, 2009


HON. JOHN A. HOUSTON
United States District Judge