

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ANTHONY GASTON,

Plaintiff,

vs.

ANTHONY HEDGEPEETH, Warden, *et al.*,

Defendant.

Case No. 1:13-cv-01395-RRB

ORDER REGARDING
MOTION AT DOCKET 18

At **Docket 18** Defendant E. Morales has moved for Judgment on the Pleadings,¹ alleging that the face of the complaint shows that Plaintiff has failed to exhaust his remedies. The motion is defective on its face. First, a prisoner is not required to affirmatively plead exhaustion of administrative remedies.² Second, the appropriate procedure for obtaining dismissal for the failure to exhaust administrative remedies is a motion for summary judgment under Federal Rule of Civil Procedure 59, not a motion for judgment on the pleadings under Rule 12.³ As noted in the Screening Order, this complaint does not present the rare case where failure to exhaust is clear from the face

¹ Fed. R. Civ. P. 12(c).

² *Jones v. Bock*, 549 U.S. 199, 212–17 (2007).

³ *Albino v. Baca*, ___ F.3d ___, ___, 2014 WL 1317141 at *4–5 (9th Cir. Apr. 3, 2014) (en banc) (overruling in part *Wyatt v. Terhune*, 315 F.3d 1108 (9th Cir. 2003)).

of the complaint.⁴ Nothing in the motion pending before this Court provides any basis upon which this Court should reconsider its prior determination.

Accordingly, Defendant's Motion for Judgment on the Pleadings at **Docket 18** is **DENIED**, without prejudice to refile as a motion for summary judgment.

IT IS SO ORDERED this 22nd day of April, 2014.

S/ RALPH R. BEISTLINE
UNITED STATES DISTRICT JUDGE

⁴ Docket 10, p. 12 .