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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

DOUGLAS J. WINSTON,

Plaintiff,

vs.

JAMES TILTON, D.K. SISTO, V.)
SINGH, and T. SEQUIRA,

Defendants.

) Case No. 2:08-cv-3140-MSB

) **ORDER**

On July 1, 2010, Defendant Sisto and Singh filed an unenumerated motion to dismiss Plaintiff's Complaint under Federal Rule of Civil Procedure 12(b) on the ground that Plaintiff failed to exhaust the available administrative remedies before filing his complaint. (Dkt. # 18).

NOTICE TO PLAINTIFF

Defendants' motion to dismiss seeks to have your case dismissed for failure to exhaust prison administrative remedies as required by 42 U.S.C. § 1997e(a). A motion to dismiss under Rule 12(b) of the Federal Rules of Civil Procedure will, if granted, end your case. Plaintiff is advised of the following specific provisions of Local Rule of Civil Procedure 230(l):

(l) Motions in Prisoner Actions. All motions, except motions to dismiss for lack of prosecution, filed in actions wherein one party is incarcerated and proceeding in propria persona, shall be submitted upon the record without oral argument unless otherwise ordered by the Court. Such motions need not be

1 noticed on the motion calendar. Opposition, if any, to the granting of the
2 motion shall be served and filed by the responding party not more than
3 twenty-one (21),days after the date of service of the motion. A responding
4 party who has no opposition to the granting of the motion shall serve and file
5 a statement to that effect, specifically designating the motion in question.
6 Failure of the responding party to file an opposition or to file a statement of no
7 opposition may be deemed a waiver of any opposition to the granting of the
8 motion and may result in the imposition of sanctions. The moving party may,
9 not more than seven (7) days after the opposition is served, serve and file a
10 reply to the opposition. All such motions will be deemed submitted
11 twenty-eight (28) days after the service of the motion or when the reply is
12 filed, whichever comes first. *See* L.R. 135.

13
14 When deciding a motion to dismiss for failure to exhaust, the Court may consider
15 evidence beyond your complaint, including sworn declarations and other admissible
16 documentary evidence. *See Wyatt v. Terhune*, 315 F.3d 1108, 1120 n.14 (9th Cir. 2003).
17 Plaintiff is therefore further advised that if the defendants produce admissible evidence
18 demonstrating that you failed to exhaust administrative remedies, your complaint will be
19 dismissed without prejudice unless your response to the defendants' motion to dismiss
20 includes admissible evidence sufficient to show that you exhausted all available
21 administrative remedies or that no administrative remedies were available to you. Types of
22 admissible evidence may include copies of your grievances, grievance responses and sworn
23 declarations.

24
25 You must timely respond to motions filed by the defendants. If you fail to respond
26 to Defendants' motion to dismiss, the Court may construe such failure as a consent to the
27 granting of that motion without further notice, and judgment may be entered dismissing this
28 action without prejudice. *See Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995); Local Rule
230(l).

29
30 **IT IS HEREBY ORDERED** that Plaintiff must file a response to Defendants' motion
31 to dismiss, together with copies of grievances, sworn declarations or other admissible
32 evidence, within 21 days of the date of this order. Failure to do so will result in the Court
33 granting the motion.

34
35 **IT IS FURTHER ORDERED** that Defendants may file a reply within 7 days after
36 service of Plaintiff's response.

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IT IS FURTHER ORDERED that the motion will be deemed ready for decision without oral argument on the day following the date set for filing a reply unless otherwise ordered by the Court.

DATED this 1st day of July, 2010.

/s/ Marsha S. Berzon
MARSHA S. BERZON
United States Circuit Judge, sitting by designation