



1 exhaustion issue. ECF No. 58 at 15-18. This court adopted this recommendation on October 5,  
2 2012. ECF No. 61.

3 On February 8, 2013, the magistrate judge appointed pro bono counsel David M.  
4 Poore to represent plaintiff. ECF No. 63.

5 On September 26, 2013, the parties filed their joint pretrial statement. ECF No.  
6 70. The court issued the Final Pretrial Order on October 29, 2013. ECF No. 78.

7 Plaintiff filed the instant motions on December 5, 2013.

## 8 II. MOTION TO RELIEVE COUNSEL

9 Plaintiff asserts he has a conflict with Attorney Poore as a result of the alleged  
10 misstatements in the Joint Pretrial Statement that plaintiff believes harm his case. ECF No. 79 at  
11 4.

12 Without determining that Attorney Poore committed any misconduct, the court  
13 nonetheless relieves him as counsel and substitutes plaintiff in pro per.

## 14 III. MOTION FOR SANCTIONS

15 Plaintiff alleges both counsel included incorrect statements in their Joint Pretrial  
16 Statements and asks for an order sanctioning them under Rule 11 of the Federal Rules of Civil  
17 Procedure.

18 Under Rule 11, by signing a document, an attorney certifies that (1) he or she has  
19 read the pleadings or motions he or she filed, and (2) the pleading or motion is “well-grounded in  
20 fact,” has a colorable basis in law, and is not filed for an improper purpose. Fed. R. Civ. P. 11;  
21 *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990); *Smith v. Ricks*, 31 F.3d 1478, 1488  
22 (9th Cir. 1994). The Rule requires that the lawyer undertake “an inquiry reasonable under the  
23 circumstances” to determine whether his or her legal contentions are “warranted by existing law”  
24 and that his or her factual claims either “have evidentiary support or, if specifically so identified,  
25 will likely have evidentiary support after a reasonable opportunity for further investigation.” Fed.  
26 R. Civ. P. 11(b). When considering apparent Rule 11 violations, the court utilizes an objective  
27 standard of reasonable inquiry, which does not require a finding of bad faith. *Chambers v.*  
28 *NASCO, Inc.*, 501 U.S. 32, 47 (1991); *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 829 (9th  
Cir. 1986) (concluding that subjective bad faith is not an element under Rule 11), *overruled on  
other grounds*, *Cooter & Gell*, 496 U.S. at 399.

Plaintiff contends that counsel misspoke in three ways: in claiming the exhaustion  
of administrative remedies was a disputed issue of fact because, in plaintiff’s view, the exhaustion

1 question has been resolved by motion practice; in describing the basis for his prior lawsuit; and in  
2 recounting plaintiff's request for injunctive relief. ECF No. 80 at 4-6.

3 First, even though the court rejected Fields' pretrial attack on the exhaustion of  
4 administrative remedies, exhaustion is an affirmative defense that may be raised at trial. *Jones v.*  
5 *Bock*, 549 U.S. 199, 216 (2007); *Johnston v. Maha*, 460 Fed. App'x 11, 15 n.3 (2d Cir. 2012).

6 Second, counsels' characterization of *Hunt v. Reyes*, No. 2:08-cv-1181 MCE  
7 CKD, is supported by a reading of the complaint in that case. See Docket 2:08-cv-1181, ECF No.  
8 36 ¶ 22 ("On February 16, 2007, Defendant Fields placed a CDCR 128G General Chrono, gang  
9 update, in Plaintiff's central file that she had observed Plaintiff for the past two years associating  
10 with Blood gang members, and specifically, on February 14 and February 21, 2007, associating  
11 with Blood gang members, and based upon those dates, she concludes that Plaintiff is an associate  
12 of the Blood disruptive group.").

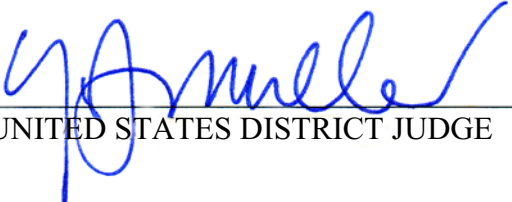
13 Third, in the joint pretrial statement, counsel asserted that plaintiff's claim for  
14 injunctive relief included a request for removal of the gang affiliation records from plaintiff's  
15 central file. ECF No. 70 at 3. Plaintiff contends his request for injunctive relief was limited to an  
16 order preventing further retaliation, prohibiting defendants from removing inmates from work  
17 assignments without procedural protections, and establishing a more robust policy for  
18 investigation of inmates' claims of retaliation. ECF No. 80 at 5. However, his complaint  
19 includes the request that an order of injunctive relief include an order prohibiting "defendant from  
20 adding Plaintiff to any gang list or identifying Plaintiff as a gang associate without a proper  
21 validation procedure." ECF No. 1 ¶ 30. Counsels' statement is not significantly different from  
22 this request so as to warrant sanctions. Moreover, the Pretrial Order does not incorporate  
23 counsels' description of plaintiff's request for injunctive relief. ECF No. 78 at 2-3.

24 IT IS THEREFORE ORDERED that:

25 1. Plaintiff's motion to relieve counsel, ECF No. 79, is granted and David M.  
26 Poore is relieved as counsel; and

27 2. Plaintiff's motion for sanctions, ECF No. 80, is denied.

28 Dated: December 25, 2013.

  
UNITED STATES DISTRICT JUDGE