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8   IN THE UNITED STATES DISTRICT COURT

9   FOR THE EASTERN DISTRICT OF CALIFORNIA

10   RAYMOND D. JACKSON,

11   Plaintiff,   No. 2: 11-cv-1157 JAM KJN P

12   vs.

13   STEVEN PLETCHER, et al.,

14   Defendants.   <u>ORDER</u>

15   _____/

16   Plaintiff, a state prisoner proceeding through counsel, has requested that defendant

17   Pletcher be dismissed without prejudice. Defendant Pletcher and the remaining defendants do

18   not object to the dismissal without prejudice. Pursuant to Fed. R. Civ. P. 41(a), plaintiff's

19   request shall be honored.

20   On March 14, 2013, the undersigned recommended that defendant Pletcher's

21   motion to stay be granted. Because defendant Pletcher is dismissed, his motion to stay and the

22   March 14, 2013 findings and recommendations are vacated.

23   On December 6, 2012, remaining defendants Osman, Bick and Aguilera filed a

24   summary judgment motion on grounds that plaintiff failed to exhaust administrative remedies.

25   On December 20, 2012, the court denied this motion without prejudice pending the court's ruling

26   on defendant Pletcher's motion to stay.

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2   On January 3, 2012, the court appointed counsel to represent plaintiff. On May

3   21, 2012, plaintiff's filed an amended complaint. On June 19, 2012, defendant Osman filed an

4   answer to the amended complaint. On July 24, 2012, defendants Aguilera and Bick filed an

5   answer to the amended complaint.

6   Following the filing of the amended complaint, the court did not set discovery or

7   dispositive motion cut-off deadlines. For this reason, both parties shall submit status reports

8   informing the court whether further discovery is required and, if so, the amount of time they

9   anticipate to complete discovery.

10   If defendants still intend to argue that plaintiff failed to exhaust administrative

11   remedies, they shall file an unenumerated Rule 12(b) motion within twenty-one days of the date

12   of the date of this order. See Wyatt v. Terhune, 315 F.3d 1108, 1119-20 (9th Cir. 2003) (the

13   proper method for asserting failure to exhaust administrative remedies is an unenumerated Rule

14   12(b) motion). Plaintiff does not require discovery in order to respond to this motion. The court

15   will issue a further scheduling order after reviewing these documents.

16   Accordingly, IT IS HEREBY ORDERED that:

17   1. Defendant Pletcher is dismissed without prejudice;

18   2. Defendant Pletcher's motion to stay (dkt. no. 162) and the March 14, 2013

19   findings and recommendations (dkt. no. 189) are vacated;

20   3. Within twenty-one days of the date of this order, defendants may file a motion

21   to dismiss pursuant to Federal Rule of Civil Procedure 12(b) for failure to exhaust administrative

22   remedies; if defendants do not intend to pursue this motion, they shall notify the court within that

23   time; and

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1   4. Within twenty-one days of the date of this order, both parties shall file status

2   reports addressing whether additional time to conduct discovery is required.

3   DATED: May 1, 2013

4   _____
    KENDALL J. NEWMAN
5   UNITED STATES MAGISTRATE JUDGE

6   jack1157.stip

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