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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

GREGORY A. FRANKLIN,
CDCR #E-66269,

Plaintiff,

vs.

L.E. SCRIBNER, et al.,

Defendants.

Civil No. 09cv1067-MMA (RBB)

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

Plaintiff Gregory A. Franklin is a state prisoner proceeding *pro se* in this civil rights action filed pursuant to the Civil Rights Act, 42 U.S.C. § 1983.

Defendants have filed a Motion to Dismiss the Complaint pursuant to FED.R.CIV.P. 12(b). Defendants argue Plaintiff has failed to exhaust administrative remedies prior to suit as required by 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 develop a record.” *Id.* at 1120 n.14; *see also Marella v. Terhune*, 568 F.3d 1024, 1028 (9th Cir. 2009) (remanding case to district court where court failed to

1 “effectively give [plaintiff] fair notice that he should have submitted evidence regarding
2 exhaustion of administrative remedies”).

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

9 **Conclusion and Order**

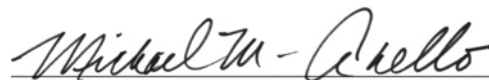
10 Accordingly, the Court sets the following briefing schedule:

- 11 1) Plaintiff, if he chooses, may file an Opposition to Defendants’ Motion to
12 Dismiss and serve it upon Defendants’ counsel of record no later than
13 **December 20, 2010.**
- 14 2) Defendants may file a Reply to Plaintiff’s Opposition, and serve it upon
15 Plaintiff no later than **December 27, 2010.**

16 At that time, the Court will consider the matter fully briefed as submitted on the
17 papers and will thereafter issue a written Order. Unless otherwise ordered, no appearances
18 are required on the date set for hearing and no oral argument will be held. *See* S.D. Cal.
19 CivLR 7.1.d.1.

20 **IT IS SO ORDERED.**

21 DATED: November 8, 2010

22 

23 Hon. Michael M. Anello
24 United States District Judge