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

ELIJAH BEN PASCHELKE,
CDCR # V-37938,

Plaintiff,

vs.

ROBERT HERNANDEZ, et al.,

Defendants.

Civil No. 09-2657-W(WVG)

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

Plaintiff 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

1 judgment,” the Court “must assure that [the plaintiff] has fair notice of his opportunity to
2 develop a record.” *Id.* at 1120 n.14; *see also Marella v. Terhune*, 568 F.3d 1024, 1028 (9th Cir.
3 2009) [remanding case to district court where court failed to “effectively give (plaintiff) fair
4 notice that he should have submitted evidence regarding exhaustion of administrative remedies].

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

11 **Conclusion and Order**

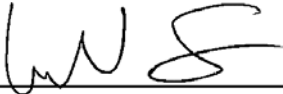
12 Accordingly, the Court sets the following briefing schedule:

- 13 1) Plaintiff, if he chooses, may file an Opposition to Defendants’ Motion to Dismiss
14 and serve it upon Defendants’ counsel of record no later than **April 13, 2011**
- 15 2) Defendants may file a Reply to Plaintiff’s Opposition, and serve it upon Plaintiff
16 no later than **April 20, 2011**.

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

20 **IT IS SO ORDERED.**

21
22 DATED: March 16, 2011

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25 Hon. William V. Gallo
26 U.S. Magistrate Judge
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