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

LEWAYNE LEE MILLER,  
CDCR #J-64930,

Plaintiff,

vs.

S. RUTLEDGE; D. RUSH;  
J. PARTIDA; R. LOPEZ,

Defendants.

Civil No. 10-1902 MMA (NLS)

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

LeWayne Lee Miller (“Plaintiff”), a state prisoner currently incarcerated at Kern Valley State Prison located in Delano, California, and proceeding in pro se, has filed a civil rights Complaint pursuant to 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

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

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

12 Plaintiff is further advised he may file an Opposition to Defendants’ Motion to Dismiss  
13 and serve it upon Defendants’ counsel of record no later than **April 11, 2011**.

14 Defendants may file a Reply to Plaintiff’s Opposition, and serve it upon Plaintiff no later  
15 than **April 18, 2011**.

16 At that time, the Court will consider the matter fully briefed as submitted on the papers  
17 and will thereafter issue a written Order. No appearances by the parties are required. *See* S.D.  
18 Cal. CivLR 7.1.d.1.

19 **IT IS SO ORDERED.**

20 DATED: March 21, 2011

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

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