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6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF CALIFORNIA
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9 DENNIS HAMILTON,

10 Plaintiff,

11 v.

12 JOHN HART, et al.,

13 Defendants.
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1:10-cv-00272-LJO-GSA-PC

ORDER DENYING UNENUMERATED
RULE 12(b) MOTIONS, WITHOUT
PREJUDICE, ON PROCEDURAL
GROUNDS AND REQUIRING
DEFENDANTS TO FILE RESPONSIVE
PLEADING OR MOTION WITHIN
THIRTY DAYS
(Docs. 26, 28, 37.)

ORDER VACATING ORDER ISSUED ON
MARCH 25, 2014 WHICH REQUIRED
PLAINTIFF TO FILE OPPOSITION OR
STATEMENT OF OPPOSITION
(Doc. 38.)
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18 Plaintiff Dennis Hamilton (“Plaintiff”), a state prisoner proceeding pro se and in forma
19 pauperis, filed this civil rights action pursuant to 42 U.S.C. § 1983 on February 18, 2010. This
20 action is proceeding with Plaintiff’s initial Complaint on Plaintiff’s Eighth Amendment claims
21 for (1) excessive force, against defendants Correctional Officers (C/Os) Hart, Doe Lieutenant,
22 Castro, Llamas, Prouty, Phillips, and Ronquillo; (2) inadequate medical care, against
23 defendants C/Os Hart, Phillips, Bogle, Prouty, Ronquillo, Trupe and Ocampo; and (3) failure-
24 to-protect Plaintiff, against defendants C/Os Phillips and Ronquillo.

25 On October 15, 2013, December 2, 2013, and January 28, 2014, defendants Hart,
26 Phillips, Bogle, Prouty, Ronquillo, Llamas, Trupe and Ocampo (“Defendants”) filed
27 unenumerated Rule 12(b) motions to dismiss on the ground that Plaintiff failed to exhaust the
28 available administrative remedies. 42 U.S.C. § 1997e(a); Fed. R. Civ. P. 12(b). (Docs. 26, 28,

1 37.) Plaintiff has filed an opposition to the October 15, 2013 and December 2, 2013 motions,
2 and Defendants have filed a reply to Plaintiff's opposition. (Docs. 33, 35.) On March 25,
3 2014, the court issued an order requiring Plaintiff to file an opposition or statement of non-
4 opposition to the January 28, 2014 motion, within thirty days. (Doc. 38.)

5 On April 3, 2014, the United States Court of Appeals for the Ninth Circuit issued a
6 decision overruling Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003) with respect to the
7 proper procedural device for raising the issue of administrative exhaustion. Albino v. Baca,
8 No. 10-55702, 2014 WL 1317141, at *1 (9th Cir. Apr. 3, 2014) (en banc). Following the
9 decision in Albino, Defendants may raise the issue of exhaustion in either (1) a motion to
10 dismiss pursuant to Rule 12(b)(6), in the rare event the failure to exhaust is clear on the face of
11 the complaint, or (2) a motion for summary judgment. Albino, 2014 WL 1317141, at *4
12 (quotation marks omitted). An unenumerated Rule 12(b) motion is no longer the proper
13 procedural device for raising the issue of exhaustion. Id.

14 Accordingly, in light of the decision in Albino, it is HEREBY ORDERED that:

15 1. Defendants' unenumerated Rule 12(b) motions, filed on October 15, 2013,
16 December 2, 2013, and January 28, 2014, are DENIED, without prejudice, on procedural
17 grounds;

18 2. Defendants have **thirty (30) days** from the date of service of this order within
19 which to file a responsive pleading or motion; and

20 3. The court's order issued on March 25, 2014, which required Plaintiff to file an
21 opposition or statement of opposition to Defendants' motion to dismiss of January 28, 2014, is
22 VACATED.

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24 IT IS SO ORDERED.

25 Dated: April 11, 2014

/s/ Gary S. Austin
26 UNITED STATES MAGISTRATE JUDGE
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