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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

FRED GOMEZ,	)	1:11-cv-01436-AWI-DLB PC
	)	
Plaintiff,	)	ORDER CONVERTING DEFENDANTS'
	)	UNENUMERATED 12(B) MOTION TO
vs.	)	DISMISS BASED ON EXHAUSTION TO
	)	MOTION FOR SUMMARY JUDGMENT
	)	
SWAIM, et al.,	)	ORDER DIRECTING PARTIES TO NOTIFY
	)	THE COURT WHETHER ADDITIONAL
Defendants.	)	DISCOVERY IS NEEDED WITHIN
	)	THIRTY (30) DAYS
	)	
	)	NOTICE AND WARNING OF
	)	REQUIREMENTS FOR OPPOSING
	)	DEFENDANTS' SUMMARY JUDGMENT
	)	MOTION

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Plaintiff Fred Gomez ("Plaintiff") is a prisoner in the custody of the California Department of Corrections and Rehabilitation ("CDCR"). Plaintiff is proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff filed this action on August 26, 2011.

On May 21, 2013, the Court screened Plaintiff's First Amended Complaint ("FAC") and found cognizable claims against Defendants Swaim, Becerra, Daveiga, and Junious for deliberate indifference to Plaintiff's conditions of confinement, in violation of the Eighth Amendment for

1 placing Plaintiff on management cell status for twenty-two days without adequate heating. The  
2 Court dismissed all other claims and Defendants. (ECF No. 28.) On October 3, 2013,  
3 Defendants filed a Motion to Dismiss the claims based on failure to exhaust. (ECF No. 37.)  
4 Defendant Junious joined in the motion on February 13, 2014. (ECF No. 44.)

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, No.  
8 10-55702, 2014 WL 1317141, at \*1 (9th Cir. Apr. 3, 2014) (en banc). Following the decision in  
9 Albino, Defendants may raise the issue of exhaustion in either (1) a motion to dismiss pursuant  
10 to Rule 12(b)(6), in the rare event the failure to exhaust is clear on the face of the complaint, or  
11 (2) a motion for summary judgment. Albino, 2014 WL 1317141, at \*4 (quotation marks  
12 omitted). An unenumerated Rule 12(b) motion is no longer the proper procedural device for  
13 raising the issue of exhaustion. Id.

14 Accordingly, pursuant to Albino, the Court now CONVERTS the exhaustion portion of  
15 Defendants' Motion to Dismiss into a Motion for Summary Judgment. Within thirty (30) days  
16 of the date of service of this order, the parties SHALL inform the Court whether any additional  
17 discovery is needed related to exhaustion, and if so, what type of discovery.<sup>1</sup> Fed. R. Civ. Proc.  
18 56(d).

19  
20 Once the discovery issue is addressed, the Court will set a further briefing schedule for  
21 the Motion for Summary Judgment. The parties are relieved of their obligation to file a Separate  
22 Statement of Undisputed Facts.  
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28 <sup>1</sup> The Court notes that the exhaustion issue appears to be fully briefed, but, in the interests of Rule 56(d), the Court will consider requests for further discovery.

1 The Court hereby notifies Plaintiff of the following rights and requirements for opposing  
2 the motion<sup>2</sup>:

3 1. A motion for summary judgment is a request for judgment on some or all of  
4 Plaintiff's claims in favor of Defendants without trial. Fed. R. Civ. P. 56(a). Defendants'  
5 motion sets forth the facts which they contend are not reasonably subject to dispute and that  
6 entitle them to judgment as a matter of law. Fed. R. Civ. P. 56(c).

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8 2. Plaintiff has the right to oppose a motion for summary judgment. To oppose the  
9 motion, Plaintiff must show proof of his claims. Plaintiff may agree with the facts set forth in  
10 Defendants' motion but argue that Defendants are not entitled to judgment as a matter of law.

11 In the alternative, if Plaintiff does not agree with the facts set forth in Defendants'  
12 motion, he may show that Defendants' facts are disputed in one or more of the following ways:  
13 (1) Plaintiff may rely upon statements made under the penalty of perjury in the complaint or the  
14 opposition if (a) the complaint or opposition shows that Plaintiff has personal knowledge of the  
15 matters stated and (b) Plaintiff calls to the Court's attention those parts of the complaint or  
16 opposition upon which Plaintiff relies; (2) Plaintiff may serve and file declarations setting forth  
17 the facts which Plaintiff believes prove his claims; (3) Plaintiff may rely upon written records but  
18 Plaintiff must prove that the records are what he claims they are; or (4) Plaintiff may rely upon  
19 all or any part of the transcript of one or more depositions, answers to interrogatories, or  
20 admissions obtained in this proceeding. Should Plaintiff fail to contradict Defendants' motion  
21 with declarations or other evidence, Defendants' evidence will be taken as truth, and final  
22 judgment may be entered without a full trial. Fed. R. Civ. P. 56(e).

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26 <sup>2</sup> Woods v. Carey, Nos. 09-15548, 09-16113, 2012 WL 2626912 (9th Cir. Jul. 6, 2012); Rand v. Rowland, 154 F.3d  
27 952 (9th Cir. 1998); Klinge v. Eikenberry, 849 F.2d 409 (9th Cir. 1988). The requirements have been tailored to  
28 fit the circumstances of this action.

