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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

COLIN M. RANDOLPH,
Plaintiff,
v.
B. NIX, et al.,
Defendants.

Case No. 1:12-cv-00392-LJO-MJS (PC)
**ORDER (1) DENYING UNENUMERATED
RULE 12(b) MOTION WITHOUT
PREJUDICE, (2) DENYING REQUEST TO
CONVERT, (3) STRIKING NOTICE AND
MOTION FOR SUMMARY JUDGMENT,
and (4) REQUIRING DEFENDANT AVERY
TO FILE RESPONSIVE PLEADING OR
MOTION WITHIN THIRTY DAYS**
(ECF Nos. 33, 34, 35)

Plaintiff is a state prisoner proceeding pro se and in forma pauperis in this civil rights action filed pursuant to 42 U.S.C. § 1983. The matter proceeds on a medical indifference claim against Defendants Akanno and Avery. On February 26, 2014, Defendant Akanno filed an answer.

On March 26, 2014, Defendant Avery filed an unenumerated Rule 12(b) motion to dismiss on the ground that Plaintiff failed to exhaust the available administrative remedies. 42 U.S.C. § 1997e(a); Fed. R. Civ. P. 12(b). Plaintiff filed opposition.

On April 3, 2014, the United States Court of Appeals for the Ninth Circuit issued a decision overruling *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003) with respect to the proper procedural device for raising the issue of administrative exhaustion. *Albino v. Baca*, No. 10-55702, 2014 WL 1317141, at *1 (9th Cir. Apr. 3, 2014) (en banc). Following the decision in *Albino*, Defendant may raise the issue of exhaustion in either (1) a motion to

1 dismiss pursuant to Rule 12(b)(6), in the rare event the failure to exhaust is clear on the
2 face of the complaint, or (2) a motion for summary judgment. *Albino*, 2014 WL 1317141, at
3 *4. An unenumerated Rule 12(b) motion is no longer the proper procedural device for
4 raising the issue of exhaustion. *Id.*

5 On April 22, 2014, Defendant Avery filed a request to convert the 12(b) motion to a
6 Rule 56 motion for summary judgment along with a proposed post-conversion notice and
7 motion for summary judgment.

8 For the reasons stated, the unenumerated Rule 12(b) motion is procedurally
9 deficient in light of the decision in *Albino*. The unenumerated Rule 12(b) motion shall be
10 denied, without prejudice, on procedural grounds. Because the Rule 12 (b) motion does not
11 contain all that a motion for summary judgment would require and ensure proper notice to
12 Plaintiff of such a motion, the motion to convert will be denied.

13 Accordingly, for the reasons stated, it is HEREBY ORDERED that:

- 14 1. The unenumerated Rule 12(b) motion filed March 26, 2014 (ECF No. 33) is
15 DENIED, without prejudice, on procedural grounds,
- 16 2. The request to convert the 12(b) motion filed April 22, 2014 (ECF No. 34) is
17 DENIED,
- 18 3. The notice and motion for summary judgment filed April 22, 2014 (ECF No.
19 35) shall be stricken from the record, and
- 20 4. Defendant Avery shall, within **thirty (30) days** from the date of service of this
21 Order file a responsive pleading or motion.

22 IT IS SO ORDERED.
23

24 Dated: April 30, 2014

25 /s/ Michael J. Seng
26 UNITED STATES MAGISTRATE JUDGE
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