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8 UNITED STATES DISTRICT COURT  
9 EASTERN DISTRICT OF CALIFORNIA  
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11 DARRELL WAYNE KING,

12 Plaintiff,

13 vs.

14 JOHN D. CHOKATOS, et al.,

15 Defendants.  
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1:12-cv-01936-LJO-GSA-PC

ORDER DENYING DEFENDANTS'  
REQUEST TO CONVERT UNENUMERATED  
RULE 12(b) MOTION TO DISMISS TO  
MOTION FOR SUMMARY JUDGMENT  
(Doc. 23.)

ORDER DISREGARDING DEFENDANTS'  
NOTICE OF MOTION FOR SUMMARY  
JUDGMENT AS MOOT  
(Doc. 24.)

ORDER DENYING DEFENDANTS'  
UNENUMERATED RULE 12(b) MOTION TO  
DISMISS ON PROCEDURAL GROUNDS,  
WITHOUT PREJUDICE  
(Doc. 16.)

ORDER GRANTING DEFENDANTS THIRTY  
DAYS IN WHICH TO FILE A REPLY TO  
PLAINTIFF'S OPPOSITION TO RULE  
12(b)(6) MOTION

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24 **I. BACKGROUND**

25 Darrell Wayne King ("Plaintiff") is a state prisoner proceeding pro se and in forma  
26 pauperis with this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff filed the Complaint  
27 commencing this action on November 29, 2012. (Doc. 1.) This action proceeds on the initial  
28 Complaint against defendants Dr. John D. Chokatos and LVN Michele Ivy Stringer

1 (“Defendants”) for deliberate indifference to Plaintiff’s medical needs, in violation of the  
2 Eighth Amendment. (Id.)

3 On February 18, 2014, Defendants filed an unenumerated Rule 12(b) motion to dismiss  
4 on the ground that Plaintiff failed to exhaust the available administrative remedies, and a Rule  
5 12(b)(6) motion to dismiss for failure to state a claim on the grounds that Plaintiff failed to  
6 comply with the California Government Torts Act and fails to state a claim for professional  
7 negligence against defendant Stringer. (Doc. 16.) On April 21, 2014, Plaintiff filed an  
8 opposition to the motions. (Doc. 22.) Defendants have not yet filed a reply to the opposition.

9 On April 23, 2014, Defendants filed a request to convert their unenumerated Rule 12(b)  
10 motion to a motion for summary judgment, in light of the Ninth Circuit’s recent decision in  
11 Albino v. Baca, No. 10-55702, 2014 WL 1317141, at \*1 (9th Cir. Apr. 3, 2014) (en banc), and  
12 allow Plaintiff twenty-one days to file a supplemental opposition. (Doc. 23.) Defendants also  
13 request an extension of time to file their reply to Plaintiff’s April 21, 2014 opposition to their  
14 Rule 12(b)(6) motion. (Id.) Defendants have also filed a notice of motion for summary  
15 judgment, conditioned on the court granting their request to convert, and a Rand warning  
16 directed to Plaintiff. (Doc. 24.)

17 Defendants’ motion to convert and motion for extension of time are now before the  
18 court.

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20 **II. CONVERSION OF MOTION TO DISMISS TO MOTION FOR SUMMARY JUDGMENT**

21 **A. Legal Standards**

22 **Conversion of Motion to Dismiss**

23 Generally, when resolving a motion to dismiss, the court may not consider materials  
24 outside the complaint and pleadings. See Branch v. Tunnell, 14 F.3d 449, 453 (9th Cir. 1994);  
25 Cooper v. Pickett, 137 F.3d 616, 622 (9th Cir. 1998). If materials outside the pleadings are  
26 considered, then a motion to dismiss may be converted to a motion for summary judgment  
27 under Rule 56. See Anderson v. Angelone, 86 F.3d 932, 934 (9th Cir. 1996). The district court  
28 must take some affirmative action to effectuate conversion, preferably by an explicit ruling that

1 is will consider extrinsic materials attached to the motion to dismiss. Swedberg v. Marotzke,  
2 339 F.3d 1139, 1146 (9th Cir. 2003). Upon conversion, all parties must be given a reasonable  
3 opportunity to present all material pertinent to the motion. Fed. R. Civ. P. 12(d). Where  
4 plaintiff is a pro se prisoner, the court must explain the conversion to summary judgment and  
5 the consequence of failing to provide counter-affidavits. Anderson, 86 F.3d at 934.

6 **Albino v. Baca**

7 The Ninth Circuit's recent decision in Albino v. Baca overruled Wyatt v. Terhune, 315  
8 F.3d 1108, 1119 (9th Cir. 2003) with respect to the proper procedural device for raising the  
9 issue of administrative exhaustion. Following the decision in Albino, Defendants may raise the  
10 issue of exhaustion in either (1) a motion to dismiss pursuant to Rule 12(b)(6), in the rare event  
11 the failure to exhaust is clear on the face of the complaint, or (2) a motion for summary  
12 judgment. Albino, 2014 WL 1317141, at \*4 (quotation marks omitted). An unenumerated  
13 Rule 12(b) motion is no longer the proper procedural device for raising the issue of exhaustion.

14 Id.

15 **B. Defendants' Request**

16 Defendants request the court to convert their unenumerated Rule 12(b) motion to a  
17 motion for summary judgment, in light of the Albino decision. Defendants argue that  
18 conversion is appropriate because their pending motion complies with the exhaustion standard  
19 discussed in Albino, which held that the defendant's burden is to prove that there was an  
20 available administrative remedy and that the prisoner did not exhaust that available remedy.  
21 Defendants also argue that conversion is appropriate because the Albino court observed that the  
22 procedural changes are primarily a "matter of nomenclature." Albino, 2014 WL 1317141 at  
23 \*6. Defendants assert that they fully briefed the issue of exhaustion in their pending Rule 12(b)  
24 motion, and the motion includes evidentiary support showing that Plaintiff failed to utilize the  
25 existing prison grievance process of which he was aware, regarding the claim against  
26 Defendants. Defendants request the court to provide Plaintiff twenty-one days to file  
27 supplemental oppositional briefing that comports with the standards set forth under Rule 56 and  
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1 the Rand notice filed concurrently with Defendants’ request for conversion.<sup>1</sup> Defendants also  
2 argue that converting the motion serves the interests of judicial efficiency.

3 **C. Discussion**

4 Given the state of the law at the time, Defendants properly followed the process set out  
5 in Wyatt and moved for dismissal of Plaintiff’s Complaint for failure to exhaust by filing an  
6 unenumerated motion under Federal Rule of Civil Procedure 12(b). However, under Albino  
7 that is no longer the proper procedure for raising the issue of exhaustion.

8 The court has considered Defendants’ reasoned arguments in support of their motion to  
9 convert. However, conversion of only part of the existing motion to dismiss at this stage of the  
10 proceedings confuses the issues, which the court finds to be prejudicial to Plaintiff who would  
11 be required to distinguish the motion for summary judgment from the Rule 12(b)(6) motion to  
12 dismiss and file a new or supplemental response addressing only the motion for summary  
13 judgment applying new rules. While it is true that the Albino court observed that the  
14 procedural changes are primarily a “matter of nomenclature,” there are significant differences  
15 between summary judgment and other procedures aimed at eliminating claims and defenses.

16 The Court finds that clear separation of the motions will simplify the process and thus  
17 serve judicial efficiency and fairness to both parties. Therefore, Defendants’ unenumerated  
18 Rule 12(b) motion shall be denied for procedural reasons, without prejudice to renewal of the  
19 motion as a motion for summary judgment.

20 **III. CONCLUSION**

21 Based on the foregoing, IT IS HEREBY ORDERED that:

- 22 1. Defendants’ request to convert their unenumerated Rule 12(b) motion to dismiss  
23 to a motion for summary judgment, filed on April 23, 2014, is DENIED;  
24 2. Defendants’ notice of motion of summary judgment, filed on April 23, 2014, is  
25 DISREGARDED as moot;

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27 <sup>1</sup> A Rand Notice and Warning informs a prisoner pro se plaintiff of his rights and responsibilities in  
28 opposing the defendant’s motion for summary judgment. Rand v. Rowland, 154 F.3d 952 (9th Cir. 1998) (en  
banc). Pursuant to Woods v. Carey, 684 F.3d 934, 939 (9th Cir. 2012), defendants are expected to give this  
required notice contemporaneously with summary judgment motions directed at actions by pro se plaintiffs.

- 1 3. Defendants' unenumerated Rule 12(b) motion to dismiss is DENIED, without  
2 prejudice to renewal of the motion as a motion for summary judgment; and  
3 4. Defendants are GRANTED an extension of time until thirty days from the date  
4 of service of this order, in which to file a reply to Plaintiff's opposition to  
5 Defendants' Rule 12(b)(6) motion to dismiss for failure to state a claim.

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7 IT IS SO ORDERED.

8 Dated: May 7, 2014

/s/ Gary S. Austin  
UNITED STATES MAGISTRATE JUDGE