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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

MARIO NAVARRO,  
Plaintiff,  
v.  
DEBRA HERNDON, et al.,  
Defendants.

No. 2:09-cv-1878 KJM KJN P

ORDER

The Ninth Circuit Court of Appeals, in Albino v. Baca, \_\_\_ F.3d \_\_\_, 2014 WL 1344468 (9th Cir. Apr. 7, 2014) (en banc), recently held that a motion for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, not an “unenumerated 12(b) motion” to dismiss, is the appropriate vehicle for challenging a prisoner’s claims based on an alleged failure to exhaust administrative remedies.

Accordingly, IT IS HEREBY ORDERED that:

1. Defendants’ motion to dismiss for failure to exhaust administrative remedies, currently pending in this action (ECF No. 107), is denied without prejudice.
2. Defendant may file and serve, within thirty (30) days after the filing date of this order, a motion for summary judgment that includes notice to plaintiff of the evidentiary requirements for opposing the motion. See Woods v. Carey, 684 F.3d 934 (9th Cir. 2012); Rand v. Rowland, 154 F.3d 952, 957 (9th Cir. 1998). Such motion shall be briefed in accordance with Local Rule

1 230(1).

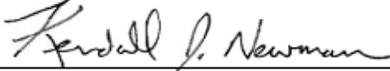
2 3. Due to the patchwork nature of briefing on the prior motion to dismiss (see e.g. ECF  
3 No. 140 (designating three documents as portions of plaintiff's surreply)), neither defendants nor  
4 plaintiff may rely on evidence previously submitted in this action. Rather, defendants may file  
5 one motion and a reply (optional), and plaintiff may file one opposition but no surreply; these  
6 respective briefs shall include all of the parties' evidence.

7 4. Finally, plaintiff is admonished to stop filing errant motions and requests in this action.  
8 (See e.g. ECF No. 141 (request for court intervention); ECF No. 142 (notice of obstruction); ECF  
9 No. 143 (request for order allowing new evidence).) Plaintiff is cautioned that a litigant  
10 proceeding in forma pauperis may suffer restricted access to the court where it is determined that  
11 he has filed excessive motions in a pending action. DeLong v. Hennessey, 912 F.2d 1144 (9th  
12 Cir. 1990); see also Tripati v. Beaman, 878 F2d 351, 352 (10th Cir. 1989). Plaintiff has filed  
13 excessive motions and requests in this action. If plaintiff does not exercise appropriate restraint  
14 in the future, by limiting his filings only to authorized matters, the court will expressly consider  
15 whether to restrict plaintiff's access to the court for the remainder of this litigation.

16 SO ORDERED.

17 Dated: April 16, 2014

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KENDALL J. NEWMAN  
UNITED STATES MAGISTRATE JUDGE