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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

GOLDYN COOPER,  
Plaintiff,  
v.  
SCOTT HEATLEY, et al.,  
Defendants.

No. 2:12-cv-00602 KJM DAD P

ORDER

On March 5, 2014, defendants filed a motion to dismiss on the grounds that this court lacks subject matter jurisdiction over this action because plaintiff failed to exhaust his administrative remedies prior to filing suit as required. On April 3, 2014, the United States Court of Appeals for the Ninth Circuit overruled its prior decision in Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003), with respect to the proper procedural device for seeking pretrial resolution of an affirmative defense on the basis of failing to comply with the administrative exhaustion requirement. See Albino v. Baca, \_\_\_ F.3d \_\_\_, 2014 WL 1317141 at \*1 (9th Cir. 2014) (en banc). Under the decision in Albino, a defendant may raise the issue of proper exhaustion in either (1) a motion to dismiss brought pursuant to Rule 12(b)(6), in the rare event the failure to exhaust is clear on the face of the complaint, or (2) a motion for summary judgment. Id. at \*4 (quotation marks omitted). An unenumerated Rule 12(b) motion is no longer the proper procedural device for raising the issue of exhaustion. Id.

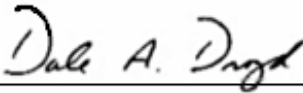
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Accordingly, IT IS HEREBY ORDERED that:

1. Defendants' March 5, 2014 motion to dismiss for failure to exhaust administrative remedies prior to filing suit (ECF No. 37) is denied without prejudice to the filing of a motion for summary judgment in accordance with the decision in Albino within thirty days; and

2. Plaintiff's opposition, which may incorporate his previously filed opposition, shall be filed within twenty-one days after the date of service of the motion on plaintiff; defendants' reply, which may incorporate by reference his previously filed reply on his motion to dismiss, shall be filed seven days thereafter.

Dated: May 21, 2014



\_\_\_\_\_  
DALE A. DROZD  
UNITED STATES MAGISTRATE JUDGE

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