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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CURTIS NUNEZ, JR.,
Plaintiff,
v.
K.M. PORTER, et al.,
Defendants.

No. 2:12-cv-2775 JAM 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.

In the present case, the undersigned properly considered defendants’ motion to dismiss pursuant to the former procedure and standard; however, in light of Albino, that procedure and standard no longer apply.

Accordingly, IT IS HEREBY ORDERED that:

1. The undersigned’s amended findings and recommendations filed March 26, 2014 (ECF No. 36), are withdrawn;

///

1 2. Defendants' motion to dismiss for failure to exhaust administrative remedies (ECF No.
2 20), is denied without prejudice;

3 3. The extension of time accorded to plaintiff for filing objections (ECF No. 38), is moot;
4 and

5 4. Defendants may file and serve, within thirty (30) days after the filing date of this order,
6 a motion for summary judgment based on plaintiff's alleged failure to exhaust his administrative
7 remedies, consistent with Albino v. Baca, ___ F.3d ___, 2014 WL 1344468; the motion shall
8 include notice to plaintiff of the evidentiary requirements for opposing the motion, see Woods v.
9 Carey, 684 F.3d 934 (9th Cir. 2012); Rand v. Rowland.

10 SO ORDERED.

11 Dated: April 18, 2014

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13 /Nune2775.Albino.withdraw.F&R.

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KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE