1 2 3 4 5 6 7 8 UNITED STATES DISTRICT COURT 9 FOR THE EASTERN DISTRICT OF CALIFORNIA 10 11 LARRY HINES, No. 2:13-cv-0392 JAM AC P 12 Plaintiff, 13 v. 14 NORIEGA, et al., **ORDER** 15 Defendants. 16 17 Plaintiff, a state prisoner proceeding pro se, seeks relief pursuant to 42 U.S. § 1983. 18 Pending before the court is defendant Noriega's fully briefed motion to dismiss the amended 19 complaint for failure to exhaust administrative remedies, pursuant to non-enumerated Fed. R. Civ. 20 P. 12(b), and for failure to state a claim, pursuant to Fed. R. Civ. P. 12(b)(6). ECF Nos. 18, 22, 21 23. 22 On April 3, 2014, the Ninth Circuit overruled Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th 23 Cir. 2003) and held that the defense of failure to exhaust administrative remedies under 42 U.S.C. 24 § 1997e(a) should in most cases be presented in a motion for summary judgment rather than a 25 motion to dismiss under unenumerated Rule 12(b). Albino v. Baca, No. 10-55702, 2014 WL 26 1317141 (9th Cir. Apr. 3, 2014) (en banc). Because defendant Noriega has moved for dismissal 27 of the amended complaint as administratively unexhausted pursuant to Rule 12(b), and has not 28 1

complied with the requirements of Rule 56, the court will vacate the motion and direct the defendant to file within fourteen (14) days a motion that complies with <u>Albino</u>. The portion of defendant's motion that asserts failure to state a claim, and does not involve administrative exhaustion, may be refiled as a separate motion or in combination with a motion for summary judgment pursuant to Rule 56 regarding plaintiff's alleged failure to exhaust.

Accordingly, IT IS ORDERED that:

- 1. Defendant's motion to dismiss (ECF No. 18) is vacated;
- 2. Defendant may, within fourteen days, bring a motion for summary judgment pursuant to Fed. R. Civ. P. 56 on the issue of administrative exhaustion. In doing so, defendant must provide plaintiff with the notice required under <u>Rand v. Rowland</u>, 154 F.3d 952, 957 (9th Cir. 1998) (en banc);
- 3. Defendant may, within fourteen days, re-file that portion of the vacated motion brought pursuant to Rule 12(b)(6) in a separate motion or in combination with any motion for summary judgment regarding the exhaustion of administrative remedies.

DATED: April 10, 2014

ALLISON CLAIRE

UNITED STATES MAGISTRATE JUDGE