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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

IRA DON PARTHEMORE,
Plaintiff,
v.
B. KISSEL, et al.,
Defendants.

No. 2:13-cv-0819 KJM AC P

ORDER

Plaintiff, a state prisoner proceeding pro se, seeks relief pursuant to 42 U.S. § 1983. On March 10, 2014 defendants filed a motion to dismiss the first amended complaint for failure to exhaust administrative remedies, pursuant to non-enumerated Fed. R. Civ. P. 12(b), and for failure to state a claim, pursuant to Fed. R. Civ. P. 12(b)(6). ECF No. 33.

On April 3, 2014, the Ninth Circuit overruled Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003) and held that the defense of failure to exhaust administrative remedies under 42 U.S.C. § 1997e(a) should in most cases be presented in a motion for summary judgment rather than a motion to dismiss under unenumerated Rule 12(b). Albino v. Baca, No. 10-55702, 2014 WL 1317141 (9th Cir. Apr. 3, 2014) (en banc). Because defendants have moved for dismissal of the amended complaint as administratively unexhausted pursuant to Rule 12(b), and have not complied with the requirements of Rule 56, the court will vacate the motion and direct the

1 defendants to file within fourteen (14) days a motion that complies with Albino. The portion of
2 defendants' motion that asserts failure to state a claim, and does not involve administrative
3 exhaustion, may be refiled as a separate motion or in combination with a motion for summary
4 judgment pursuant to Rule 56 regarding plaintiff's alleged failure to exhaust.

5 Accordingly, IT IS ORDERED that:

- 6 1. Defendants' motion to dismiss (ECF No. 33) is vacated;
- 7 2. Defendants may, within fourteen days, bring a motion for summary judgment pursuant
8 to Fed. R. Civ. P. 56 on the issue of administrative exhaustion. In doing so, defendants must
9 provide plaintiff with the notice required under Rand v. Rowland, 154 F.3d 952, 957 (9th Cir.
10 1998) (en banc);
- 11 3. Defendants may, within fourteen days, re-file that portion of the vacated motion
12 brought pursuant to Rule 12(b)(6) in a separate motion or in combination with any motion for
13 summary judgment regarding the exhaustion of administrative remedies.

14 DATED: April 15, 2014

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16 ALLISON CLAIRE
17 UNITED STATES MAGISTRATE JUDGE
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