

1 issue of exhaustion is not properly raised in an unenumerated Rule 12(b)(6) motion and has not
2 been for some time. On April 3, 2014, the United States Court of Appeals for the Ninth Circuit
3 overruled Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003), with respect to the proper
4 procedural device for raising the issue of administrative exhaustion. Albino v. Baca, 747 F.3d
5 1162, 1166 (9th Cir. 2014) (en banc). Following the decision in Albino, a defendant may raise
6 the issue of exhaustion in either (1) a motion to dismiss pursuant to Rule 12(b)(6), “[i]n the rare
7 event that a failure to exhaust is clear on the face of the complaint,” or (2) a motion for summary
8 judgment. Id. at 1166. “[A]n unenumerated motion under Rule 12(b) is not the appropriate
9 procedural device for pretrial determination of whether administrative remedies have been
10 exhausted under the PLRA.” Id. at 1168.

11 It is not clear from the face of the complaint that plaintiff failed to exhaust, as the
12 complaint indicates that she did in fact exhaust her administrative remedies (ECF No. 23 at 3-5)
13 and defendants rely on outside evidence to demonstrate her alleged failure (ECF No. 32-4).
14 Because defendants have improperly raised the exhaustion defense in their motion to dismiss, the
15 motion will be denied without prejudice to a motion in the proper form. Defendants may either
16 re-file their motion to dismiss without the exhaustion argument or they may file it as a motion for
17 summary judgment that complies with the applicable rules and includes the notice required by
18 Rand v. Rowland, 154 F.3d 952, 957 (9th Cir. 1998) (en banc).²

19 Accordingly, IT IS HEREBY ORDERED that:

20 1. Defendants’ motion to dismiss (ECF No. 32) is denied without prejudice to a motion
21 in the proper form.

22 2. Within fourteen days of the service of this order, defendants must (1) re-file their
23 motion to dismiss without the exhaustion argument; (2) file a motion for summary judgment on
24 exhaustion that complies with the applicable rules and includes the notice required by Rand v.

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26 single case that would count as a strike with respect to the instant action. Tierney v. Kupers, 128
27 F.3d 1310, 1311 (9th Cir. 1997) (the language of § 1915(g) “makes clear its application to claims
28 dismissed prior to the current proceedings”).

² Defendants will not be precluded from raising the exhaustion issue at a later date if they choose
not to file a motion for summary judgment at this time.

1 Rowland, 154 F.3d 952, 957 (9th Cir. 1998) (en banc); or (3) answer the complaint.

2 DATED: July 14, 2020

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4 ALLISON CLAIRE
5 UNITED STATES MAGISTRATE JUDGE
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