



1 Rule 12(b) motion to dismiss on the ground that Plaintiff failed to exhaust the available administrative  
2 remedies. 42 U.S.C. § 1997e(a); Fed. R. Civ. P. 12(b). Plaintiff filed an opposition on February 10,  
3 2014, and Defendants filed a reply on February 20, 2014.

4 On April 3, 2014, the United States Court of Appeals for the Ninth Circuit issued a decision  
5 overruling Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003) with respect to the proper  
6 procedural device for raising the issue of administrative exhaustion. Albino v. Baca, No. 10-55702,  
7 2014 WL 1317141, at \*1 (9th Cir. Apr. 3, 2014) (en banc). Following the decision in Albino,  
8 Defendants may raise the issue of exhaustion in either (1) a motion to dismiss pursuant to Rule  
9 12(b)(6), in the rare event the failure to exhaust is clear on the face of the complaint, or (2) a motion  
10 for summary judgment. Albino, 2014 WL 1317141, at \*4 (quotation marks omitted). An  
11 unenumerated Rule 12(b) motion is no longer the proper procedural device for raising the issue of  
12 exhaustion. Id.

13 Accordingly, in light of the decision in Albino, it is HEREBY ORDERED that:

14 1. Defendants' unenumerated Rule 12(b) motion is denied, without prejudice, on  
15 procedural grounds; and

16 2. Defendants have **thirty (30) days** from the date of service of this order within which to  
17 file a responsive pleading or motion.

18  
19 IT IS SO ORDERED.

20 Dated: April 10, 2014

  
21 UNITED STATES MAGISTRATE JUDGE