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**UNITED STATES DISTRICT COURT**  
EASTERN DISTRICT OF CALIFORNIA

JESSIE L. SERRANO,

Plaintiff,

v.

SCOTT RAWERS, et al.,

Defendants.

Case No. 1:11-cv-0399-MJS (PC)

**ORDER (1) DENYING UNENUMERATED  
RULE 12(b) MOTION WITHOUT  
PREJUDICE, (2) DENYING  
DEFENDANT'S MOTION FOR AN  
EXTENSION OF TIME AS MOOT, AND (3)  
REQUIRING DEFENDANT TO FILE  
RESPONSIVE PLEADING OR MOTION  
WITHIN THIRTY DAYS**

**(ECF Nos. 21, 26)**

Plaintiff Jessie L. Serrano, a state prisoner proceeding pro se and in forma pauperis, filed this civil rights action pursuant to 42 U.S.C. § 1983. The matter proceeds on an Eighth Amendment failure to protect claim against Defendant Lucas.

On November 25, 2013, Defendant Lucas filed a motion to dismiss the action under the unenumerated provisions of Federal Rule of Civil Procedure 12(b) for failure to exhaust administrative remedies. (ECF No. 21); 42 U.S.C. § 1997e(a); Fed. R. Civ. P. 12(b). Defendant also filed a motion for an extension of time to reply to Plaintiff's opposition to the motion to dismiss. (ECF No. 26.)

On April 3, 2014, the United States Court of Appeals for the Ninth Circuit issued a decision overruling Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003) with respect to the proper procedural device for raising the issue of administrative exhaustion. Albino v.

1 Baca, No. 10-55702, 2014 WL 1317141, at \*1 (9th Cir. Apr. 3, 2014) (en banc). Following  
2 the decision in Albino, Defendants may raise the issue of exhaustion in either (1) a motion  
3 to dismiss pursuant to Rule 12(b)(6), in the rare event the failure to exhaust is clear on the  
4 face of the complaint, or (2) a motion for summary judgment. Albino, 2014 WL 1317141, at  
5 \*4. An unenumerated Rule 12(b) motion is no longer the proper procedural device for  
6 raising the issue of exhaustion. Id.

7 For the reasons stated, the unenumerated Rule 12(b) motion is procedurally  
8 deficient in light of the decision in Albino. The unenumerated Rule 12(b) motion shall be  
9 denied, without prejudice, on procedural grounds. Accordingly, Defendant's motion for an  
10 extension of time should also be denied as moot.

11 Accordingly, for the reasons stated, it is HEREBY ORDERED that:

- 12 1. The unenumerated Rule 12(b) motion filed November 25, 2013 (ECF No. 21)  
13 is DENIED, without prejudice, on procedural grounds,
- 14 2. Defendant's motion for an extension of time filed March 21, 2014 (ECF No.  
15 26) is DENIED as moot; and
- 16 3. Defendant shall, within **thirty (30) days** from the date of service of this order  
17 file a responsive pleading or motion.

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19 IT IS SO ORDERED.

20 Dated: May 12, 2014

21 /s/ Michael J. Seng  
22 UNITED STATES MAGISTRATE JUDGE  
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