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8 UNITED STATES DISTRICT COURT  
9 EASTERN DISTRICT OF CALIFORNIA  
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11 BRIAN ESPRITT,

12 Plaintiff,

13 v.

14 A. SAESEE, et al.,

15 Defendants.  
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1:11-cv-00519-AWI-GSA-PC

ORDER DENYING UNENUMERATED  
RULE 12(b) MOTION, WITHOUT  
PREJUDICE, ON PROCEDURAL  
GROUND AND REQUIRING  
DEFENDANTS TO FILE RESPONSIVE  
PLEADING OR MOTION WITHIN  
THIRTY DAYS

(Doc. 37.)

18 Brian Espritt (“Plaintiff”), a civil detainee at Atascadero State Hospital in Atascadero,  
19 California, is proceeding pro se and in forma pauperis in this civil rights action pursuant to 42  
20 U.S.C. § 1983. Plaintiff filed the Complaint commencing this action on March 28, 2011.  
21 (Doc. 1.) This case now proceeds on the Second Amended Complaint, filed by Plaintiff on  
22 July 20, 2012, against defendants Saesee, Hill, Torres, Davis, Lopez, Ballesteros, and Magallon  
23 for excessive force in violation of the Eighth Amendment. (Doc. 26.)

24 On September 19, 2013, defendants Magallon, Hill, Saesee, Lopez, and Ballasteros  
25 (“Defendants”) filed an unenumerated Rule 12(b) motion to dismiss on the ground that Plaintiff  
26 failed to exhaust the available administrative remedies. 42 U.S.C. § 1997e(a); Fed. R. Civ. P.  
27 12(b). (Doc. 37.) On November 14, 2013, Plaintiff filed an opposition to the motion. (Doc.  
28 43.) On November 20, 2013, Defendants filed a reply to the opposition. (Doc. 45.)

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

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

11 1. Defendants' unenumerated Rule 12(b) motion, filed on September 19, 2013, is  
12 DENIED, without prejudice, on procedural grounds; and

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

15 IT IS SO ORDERED.

16 Dated: April 11, 2014

17 /s/ Gary S. Austin  
18 UNITED STATES MAGISTRATE JUDGE