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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

EDIN A. CHACON,

Plaintiff,

vs.

J. CERRINI, et al.,

Defendants.

1:11-cv-01689-AWI-GSA-PC

ORDER RE DEFENDANTS' NOTICE OF  
WITHDRAWAL OF MOTION  
(Doc. 44.)

ORDER WITHDRAWING DEFENDANTS'  
MOTION TO DISMISS FROM THE  
COURT'S CALENDAR  
(Doc. 39.)

ORDER VACATING ORDER ISSUED ON  
MARCH 25, 2014  
(Doc. 43.)

ORDER FOR DEFENDANTS TO FILE  
NEW RESPONSE TO FIRST AMENDED  
COMPLAINT WITHIN THIRTY DAYS

**I. BACKGROUND**

Edin A. Chacon ("Plaintiff") is a former state prisoner proceeding pro se and in forma pauperis in this civil rights action filed pursuant to 42 U.S.C. § 1983. Plaintiff filed the Complaint commencing this action on January 10, 2011. (Doc. 1.) This case now proceeds on Plaintiff's First Amended Complaint filed on May 3, 2012, against defendants Correctional Officer (C/O) T. Crouch, Lieutenant J. Tyree, C/O Rivera, and IGI Adame (collectively, "Defendants"), for retaliation in violation of the First Amendment. (Doc. 22.)

On February 13, 2014, defendants Tyree and Rivera filed an unenumerated Rule 12(b) motion to dismiss on the ground that Plaintiff failed to exhaust the available administrative

1 remedies for the claims against them. 42 U.S.C. § 1997e(a); Fed. R. Civ. P. 12(b). (Doc. 39.)  
2 On March 25, 2014, the court issued an order requiring Plaintiff to file a response to the motion  
3 to dismiss within thirty days. (Doc. 43.) Plaintiff has not yet filed a response to the motion.

4 On May 6, 2014, defendants Tyree and Rivera filed a Notice of Withdrawal of their  
5 motion to dismiss. (Doc. 44.)

6 **II. NOTICE OF WITHDRAWAL**

7 Defendants Tyree and Rivera have filed a notice of withdrawal of their motion to  
8 dismiss, in light of the Ninth Circuit's recent decision in Albino v. Baca, No. 10-55702, 2014  
9 WL 1317141, at \*1 (9th Cir. Apr. 3, 2014) (en banc). Defendants request fourteen days in  
10 which to file an answer to the complaint. Defendants also request that the court grant them  
11 thirty days from the date the court issues its discovery and scheduling order, in which to file a  
12 motion for summary judgment based on Plaintiff's failure to exhaust administrative remedies as  
13 to defendants Tyree and Rivera.

14 **Discussion**

15 On April 3, 2014, the Ninth Circuit Court of Appeals issued its ruling in Albino,  
16 overruling Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003), finding that exhaustion  
17 issues are more appropriately handled under the Federal Rules' explicit provisions, and  
18 requiring Defendants to raise the exhaustion defense under Federal Rule of Civil Procedure 56,  
19 via a motion for summary judgment. Albino at \*1.

20 In light of the Ninth Circuit's decision in Albino, and good cause appearing, D  
21 defendants Tyree and Rivera's motion to dismiss of February 13, 2014 shall be withdrawn from  
22 the court's calendar. Defendants shall be allowed thirty days in which to file a new response to  
23 the complaint. In addition, upon issuance of a scheduling order in this action at a later stage of  
24 the proceedings, Defendants shall be allowed ample time to file a motion for summary  
25 judgment based on Plaintiff's failure to exhaust administrative remedies.<sup>1</sup>

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28 <sup>1</sup> As a rule, the court's new scheduling order allows three months for the filing of motions for summary  
judgment under Fed. R. Civ. P. 56 for failure to exhaust administrative remedies.

1 **IV. CONCLUSION**

2 Based on the foregoing, **IT IS HEREBY ORDERED** that:

- 3 1. Defendants Tyree and Rivera's motion to dismiss filed on February 13, 2014, is  
4 WITHDRAWN from the court's calendar;
- 5 2. The court's order of March 25, 2014, which required Plaintiff to file an  
6 opposition to defendants Tyree and Rivera's motion to dismiss of February 13,  
7 2014 within thirty days, is VACATED; and
- 8 3. Defendants are granted **thirty (30) days** from the date of service of this order  
9 within which to file a new response to the First Amended Complaint.

10 IT IS SO ORDERED.

11 Dated: May 7, 2014

12 /s/ Gary S. Austin  
13 UNITED STATES MAGISTRATE JUDGE