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**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA**

GILBERT AMBALONG, Plaintiff, v. R.H. TRIMBLE, et al., Defendants.	Case No. 1:12-cv-00658-AWI-DLB (PC) ORDER DENYING UNENUMERATED RULE 12(B) MOTION AND REQUIRING DEFENDANTS TO FILE RESPONSIVE PLEADING OR MOTION WITHIN THIRTY DAYS (Doc. 20)
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Plaintiff Gilbert Ambalong (“Plaintiff”), a state prisoner proceeding pro se and in forma pauperis, filed this civil rights action pursuant to 42 U.S.C. § 1983 on April 25, 2012. This action is proceeding on Plaintiff’s amended complaint against Defendants D.B. Allen, F. Igbinosa, R.H. Trimble, and B. Green (“Defendants”) for deliberate indifference to Plaintiff’s health and safety, in violation of the Eighth Amendment of the United States Constitution.

On July 2, 2013, Defendants filed an unenumerated Rule 12(b) motion to dismiss on the ground that Plaintiff failed to exhaust the available administrative remedies. 42 U.S.C. § 1997e(a); Fed. R. Civ. P. 12(b). Plaintiff did not file a response to the motion. Local Rule 230(l).

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. Baca*, No. 10-55702, 2014 WL 1317141, at *1 (9th Cir. Apr. 3, 2014) (en banc). Following the decision in *Albino*, Defendants may raise the issue of exhaustion in either (1) a motion to dismiss pursuant to

1 Rule 12(b)(6), in the rare event that the failure to exhaust is clear on the face of the complaint, or
2 (2) a motion for summary judgment. *Albino*, 2014 WL 1317141, at *4 (quotation marks omitted).
3 An unenumerated Rule 12(b) motion is no longer the proper procedural device for raising the issue
4 of exhaustion. *Id.*

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

- 6 1. Defendants' unenumerated Rule 12(b) motion is DENIED; and
- 7 2. Defendants have **thirty (30) days** from the date of service of this order within
8 which to file a responsive pleading or motion.

9
10 IT IS SO ORDERED.

11 Dated: April 16, 2014



12 SENIOR DISTRICT JUDGE