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

EARL WARNER,  
Plaintiff,  
v.  
MATTHEW L. CATE, et al.,  
Defendants.

Case No. 1:12-cv-01146-MJS (PC)  
**ORDER (1) DISREGARDING UNENUMERATED RULE 12(b) MOTION , (2) DISREGARDING MOTION TO STRIKE SURREPLY TO UNENUMERATED RULE 12(b) MOTION, (3) REQUIRING DEFENDANTS TO FILE RESPONSIVE PLEADING OR MOTION WITHIN FORTY-FIVE DAYS, and (4) DENYING REQUEST FOR STAY OF DISCOVERY AND SCHEDULING**  
**(ECF Nos. 20, 29, 33)**

On July 12, 2012, Plaintiff Earl Warner, a state prisoner proceeding pro se and in forma pauperis, filed this civil rights action pursuant to 42 U.S.C. § 1983. (ECF No. 1.) This matter proceeds on a failure to protect claim against Defendants Walker, McGaha, Prokop, Spalding, and Fellows.

On September 16, 2013, Defendants 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. 42 U.S.C. § 1997e(a); Fed. R. Civ. P. 12(b). Plaintiff filed opposition to which Defendants replied. Plaintiff filed a surreply which Defendants move to strike.

On April 3, 2014, the United States Court of Appeals for the Ninth Circuit issued a

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

9 On May 13, 2014, Defendants filed a notice acknowledging *Albino* and withdrawing  
10 their 12(b) motion and requesting forty-five days to file a motion for summary judgment for  
11 failure to exhaust and requesting the Court refrain from issuing a discovery and scheduling  
12 order until its ruling on summary judgment. Plaintiff filed opposition to which Defendants  
13 replied.

14 Accordingly, it is HEREBY ORDERED that:

- 15 1. The unenumerated Rule 12(b) motion filed September 16, 2013 (ECF No. 20)  
16 shall be DISREGARDED,
- 17 2. The motion to strike Plaintiff's surreply to the 12(b) motion (ECF No. 29) shall  
18 be DISREGARDED,
- 19 3. Defendants shall, **within forty-five (45) days** from the date of service of this  
20 Order file a responsive pleading or motion, and
- 21 4. Defendants unsupported request that the Court refrain from issuing a  
22 discovery and scheduling order pending ruling on summary judgment (ECF  
23 No. 33) is DENIED.

24 IT IS SO ORDERED.

25 Dated: May 30, 2014

26 /s/ Michael J. Seng  
27 UNITED STATES MAGISTRATE JUDGE  
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