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3 UNITED STATES DISTRICT COURT  
4 WESTERN DISTRICT OF WASHINGTON  
5 AT TACOMA

6 JAMES BYRON HOLCOMB,

7 Plaintiff,

8 v.

9 CAROLYN W. COLVIN, Commissioner of  
10 Social Security

11 Defendant.

Case No. 3:13-cv-05256-KLS

ORDER DENYING PLAINTIFF'S  
MOTION TO STRIKE DEFENDANT'S  
MOTION TO DISMISS

12 Plaintiff has brought this matter for judicial review of defendant's dismissal of his claim  
13 for spousal benefits. Pursuant to 28 U.S.C. § 636(c), Federal Rule of Civil Procedure 73 and  
14 Local Rule MJR 13, the parties have consented to have this matter heard by the undersigned  
15 Magistrate Judge. This matter comes before the Court on plaintiff's filing of a motion to strike  
16 defendant's motion to dismiss the complaint in this matter and to order defendant to file an  
17 answer and the administrative record, or in the alternative to continue the motion to dismiss to  
18 allow plaintiff additional time to file a response to the motion to dismiss.<sup>1</sup> See ECF #6 and #7.  
19 For the reasons discussed below, plaintiff's request to strike defendant's motion to dismiss and  
20 order defendant to file her answer and the administrative record is DENIED, but his request for  
21 additional time to file a response to the motion to dismiss is GRANTED.  
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24 Defendant has brought her motion to dismiss plaintiff's complaint for lack of subject  
25 matter jurisdiction pursuant to Federal Rule of Civil Procedure ("Fed. R. Civ. P.") 12(b)(1).

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<sup>1</sup> Plaintiff also has requested oral argument on his motion. The Court, however, finds such argument is unnecessary at this time, and therefore that request is DENIED.

1 Specifically, defendant alleges that because plaintiff did not exhaust all of his administrative  
2 remedies, he did not receive a final agency decision concerning his claim for spousal benefits,  
3 thereby depriving the Court of jurisdiction over this matter. It is not entirely clear what the basis  
4 for plaintiff's motion to strike is other than his assertion that the administrative record along with  
5 the answer to the complaint should be filed by defendant, and that he is prepared to go forward  
6 with arguing the merits of his case.  
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8 The Federal Rules of Civil Procedure are quite clear, however, that the defense of lack of  
9 subject matter jurisdiction "must be made before pleading if a responsive pleading is allowed."  
10 Fed. R. Civ. P. 12(b). That is, in order to assert this defense, defendant is required to assert it in  
11 a motion filed prior to filing her answer to the complaint. Defendant, therefore, was well within  
12 her rights to do so. Thus, given that defendant has not yet filed an answer, her motion to dismiss  
13 for lack of subject matter jurisdiction is properly before the Court. Nor does the Court find that  
14 the administrative record is required or necessary at this time.  
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16 A motion to dismiss attacking "the substance of a complaint's jurisdictional allegations  
17 despite their formal sufficiency," may "rely on affidavits or any other evidence properly before  
18 the court." St. Clair v. City of Chico, 880 F.2d 199, 201 (9th Cir. 1989); see also Corrie v.  
19 Caterpillar, Inc., 503 F.3d 974, 980 (9th Cir. 2007). The party opposing the motion then must  
20 "present affidavits or any other evidence necessary to satisfy its burden of establishing that the  
21 court, in fact, possesses subject matter jurisdiction." St. Clair, 880 F.2d at 201. Accordingly, it is  
22 not an abuse of the Court's discretion to consider such "extra-pleading material," even when  
23 "necessary to resolve factual disputes." Id.  
24

25 It is true that the Court may not decide the issue of subject matter jurisdiction under Fed.  
26 R. Civ. P. 12(b)(1) if "the jurisdictional issue and the issue on the merits are . . . factually so

