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

GERALD L. MILLER, JR.,  
CDCR #C-92075,  
  
Plaintiff,  
  
vs.  
  
O. RUFION; MOONGA, R.N.; J.  
AKANNO,  
  
Defendants.

Civil No. 08-1233 BTM (WMc)

**ORDER GRANTING PLAINTIFF'S  
MOTION TO WITHDRAW MOTION  
TO CHANGE PLEADINGS IN  
SECOND AMENDED COMPLAINT**

[Doc. Nos. 42, 50]

On February 22, 2010, Plaintiff filed a "Motion to Change Pleadings in Second Amended Complaint" which the Court construed as a Motion for Leave to File an Amended Complaint. See Feb. 24, 2010 Order at 1. On April 5, 2010, Plaintiff filed a Motion to withdraw his motion to amend his Second Amended Complaint. In this latest motion, Plaintiff seeks to withdraw his motion due to the fact that he has not exhausted these claims that he seeks to add to his Second Amended Complaint.

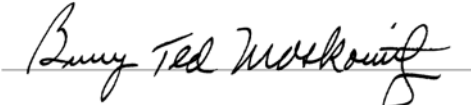
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1           The Court **GRANTS** Plaintiff’s Motion to Withdraw his Motion to Change the Pleadings  
2 in his Second Amended Complaint [Doc. Nos. 42, 50].. However, to the extent that Plaintiff  
3 seeks to have these unexhausted claims stayed, the Court must deny this request. Any new  
4 claims that were not exhausted at the time Plaintiff originally filed this action cannot be brought  
5 in this action. The plain language of 42 U.S.C. § 1997e(a) provides that no § 1983 action “shall  
6 be *brought* . . . until such administrative remedies as are available are exhausted.” 42 U.S.C.  
7 § 1997e(a) (emphasis added). The Ninth Circuit’s decision in *McKinney v. Carey*, 311 F.3d  
8 1198 (9th Cir. 2002) holds that prisoners who are incarcerated at the time they file a civil action  
9 which challenges the conditions of their confinement are required to exhaust “all administrative  
10 remedies as are available” as a mandatory precondition to suit. *See McKinney*, 311 F.3d at 1198.  
11 Thus, Plaintiff must bring these new claims in a separate civil action after the claims are fully  
12 exhausted.

13           The operative pleading in this matter remains Plaintiff’s Second Amended Complaint  
14 [Doc. No. 37].

15           **IT IS SO ORDERED.**

16 DATED: April 8, 2010

17   
18 Honorable Barry Ted Moskowitz  
19 United States District Judge  
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