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8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE EASTERN DISTRICT OF CALIFORNIA

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11 **BRADY ARMSTRONG,**

12 Plaintiff,

13 v.

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15 **A. ANDERSON, et al.,**

16 Defendants.

Case No. 1:11-cv-01996-LJO-BAM (PC)

**ORDER GRANTING DEFENDANTS'  
MOTION TO MODIFY SCHEDULING  
ORDER, AND STAY DISCOVERY AND  
DISPOSITIVE MOTIONS PENDING  
OUTCOME OF DEFENDANTS' MOTION  
FOR SUMMARY JUDGMENT**

(ECF No. 46)

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18 **I. Procedural Background**

19 Plaintiff Brady K. Armstrong ("Plaintiff") is a state prisoner proceeding pro se and in forma  
20 pauperis in this civil rights action. This matter proceeds on Plaintiff's complaint against  
21 Defendants Anderson and Adams for violations of the First and Eighth Amendments.

22 On July 5, 2013, the Court screened Plaintiff's complaint and found service appropriate for  
23 Defendants Anderson and Armstrong. (ECF No. 13.)

24 On October 14, 2013, Defendant Adams filed a motion to dismiss for failure to exhaust  
25 administrative remedies. (ECF No. 16.) Plaintiff opposed the motion on December 12, 2013, and  
26 Defendant Adams replied on December 19, 2013. (ECF Nos. 24, 27.)  
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1 On April 11, 2014, following the Ninth Circuit's decision in Albino v. Baca, 747 F.3d 1162  
2 (9th Cir. 2014), the Court struck Defendant Adams' motion to dismiss from the record and  
3 directed Defendants to file a responsive pleading within thirty days. (ECF No. 32.)

4 On April 24, 2014, Defendants filed an answer. (ECF No. 34.) Thereafter, on April 25,  
5 2014, the Court issued a Discovery and Scheduling Order. Pursuant to that order, the deadline to  
6 file any motion for summary judgment for failure to exhaust administrative remedies was July 25,  
7 2014, the deadline to complete discovery is December 25, 2014, and the deadline to file  
8 dispositive motions is March 5, 2015. (ECF No. 35.)

9 On July 21, 2014, Defendant Adams filed a motion for summary judgment on the ground  
10 that Plaintiff failed to exhaust his administrative remedies. (ECF No. 38.) Plaintiff failed to file a  
11 timely response. Accordingly, on November 3, 2014, the Court ordered Plaintiff to file an  
12 opposition or statement of non-opposition to the motion for summary judgment within twenty-  
13 one days. The Court warned Plaintiff that the failure to comply with the order would result in  
14 dismissal of this action, with prejudice, for failure to prosecute. (ECF No. 45.)

15 On November 14, 2014, Defendants Anderson and Adams filed the instant motion  
16 requesting modification of the Discovery and Scheduling Order to stay the discovery and  
17 dispositive motion deadlines in this action pending the outcome of Defendant Adams' motion for  
18 summary judgment. Defendants believe that it would be a waste of resources to conduct  
19 discovery during pendency of the motion for summary judgment because it is unclear what issues  
20 and defendants will remain in this case. Defendants also indicate that this action may be  
21 dismissed if Plaintiff fails to file an opposition or statement of non-opposition. (ECF No. 46.)

22 The Court finds a response unnecessary and the motion is deemed submitted.<sup>1</sup> Local Rule  
23 230(l).

## 24 **II. Standard**

25 Pursuant to Rule 16(b), a scheduling order "may be modified only for good cause and with  
26 the judge's consent." Fed. R. Civ. P. 16(b)(4). The "good cause" standard "primarily considers

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27 <sup>1</sup> Plaintiff will not be prejudiced by the inability to file a response because granting the motion will benefit  
28 all parties to this action and preserve judicial economy.

1 the diligence of the party seeking the amendment.” Johnson v. Mammoth Recreations, Inc., 975  
2 F.2d 604, 609 (9th Cir. 1992). The court may modify the scheduling order “if it cannot  
3 reasonably be met despite the diligence of the party seeking the extension.” Id. If the party was  
4 not diligent, the inquiry should end. Id.

### 5 **III. Discussion**

6 The Court finds good cause to vacate the discovery and dispositive motion deadlines in this  
7 action pending resolution of the motion for summary judgment. Defendants have been diligent in  
8 their litigation of this action. Defendants first filed a motion to dismiss for failure to exhaust in  
9 October 2013. However, pursuant to the Ninth Circuit’s ruling in Albino v. Baca, the motion to  
10 dismiss was stricken from the record. Thereafter, consistent with the holding in Albino and the  
11 Discovery and Scheduling Order in this matter, Defendant Adams filed a motion for summary  
12 judgment on the ground that Plaintiff failed to exhaust his administrative remedies.

13 Pending resolution of the motion for summary judgment, it is unclear what issues and  
14 defendants will remain in this case. Further, this action may be dismissed for failure to prosecute  
15 if Plaintiff fails to file an opposition or statement of non-opposition. Accordingly, vacating the  
16 relevant scheduling order deadlines will promote both judicial economy and the preservation of  
17 the parties’ resources. These deadlines shall be reset, if necessary and appropriate, following  
18 resolution of the pending motion for summary judgment.

### 19 **IV. Conclusion and Order**

20 For the reasons discussed above, and good cause appearing, IT IS HEREBY ORDERED as  
21 follows:

- 22 1. Defendants’ motion to modify the scheduling order and stay discovery and  
23 dispositive motions pending the outcome of Defendants’ motion for summary judgment  
24 is GRANTED;
- 25 2. The deadlines to complete discovery and to file dispositive motions are VACATED;  
26 and  
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3. The deadlines to complete discovery and to file dispositive motions shall be reset as appropriate and necessary following resolution of the pending motion for summary judgment.

IT IS SO ORDERED.

Dated: November 18, 2014

/s/ Barbara A. McAuliffe  
UNITED STATES MAGISTRATE JUDGE