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2
3 **UNITED STATES DISTRICT COURT**
4 **FOR THE EASTERN DISTRICT OF CALIFORNIA**
5

6 **STEVEN R. MILLER,**

7 **Plaintiff,**

8 **v.**

9 _____”
10 **Defendants.**
11

1:12-cv-01288-LJO (PC)

**ORDER RE MOTION TO COMPEL
AND MISCELLANEOUS REQUESTS
(ECF NO. 61)**

12
13 Pro se Plaintiff Steven Miller brings this case against Defendants, alleging failure to protect and
14 deliberate indifference claims under the Eighth and Fourteenth Amendments. *See* ECF No. 32. The
15 Discovery and Scheduling Order, issued February 1, 2017, set May 1, 2017 as the deadline for filing
16 “[a]ll motions asserting failure to exhaust administrative remedies.” ECF No. 41 at 3. The Discovery and
17 Scheduling Order further provides:

18 The issue of exhaustion must be raised by either (1) a procedurally proper
19 motion for summary judgment, or (2) a motion to dismiss pursuant to
20 Federal Rule of Civil Procedure 12(b)(6) if the failure to exhaust is clear
21 on the face of the complaint. If the parties believe that discovery related to
22 exhaustion is necessary, they may request discovery pursuant to Federal
23 Rule of Civil Procedure 56(d). Requests for limited discovery must be
24 made within 30 calendar days of the date of service of any motion
25 asserting failure to exhaust. A party may also request that discovery, other
than discovery related to exhaustion, be stayed pending the resolution of
an exhaustion motion.

Id.

On July 31, 2017, Plaintiff filed a “Motion to Compel a Response for Failure to Meet Exhaustion

1 Motion Filing Deadline . . . and Failure in Notification of Fresno Defendants Brief Statement From
2 Telephonic Hearing.” ECF No. 61. First, Plaintiff notes, correctly, that no Defendant filed any motion
3 asserting failure to exhaust administrative remedies by the May 1, 2017 deadline. *Id.* at 1. He then asks
4 the Court to compel Defendant to file “some sort of motion seeking the resolution of summary
5 judgment” or “find the Defendants in procedural default and grant a Summary Judgment to Plaintiff
6 under Federal Rules of Civil Procedure Rule 54(b).” *Id.* at 2.

7 This request is **DENIED**. While it is true that Defendants missed the relevant deadline for filing
8 a motion regarding exhaustion of administrative remedies, this only means that, absent a legally
9 justifiable excuse for doing so, Defendants have waived the right to bring a motion to dismiss and/or a
10 motion for summary judgment as to that issue. This does not necessarily mean that the issue of
11 exhaustion cannot be raised in a different context.

12 Second, Plaintiff appears to be suggesting that the Fresno County Defendants failed to file a
13 “brief statement” prior to the trial setting conference held on May 18, 2017. This is incorrect. The
14 Fresno County Defendants did include a brief statement of the case within their scheduling conference
15 statement filed in advance of the trial setting conference. *See* ECF No. 57 at 1. According to the proof of
16 service, the document containing that brief statement was served on Plaintiff at his address of record. *Id.*
17 at 4. The Court therefore sees no need to act upon Plaintiff’s request.

18
19 IT IS SO ORDERED.

20 Dated: August 2, 2017

/s/ Lawrence J. O’Neill
UNITED STATES CHIEF DISTRICT JUDGE