

1 exhaustion grounds. (Doc. 56.)

2 **II. Modification of Scheduling Order**

3 Pursuant to F.R.Civ.P. 16(b)(3)(A), district courts must enter scheduling orders to
4 establish deadlines for, among other things, to file motions and complete discovery. “A schedule
5 may be modified only for good cause and with the judge’s consent.” F.R.Civ.P. 16(b)(4). This
6 standard “primarily considers the diligence of the party seeking the amendment.” *Johnson v.*
7 *Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992). However, there are a number of
8 factors that may be considered such as:

- 9 1) whether trial is imminent, 2) whether the request is opposed, 3) whether the
- 10 non-moving party would be prejudiced, 4) whether the moving party was diligent
- 11 in obtaining discovery within the guidelines established by the court, 5) the
- 12 foreseeability of the need for additional discovery in light of the time allowed for

13 *U.S. ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1526 (9th Cir. 1995) *vacated on other*
14 *grounds*, 520 U.S. 939, 117 S. Ct. 1871 (1997) citing *Smith v. United States*, 834 F.2d 166, 169
15 (10th Cir.1987).

16 Here, trial is not imminent. While the time for Plaintiff to file an opposition to
17 Defendant’s motion for an extension of time has not yet lapsed, early consideration of
18 Defendant’s motion is appropriate because the new deadline will expire before the deadline for
19 filing an opposition and reply to this motion. Additionally, following remand from the Ninth
20 Circuit via mandate, Defendants’ request for additional time to determine which of the
21 Defendants were involved with the various aspects Plaintiff’s medical issues appears reasonable.
22 Although Defendants’ requested extension of time is granted, discovery on all issues shall remain
23 open as this aging case must move forward.

24 Defendants’ motion for extension of time implies that they intend to rely heavily, if not
25 exclusively, on the detailed requirements of section 3084.2 of Title 15 in any motion regarding
26 exhaustion. Any such motion will be subject to summary dismissal absent a showing that the
27 specific requirements of § 3084.0 *et seq.* were made known to Plaintiff at the time he filed any
28 inmate appeals which are attacked as insufficient. *Ross v. Blake*, 136 S. Ct. 1850, 1859 (2016)

1 (administrative remedies that are “essentially ‘unknowable’” are unavailable).

2 **III. Order**

3 Accordingly, it is HEREBY ORDERED that:

4 (1) Defendants’ motion to modify dates in the scheduling order, filed on August
5 31, 2016, is GRANTED and the Discovery and Scheduling Order is
6 MODIFIED as follows:

7 a. the deadline for filing motions for summary judgment under
8 Federal Rule of Civil Procedure 56 for failure to exhaust
9 administrative remedies is extended to thirty days after the date of
10 service of this order;

11 b. discovery shall remain open on all issues; and

12 (2) other than the above modification of deadlines, all requirements of the
13 Discovery and Scheduling Order which issued on February 18, 2016, (Doc.
14 43), remain in effect.

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16 IT IS SO ORDERED.

17 Dated: September 1, 2016

18 */s/ Sheila K. Oberto*
19 UNITED STATES MAGISTRATE JUDGE
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