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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

DEWAYNE THOMPSON,

 Plaintiff,

 v.

T. ADAMS, et al.,

 Defendants.

Case No. 1:13-cv-00655-AWI-SKO (PC)

ORDER GRANTING MOTION FOR
PROTECTIVE ORDER AND STAYING
DISCOVERY PENDING RESOLUTION OF
MOTION FOR SUMMARY JUDGMENT
FOR FAILURE TO EXHAUST

(Doc. 46)

Plaintiff DeWayne Thompson (“Plaintiff”), a state prisoner proceeding pro se and in forma pauperis, filed this civil rights action pursuant to 42 U.S.C. § 1983 on May 6, 2013. This action for damages is proceeding on Plaintiff’s fourth amended complaint against Defendants Felix, Harmon, Pendergrass, Cruz, and Brodie (“Defendants”) for violation of the Eighth Amendment of the United States Constitution. 28 U.S.C. § 1915A.

Defendants filed an answer on September 4, 2015, and the Court issued a scheduling order on September 9, 2015. On October 14, 2015, Defendants filed a motion seeking a protective order staying discovery pending resolution of their concurrently-filed motion for summary judgment for failure to exhaust the available administrative remedies. 42 U.S.C. § 1997e(a); Fed. R. Civ. P. 26(c); Fed. R. Civ. P. 56. (Docs. 45, 46.) Plaintiff filed an opposition to the motion for summary judgment on November 3, 2015, and he stated therein that he is not invoking Rule 56(d) to oppose the motion for a protective order. Fed. R. Civ. P. 56(d). (Doc. 48, Opp., 1:13-24.)

1 The Court is vested with broad discretion to manage discovery. *Dichter-Mad Family*
2 *Partners, LLP v. U.S.*, 709 F.3d 749, 751 (9th Cir. 2013) (per curiam), *cert. denied*, 134 S.Ct. 117
3 (2013); *Hunt*, 672 F.3d at 616; *Survivor Media, Inc. v. Survivor Prods.*, 406 F.3d 625, 635 (9th
4 Cir. 2005); *Hallett v. Morgan*, 296 F.3d 732, 751 (9th Cir. 2002). Pursuant to Rule 26(c)(1), the
5 Court may, for good cause, issue a protective order forbidding or limiting discovery. The
6 avoidance of undue burden or expense is grounds for the issuance of a protective order, Fed. R.
7 Civ. P. 26(c), and a stay of discovery pending resolution of potentially dispositive issues furthers
8 the goal of efficiency for the courts and the litigants, *Little v. City of Seattle*, 863 F.2d 681, 685
9 (9th Cir. 1988) (stay of discovery pending resolution of immunity issue). The propriety of
10 delaying discovery on the merits of the plaintiff's claims pending resolution of an exhaustion
11 motion was explicitly recognized by the Ninth Circuit. *Albino v. Baca*, 747 F.3d 1162, 1170-71
12 (9th Cir. 2014) (en banc), *cert. denied*, 135 S.Ct. 403 (2014); *see also Gibbs v. Carson*, No. C-13-
13 0860 THE (PR), 2014 WL 172187, at *2-3 (N.D. Cal. Jan. 15, 2014).

14 The failure to exhaust is an affirmative defense, and Defendants are entitled to judgment
15 on Plaintiff's claims against them if the Court determines the claims are unexhausted. *Albino*, 747
16 F.3d at 1166. Thus, the pending exhaustion motion has the potential to bring final resolution to
17 this action, obviating the need for merits-based discovery. *Gibbs*, 2014 WL 172187, at *3. In
18 *Albino*, the Ninth Circuit recognized that “[e]xhaustion should be decided, if feasible, before
19 reaching the merits of a prisoner's claims,” and “discovery directed to the merits of the suit”
20 should be left until later. *Albino*, 747 F.3d at 1170.

21 To the extent that the non-moving party needs specific discovery to address issues raised in
22 a dispositive motion, the non-moving party is entitled to seek redress. Fed. R. Civ. P. 56(d);
23 *Albino*, 747 F.3d at 1170-71; *Wyatt v. Terhune*, 315 F.3d 1108, 1115 n.7 (9th Cir. 2003)
24 (overruled on other grounds by *Albino*, 747 F.3d at 1168-69). Here, Plaintiff made no showing
25 that he needs any specific discovery in order to oppose the exhaustion motion and instead, he
26 stated his intent not to rely on Rule 56(d) to oppose the motion.

27 Accordingly, in the absence of any actual prejudice to Plaintiff and good cause having
28 been shown, Defendants' motion for a protective order shielding them from discovery pending

1 resolution of their exhaustion motion is HEREBY GRANTED and discovery is STAYED.¹ Fed.
2 R. Civ. P. 26(c); *Albino*, 747 F.3d at 1170-71.

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4 IT IS SO ORDERED.

5 Dated: November 16, 2015

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE

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28 ¹ If Defendants' motion for summary judgment is denied, the Court will issue an amended scheduling order. (Doc. 39.)