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7 UNITED STATES DISTRICT COURT
8 EASTERN DISTRICT OF CALIFORNIA
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10 SHAWN ANDERSON,

CASE NO. 1:14-cv-01380-MJS (PC)

11 Plaintiff,

**ORDER DENYING DEFENDANT'S
MOTION TO MODIFY THE DISCOVERY
AND SCHEDULING ORDER**

12 v.

13 CHRIS KRPAN, et al.,

(ECF NO. 55)

14 Defendants.

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17 Plaintiff is a state prisoner proceeding pro se and in forma pauperis in this civil
18 rights action brought pursuant to 42 U.S.C. § 1983. This matter proceeds on Plaintiff's
19 second amended complaint against Defendants Krpan and Foster on Eighth Amendment
20 medical indifference claims. (ECF No. 28, 30.)

21 On April 27, 2017, this Court set the Discovery and Scheduling Order ("DSO").
22 (ECF No. 42.) The deadline set by the DSO for filing motions for summary judgment for
23 failure to exhaust administrative remedies was July 27, 2017; the deadline to amend
24 pleadings was October 27, 2017; the discovery deadline was December 27, 2017, and
25 the deadline to file all other dispositive motions is March 8, 2018. (Id.)

26 Before the Court is Defendant Krpan's December 05, 2017, motion to modify the
27 DSO. (ECF No. 55.) Therein, Defendant seeks to (i) extend the deadline to amend
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1 pleadings to January 15, 2018; and (ii) extend the deadline to file motions for summary
2 judgment for failure to exhaust administrative remedies to March 8, 2018. (*Id.*) Plaintiff
3 opposes the motion. (ECF No. 56.) Defendant filed no reply. The matter is deemed
4 submitted. Local Rule 230(l).

5 **I. Legal Standard**

6 Under Federal Rule of Civil Procedure 16, a discovery and scheduling order
7 controls the course of litigation unless the Court subsequently alters the original order.
8 Fed R. Civ. P. 16(d). Modification of a scheduling order requires a showing of good
9 cause, Fed. R. Civ. P. 16(b)(4), and good cause requires a showing of due diligence,
10 Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 609 (9th Cir. 1992). To establish
11 good cause, the party seeking the modification of a scheduling order must generally
12 show that even with the exercise of due diligence, they cannot meet the requirement of
13 that order. *Id.* If the party seeking to amend the scheduling order fails to show due
14 diligence the inquiry should end and the court should not grant the motion to modify.
15 Zivkovic v. Southern California Edison, Co., 302 F.3d 1080, 1087 (9th Cir. 2002). While
16 courts may allow post-deadline amendments, the moving party must demonstrate that it
17 was diligent in seeking amendment. Eckert Cold Storage, Inc. v. Behl, 943 F. Supp.
18 1230, 1233 (E.D. Cal. 1996).

19 “Good cause may be found to exist where the moving party shows that it diligently
20 assisted the court with creating a workable scheduling order, that it is unable to comply
21 with the scheduling order’s deadlines due to matters that could not have reasonably been
22 foreseen at the time of the issuance of the scheduling order, and that it was diligent in
23 seeking an amendment once it became apparent that the party could not comply with the
24 scheduling order.” Kuschner Nationwide Credit, Inc., 256 F.R.D. 684, 687 (E.D. Cal.
25 2009).

26 **II. Analysis**

27 Defendant’s motion will be denied. He has not established good cause for a
28 modification of the DSO.

1 Defendant contends that he did not allege exhaustion as an affirmative defense
2 because he did not have the necessary administrative records. (ECF No. 55-1.) He states
3 that on May 17, 2017, he subpoenaed medical records from the California Department of
4 Corrections and Rehabilitation (“CDCR”) and the records produced did not contain any
5 administrative proceedings initiated by Plaintiff. (Id. at 3); See Decl. of Sanford, Ex. A
6 (ECF No. 55-3.) (requesting, “Incarceration records, inmate records to include but not
7 limited to ANY/ALL medical treatment, and/or documentation by any medical staff
8 member and/or any healthcare provider relating to injury(s) or any medical issue during
9 plaintiff’s . . . incarceration.”) Defendant indicates that on August 25, 2017, he sent
10 interrogatories to Plaintiff requesting documents relating to administrative proceedings
11 and that Plaintiff did not produce those. (Id. at 3-4); see Decl. of Sanford, Exs. B, C, D, E
12 (ECF Nos. 55-4, 55-5, 55-6, 55-7.) Defendant also states that on December 01, 2017, he
13 issued another subpoena to CDCR specifically requesting administrative records and
14 CDCR replied that it would not be able to produce those records until December 20,
15 2017. (Id. at 4). Decl. of Sanford, Ex. F (ECF No. 55-8.)

16 The foregoing does not demonstrate due diligence in complying with the DSO. The
17 initial subpoenas to CDCR, issued on May 17, 2017, were for medical records and did
18 not request or even mention administrative records. See Decl. of Sanford, Ex. A (ECF
19 No. 55-3.) Defendant had notice of the existence, and even the appropriate log number,
20 of the relevant administrative records from Plaintiff’s complaint. (See ECF No. 16 at 10.)
21 No unforeseen circumstance has arisen; the failure to request these records in due time
22 reflects a lack of diligence. See Johnson, 975 F.2d at 609. Defendant did not request
23 administrative records until almost a month after the July 27 deadline for filing a motion
24 (for summary judgment for failure to exhaust administrative remedies in reliance on those
25 records. See Decl. of Sanford, Ex. B (ECF No. 55-4 at 4) (interrogatories to Plaintiff were
26 not sent until August 25, 2017)); see also Decl. of Sanford, Exs. C, D, E, F (ECF Nos. 55-
27 5, 55-6, 55-7, 55-8.)

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1 Furthermore, Defendant did not promptly, diligently seek to amend the DSO once
2 it became clear that he could not comply with the deadline. See Kuschner, 256 F.R.D. at
3 687 (noting that failure to diligently request amendment in a timely manner demonstrates
4 a lack of due diligence). He did not so move until December 05, 2017, nearly five months
5 after the deadline for submitting motions for failure to exhaust administrative remedies
6 and nearly two months after the deadline to amend the pleadings. He attributes delay to
7 Plaintiff's allegedly deficient responses to discovery, but neither requested an
8 amendment to allow time to seek better responses or sought to compel discovery.

9 Defendant has not demonstrated sufficient grounds to amend the scheduling
10 order.

Finally, Plaintiff contends that he has, in fact, exhausted his administrative remedies and provides a log number for the relevant appeal. Defendant provides no basis to suggest that an exhaustion defense is available. It is of concern that Defendant anticipated receiving appeal records on or before December 20, 2017, i.e., before his reply on this motion was due, but has not since even advised the Court whether the records support or defeat the failure to exhaust claim.

17 Accordingly, IT IS HEREBY ORDERED that Defendant's December 05, 2017
18 motion to modify the DSO (ECF No. 55) is DENIED.

IT IS SO ORDERED.

21 Dated: January 11, 2018

/s/ *Michael J. Seng*
UNITED STATES MAGISTRATE JUDGE