



1 (“FAC”) against seven correctional staff members at California State Prison in Corcoran,  
2 California (“CSP-Cor”) for allegedly placing anti-psychotic medication in Plaintiff’s food without  
3 his permission. (Doc. 28.)

4 On March 24, 2017, the United States Marshals Service was ordered to serve the FAC on  
5 Defendants Gonzales, J. Juarez, L. Lawrence, J. Medina, R. Mendoza, A. Podsakoff, and B.  
6 Stringer. (Doc. 33.) Waivers of service, which were executed on May 5, 2017, were filed for all  
7 Defendants on May 16, 2017. (Docs. 37.) In accordance with Rule 4, Defendants responses to  
8 the FAC were due on or before June 2, 2017.

9 On May 17, 2017, Defendants filed a notice of related cases and a request for  
10 consolidation of this action with *Gonzales v. Ferrso et al.*, E.D. Cal. No. 1:16-cv-01813-EPG.  
11 (Doc. 35.) Defendants also requested an extension of time relieving them of their obligation to  
12 respond to the FAC until thirty days after issuance of a ruling on their request to consolidate.  
13 (Doc. 36.) This extension was granted on May 19, 2017. (Doc. 39.) Defendants’ request to  
14 consolidate was denied on September 7, 2017. (Doc. 48.) Five days later, Defendants filed a  
15 motion to require Plaintiff to post a monetary security based on his status as a vexatious litigant  
16 under California law. (Doc. 49.) On September 13, 2017, the Court issued a Second  
17 Informational Order informing Plaintiff of the requirements to oppose Defendants’ motion  
18 pursuant to Rule 56. (Doc. 50.)

19 Two days later, Defendants filed a request for clarification as to why the Second  
20 Informational Order had issued stating they had not intended that their motion be raised under  
21 Rule 56. (Doc. 51.) An order issued on September 27, 2017, noting that Defendants filed their  
22 motion for security as their first response to the FAC, and that to the extent Defendants’ motion  
23 relied on the insufficiency of Plaintiff’s compliance with 42 U.S.C. § 1997e(a), it was akin to a  
24 motion presenting a defense under Rule 12. (Doc. 53, 2.) The order further clarified that since  
25 Defendants’ motion attacks the sufficiency of Plaintiff’s exhaustion efforts, it is akin to raising an  
26 affirmative defense, which is properly handled under the framework of Rule 56, per *Albino v.*  
27 *Baca*, 747 F.3d 1162, 1166 (9th Cir. 2014) (en banc), cert. denied, 135 S.Ct. 403 (2014). (*Id.*)<sup>2</sup>

28 <sup>2</sup> The Court declined to make a ruling on the sufficiency of Plaintiff’s exhaustion efforts without providing instructions and an opportunity to oppose. (*Id.* (citing *Woods v. Carey*, 684 F.3d 934 (9th Cir. 2012), *Wyatt v.*

1 The order stayed the action pending issuance of a ruling on Defendants’ motion for an order  
2 requiring Plaintiff to post a security under Local Rule 151(b). (*Id.*, 3.) Defendants were given ten  
3 days from the date of the issuance of the order to file a notice withdrawing the portion of their  
4 motion that relied on Plaintiff’s exhaustion efforts, withdrawing their motion in its entirety, or  
5 notifying the Court of their election to stand on their motion as filed. (*Id.*) On September 28,  
6 2017, Defendants filed a response to the Court’s order electing to stand on their motion as filed.  
7 (Doc. 54.) Plaintiff filed a response to which Defendants objected. (Docs. 60, 61.)

8 Entry of default is appropriate “[w]hen a party against whom a judgment for affirmative  
9 relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or  
10 otherwise, . . . .” *See* Fed.R.Civ.P. 55(a). Given the chronological history of this case, none of  
11 the Defendants were in default on August 25, 2017, when Plaintiff filed his motions requesting  
12 entry of default. Furthermore, while Defendants have not filed a responsive pleading to the FAC,  
13 the Court finds that they have *not* failed to otherwise defend this action.

14 Since waiving service, Defendants have filed two significant motions: for consolidation  
15 and to require Plaintiff to post monetary security—both of which require resolution before the  
16 case proceeds. The motions filed by Defendants in this action are akin to a motion for summary  
17 judgment or a motion to dismiss, which when coupled with their timely responses to this Court’s  
18 orders, do not equate to a failure to “otherwise defend” this action. *See Universal Trading & Inv.*  
19 *Co. v. Kiritchenko*, No. C-99-3073 MMC, 2007 WL 660083 (N.D. Cal. 2007) (motion for  
20 summary judgment sufficient to “otherwise defend” an action for default analysis); *Winne v.*  
21 *Knight*, No. CV 15-44-H-DLC-JTJ, 2017 WL 2256619 (D. Mont. 2017) (finding filing of motion  
22 for summary judgment and objections to findings and recommendations sufficed to otherwise  
23 defend the action); *Baker v. Kernan*, No. CIV-S-051669-JAM-KJM-P, 2008 WL 2705028, at \*3  
24 (E.D. Cal. 2008), *report and recommendation adopted*, 2008 WL 5381601 (E.D. Cal. 2008);  
25 *K’Napp v. Adams*, No. 1:06-cv-01701-LJO-GSA, 2013 WL 2630384, at \*2 (E.D. Cal. 2013)  
26 (court unable to find defendants failed to plead or otherwise defend the action on filing of tardy  
27 answers); *Gipbsin v. Kernan*, No. CIV-S-07-0157-MCE-EFB-P, 2009 WL 1650029, at \*2 (E.D.  
28 *Terhune*, 315 F.3d 1108 (9th Cir. 2003), *Rand v. Rowland*, 154 F.3d 952 (9th Cir. 1998), and *Klinge v. Eikenberry*,  
849 F.2d 409 (9th Cir. 1988)).

