

1 **II. REQUEST FOR CLARIFICATION**

2 On October 3, 2017, the court issued a Discovery and Scheduling Order in this case.
3 (ECF No. 53.) Defendants request clarification of Section III.A. of the order, which provides:

4 All motions asserting failure to exhaust administrative remedies must be filed on
5 or before **01/03/18**. The issue of exhaustion must be raised by either (1) a
6 procedurally proper motion for summary judgment, or (2) a motion to dismiss
7 pursuant to Federal Rule of Civil Procedure 12(b)(6) if the failure to exhaust is
8 clear on the face of the complaint. If the parties believe that discovery related to
9 exhaustion is necessary, they may request discovery pursuant to Federal Rule of
10 Civil Procedure 56(d). Requests for limited discovery must be made **within 30**
11 **calendar days** of the date of service of any motion asserting failure to exhaust.
12 A party may also request that discovery, other than discovery related to
13 exhaustion, be stayed pending the resolution of an exhaustion motion.

14 (ECF No. 53 at 3:19-26 ¶III.A.)

15 Defendants question why the court’s order requires them to formally request permission
16 to engage in exhaustion-based discovery before propounding it. Defendants assert that Rule
17 56(d) provides the non-movant an opportunity to obtain discovery to oppose an already
18 pending summary-judgment motion, and does not require the moving party to seek leave of the
19 Court to engage in exhaustion-based discovery before filing a motion. Considering that
20 discovery is now open for all purposes in this case, Defendants believe they are permitted to
21 engage in discovery on all issues, including exhaustion, without specific leave from the court.

22 Under Rule 56(d), the court may allow time to “obtain affidavits or declarations or to
23 take discovery” when a non-moving party cannot present facts essential to justify its opposition
24 to a motion for summary judgment. Fed. R. Civ. P. 56(d)(2). Analogously, Section III.A. of
25 the court’s Discovery and Scheduling order is meant to allow time for the non-movant to
26 conduct discovery for opposition to an exhaustion motion. The court’s order allows the parties
27 to request that discovery be limited only to exhaustion-based discovery pending resolution of
28 an exhaustion motion. This provision allows the parties to resolve the issue of exhaustion,
which may be dispositive to Plaintiff’s claims, without being required to propound or respond
to discovery requests concerning issues which may not be necessary to the resolution of the
case. See Zweig v. Hearst Corp., 521 F.2d 1129, 1135–36 (9th Cir. 1975) (“Summary
judgment has, as one of its most important goals, the elimination of waste of the time and

1 resources of both litigants and the courts in cases where a trial would be a useless formality”);
2 see also Comm. of Russian Fed. on Precious Metals and Gems v. United States, 987 F.Supp.
3 1181, 1183 (N.D. Cal. 1997) (“The purpose of summary judgment or summary adjudication is
4 to avoid unnecessary trials when there is no dispute as to the facts before the court”); accord
5 UMG Recordings, Inc. v. Glob. Eagle Entm't Inc., No. CV1403466MMMJPRX, 2015 WL
6 12778410, at *3 (C.D. Cal. Nov. 25, 2015).

7 Defendants are correct that at this stage of the proceedings, discovery is open for all
8 purposes in this case, and Defendants are permitted to engage in discovery on all issues,
9 including exhaustion, without specific leave from the court.

10 **III. CONCLUSION**

11 Accordingly, this order HEREBY RESOLVES Defendants’ request for clarification
12 filed on October 6, 2017.

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14 IT IS SO ORDERED.

15 Dated: October 12, 2017

16 /s/ Gary S. Austin
17 UNITED STATES MAGISTRATE JUDGE
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