

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

RODERICK WILLIAM LEAR,  
  
                    Plaintiff,  
  
                    v.  
  
MARTIN BITER, et al.,  
  
                    Defendants.

CASE NO. 1:15-cv-01903-MJS (PC)  
  
**ORDER GRANTING DEFENDANTS’  
MOTION TO MODIFY THE DISCOVERY  
AND SCHEDULING ORDER**  
  
(ECF NO. 44)  
  
**JANUARY 22, 2018 DEADLINE**

Plaintiff is a state prisoner proceeding pro se and in forma pauperis in this civil rights action brought pursuant to 42 U.S.C. § 1983. The matter proceeds on Plaintiff’s Second Amended Complaint against Defendants Akanno and Palomino for medical indifference under the Eighth Amendment. (ECF No. 31.)

On August 22, 2017, this Court issued its Discovery and Scheduling Order (“DSO”) setting November 22, 2017 as the deadline for filing motions for summary judgment alleging a failure to exhaust administrative remedies. (ECF No. 40.)

Defendants now move to modify the DSO to give them additional time to review recently received and voluminous medical appeals filed by Plaintiff, determine if a motion for summary judgment for failure to exhaust administrative remedies is appropriate, and, if so, prepare and file such a motion. (ECF No. 44.) As of the date of this Order, Plaintiff has filed no opposition, but his time for doing so has not yet expired. Normally, the Court

1 would delay addressing a motion until the opposing party had expressed his or her view.  
2 However, here, having considered the facts and circumstances giving rise to Defendant's  
3 motion and the lack of any perceived prejudice to Plaintiff if it is granted, the Court will  
4 proceed to address the motion at this time.

5 Under Federal Rule of Civil Procedure 16, a discovery and scheduling order  
6 controls the course of litigation unless the Court subsequently alters the original order.  
7 Fed R. Civ. P. 16(d). Modification of a scheduling order requires a showing of good  
8 cause, Fed. R. Civ. P. 16(b)(4), and good cause requires a showing of due diligence,  
9 Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 609 (9th Cir. 1992). To establish  
10 good cause, the party seeking the modification of a scheduling order must generally  
11 show that even with the exercise of due diligence, they cannot meet the requirement of  
12 that order. Id. If the party seeking to amend the scheduling order fails to show due  
13 diligence the inquiry should end and the court should not grant the motion to modify.  
14 Zivkovic v. Southern California Edison, Co., 302 F.3d 1080, 1087 (9th Cir. 2002).

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

22 Defendants' motion meets the above criteria and will be granted.

23 Defendants have demonstrated diligence. They initiated discovery August 28,  
24 2017, six days after the DSO was issued. In September and October they sought and  
25 received some one hundred pages of information regarding Plaintiff's medical appeals.  
26 (ECF No. 44 at 2.) On October 11, 2017, they initiated communications with Plaintiff  
27 regarding perceived inadequacies in Plaintiff's discovery response. Id. Then, on  
28 November 9, 2017, Defendants received an additional one hundred or so pages of

1 medical appeal material. They promptly filed this motion seeking additional time to review  
2 the new material, determine if a motion for summary judgment for failure to exhaust  
3 administrative remedies was called for, and if so, prepare the motion. Id. The request to  
4 modify was filed before the deadline to be extended. (ECF No. 40.)

5 Defendants have shown good cause and diligence. There is no reason to believe  
6 Plaintiff will be prejudiced by granting Defendant's motion.

7 Considering the foregoing, IT IS HEREBY ORDERED that Defendants' November  
8 16, 2017 motion to modify the DSO (ECF No. 44) is GRANTED. Defendants' deadline to  
9 submit a motion for summary judgment for failure to exhaust administrative remedies is  
10 extended to January 22, 2018.

11  
12 IT IS SO ORDERED.

13 Dated: November 28, 2017

/s/ Michael J. Seng  
UNITED STATES MAGISTRATE JUDGE

14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28