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8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA
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11 LARRY SMITH,

12 Plaintiff,

13 vs.

14 SGT. J. GONZALES, et al.,

15 Defendants.
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1:17-cv-00436-DAD-GSA-PC

**ORDER GRANTING DEFENDANTS'
MOTION TO MODIFY SCHEDULING
ORDER
(ECF No. 45.)**

**ORDER STAYING DEADLINES FOR
DISCOVERY AND FOR FILING
DISPOSITIVE MOTIONS, PENDING
RESOLUTION OF DEFENDANTS'
EXHAUSTION MOTION
(ECF No. 33.)**

DEADLINES STAYED:

Discovery Deadline

Dispositive Motions Deadline

23 **I. BACKGROUND**

24 Larry Smith ("Plaintiff") is a state prisoner proceeding *pro se* and *in forma pauperis* with
25 this civil rights action pursuant to 42 U.S.C. § 1983. This case now proceeds with Plaintiff's
26 First Amended Complaint filed on June 23, 2017, against defendants Sergeant Gonzales,
27 Correctional Officer (C/O) Johnson, C/O Castro, C/O Miner, C/O Florez, and C/O Potzernitz for
28 use of excessive force in violation of the Eighth Amendment; against defendants C/O Fritz and

1 C/O Scaife for failure to protect Plaintiff in violation of the Eighth Amendment; and against
2 defendant Sergeant Gonzales for retaliation in violation of the First Amendment.¹ (ECF No. 12.)

3 On February 4, 2019, the court issued a Discovery and Scheduling Order establishing
4 pretrial deadlines for the parties, including a deadline of August 4, 2019, for the parties to
5 complete discovery, including the filing of motions to compel, and a deadline of October 4, 2019,
6 for the filing of pretrial dispositive motions. (ECF No. 33.)

7 On July 19, 2019, Defendants filed a motion to modify the Discovery and Scheduling
8 Order. (ECF No. 45.) On August 5, 2019, Plaintiff filed an opposition to the motion. (ECF No.
9 46.) On August 12, 2019, Defendants filed a reply to the opposition. (ECF No. 49.)

10 Defendants' motion to modify the Discovery and Scheduling Order is now before the
11 court. Local Rule 230(l).

12 **II. MOTION TO MODIFY SCHEDULING ORDER**

13 Modification of a scheduling order requires a showing of good cause, Fed. R. Civ. P.
14 16(b), and good cause requires a showing of due diligence, Johnson v. Mammoth Recreations,
15 Inc., 975 F.2d 604, 609 (9th Cir. 1992). To establish good cause, the party seeking the
16 modification of a scheduling order must generally show that even with the exercise of due
17 diligence, they cannot meet the requirement of the order. Id. The Court may also consider the
18 prejudice to the party opposing the modification. Id. If the party seeking to amend the scheduling
19 order fails to show due diligence the inquiry should end and the Court should not grant the motion
20 to modify. Zivkovic v. Southern California Edison, Co., 302 F.3d 1080, 1087 (9th Cir. 2002).

21 **A. Defendants' Motion**

22 Defendants move to vacate and reschedule the deadlines to complete discovery and to
23 file dispositive motions in this case. On April 30, 2019, Defendants filed a motion for summary
24 judgment for failure to exhaust which is now pending and if granted, this case will be dismissed.
25 If the motion is not granted, Defendants anticipate conducting discovery and filing a merits-based
26 motion for summary judgment. Defense counsel declares that he has been diligent in defending

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28 ¹ The court issued an order dismissing all other claims and defendants from this case on April 19,
2018, for failure to state a claim. (ECF No. 19.)

1 this action, filing an answer for Defendants on February 1, 2019, and thereafter preparing a
2 motion for summary judgment on the ground of failure to exhaust administrative remedies, which
3 was filed on April 30, 2019. (Matheson Decl., ECF No. 45-1 at 4 ¶ 2.) Because the Magistrate
4 Judge's findings and recommendations have not yet issued, Defendants expect their exhaustion
5 motion will not be decided until after the time to complete discovery has passed. Further, since
6 the court's ruling on the exhaustion motion may dispose of the case, Defendants request the court
7 to vacate the discovery and dispositive motions deadlines to be re-set if necessary after the court's
8 final ruling on the exhaustion summary judgment motion. Defendants contend that Plaintiff will
9 not be prejudiced by the brief extension.

10 **B. Plaintiff's Opposition**

11 In opposition, Plaintiff argues that the parties had adequate notice of the discovery and
12 dispositive motions deadlines and therefore the deadlines should not be extended. Plaintiff
13 argues that defense counsel is wasting the court's time and stalling, and that defense counsel
14 tends to stretch the truth.

15 **C. Defendants' Reply**

16 Defendants argue that they have been diligent in the litigation of this case, meeting the
17 early initial deadline to file their exhaustion summary motion on April 30, 2019. While delays
18 occurred because both parties requested and were granted extensions of time to respond to the
19 pleadings, Defendants argue that they were reasonably diligent. Defendants deny wasting the
20 court's time and stalling, and they anticipate a rather brief extension of the existing deadlines.
21 Defendants argue there is no prejudice to Plaintiff where no trial date has been set and there have
22 been no previous motions to modify the Discovery and Scheduling Order.

23 **D. Discussion**

24 The court, based upon the above arguments, finds good cause to vacate the outstanding
25 deadlines for all parties to this action and re-set the deadlines, if necessary, after the court has
26 issued its final order on Defendants' exhaustion motion for summary judgment. .

27 **III. CONCLUSION**

28 Based on the foregoing, IT IS HEREBY ORDERED that:

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1. Defendants' motion to modify the Court's Discovery and Scheduling Order, filed on July 19, 2019, is GRANTED;
2. The deadlines for the completion of discovery and for the filing of dispositive motions are stayed, pending resolution of Defendants' exhaustion motion for summary judgment filed on April 30, 2019;
3. All other provisions of the court's February 4, 2019, Discovery and Scheduling Order remain the same; and
4. If necessary, the court shall issue a new scheduling order after final resolution of Defendants' exhaustion motion for summary judgment.

IT IS SO ORDERED.

Dated: September 5, 2019

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE