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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10 RAYMOND D. JACKSON,

11 Plaintiff,

No. 2: 11-cv-1157 JAM KJN P

12 vs.

13 STEVEN FLETCHER, et al.,

14 Defendants.

ORDER

15 _____/
16 Plaintiff's appointed counsel has filed an ex parte request to continue the hearing
17 date on the motion for summary judgment filed December 6, 2012, by defendants Osman, Bick
18 and Aguilera, from January 10, 2013, to January 31, 2013. Plaintiff's counsel states that
19 defendants' counsel denied his request to stipulate to a continuation of the hearing. (See n.1,
20 infra.) Absent continuation of the hearing, plaintiff's opposition is due by December 27, 2012.

21 Plaintiff's counsel requests that the subject hearing be continued because
22 defendants' motion is voluminous and involves complex legal issues; counsel is representing
23 plaintiff on a pro bono basis and has limited available resources to conduct the research
24 necessary to prepare an adequate response to defendants' motion, particularly during this holiday
25 season; counsel is securing the services of a third year law student to assist in this case, but the
26 student is not available until January 6, 2013.

1 Also pending in this action is a motion to stay filed by defendant Pletcher. (Dkt.
2 No. 162.) Plaintiff has timely filed an opposition to that motion (Dkt. No. 164), while defendants
3 Osman, Aguilera, and Bick have filed a statement of non-opposition “provided” the court first
4 decides their motion for summary judgment (Dkt. No. 166). A hearing on defendant Pletcher’s
5 motion to stay is scheduled before the undersigned on January 3, 2013. One additional defendant
6 in this action, defendant Hall, does not appear to be participating in the presently pending
7 matters.

8 The court does not perceive the urgency in hearing defendants’ motion for
9 summary judgment.¹ The current deadline for hearing dispositive motions is March 6, 2013.
10 (Dkt. No. 158.) Moreover, the court has not yet determined whether a stay should be entered in
11 this action and, if so, whether it should be limited to defendant Pletcher. The availability and
12 resources of pro bono counsel are relevant considerations that support plaintiff’s instant request.

13 Accordingly, for good cause shown, see Fed. R. Civ. P. 6(b)(1)(A), IT IS
14 HEREBY ORDERED that:

15 1. Plaintiff’s request (Dkt. No. 167) to continue the hearing date on the motion
16 for summary judgment filed by defendants Osman, Aguilera, and Bick, is granted.

17 2. Absent further order of this court, the hearing on the motion for summary
18 judgment filed by defendants Osman, Aguilera, and Bick (Dkt. No. 163), is rescheduled for
19 Thursday, January 31, 2013, at 10:00 a.m., in Courtroom No. 25.

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22 ¹ The motion for summary judgment filed by defendants Osman, Aguilera, and Bick is
23 premised on the alleged failure of plaintiff to exhaust his administrative remedies. Plaintiff states
24 that counsel for these defendants refused to stipulate to a continuation of the hearing on this
25 motion because, if the motion is denied, counsel intends to file a subsequent motion for summary
26 judgment on the merits of plaintiff’s claims, within the court’s current deadlines. (Dkt. No. 167-
1 at 2, ¶ 6.) The court notes, without further comment at the present time, that the proper method
for asserting a failure to exhaust administrative remedies is generally an “unenumerated Rule
12(b) motion,” and the proper remedy is dismissal without prejudice, Wyatt v. Terhune, 315 F.3d
1108, 1119-20 (9th Cir. 2003), not a preliminary or contingent motion for summary judgment.

1 3. Plaintiff shall file and serve his opposition to the subject motion on or before
2 January 17, 2013.

3 4. Defendants may file and serve a reply brief on or before January 24, 2013.

4 SO ORDERED.

5 DATED: December 19, 2012

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8 KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

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