

1 When a federal petition contains both exhausted and unexhausted claims (a so-called
2 “mixed petition”), it may under some circumstances be stayed pending further exhaustion. A
3 federal habeas court may stay a mixed petition and hold it in abeyance pursuant to Rhines v.
4 Weber, 544 U.S. 269 (2005). Under Rhines, stay and abeyance are available only where (1) good
5 cause is shown for petitioner’s failure to have first exhausted the claims in state court, (2) the
6 claim or claims at issue potentially have merit, and (3) there has been no indication that petitioner
7 has been intentionally dilatory in pursuing the litigation. Rhines, 544 U.S. at 277-78.

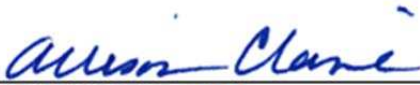
8 The Ninth Circuit provides an alternative stay procedure that requires withdrawal of the
9 unexhausted claims. See King v. Ryan, 564 F.3d 1133, 1135 (9th Cir. 2009) (citing three-step
10 procedure of Kelly v. Small, 315 F.3d 1063 (9th Cir. 2003)). Under Kelly, the court may stay a
11 petition containing only exhausted claims while allowing the petitioner to proceed to state court
12 to exhaust additional claims. Id. (citing Kelly, 315 F.3d at 1070-71). Once the additional claims
13 have been exhausted, the petitioner may amend his petition to add them back to the petition. This
14 procedure does not require a showing of cause, but presents the possibility that petitioner’s claims
15 may be time-barred for federal purposes once they are exhausted. Id. at 1135, 1140. The court
16 may deny a request for stay under Kelly if it is clear that newly-exhausted claims would be time-
17 barred. See id. at 1141.

18 Petitioner’s motion does not specify whether the stay is sought under Rhines or Kelly and
19 does not identify which claims are unexhausted or the legal basis for the requested stay. Id. The
20 court will therefore deny plaintiff’s motion without prejudice to a motion in the proper form. Any
21 such motion must specify the exhausted and unexhausted claims, identify the legal basis for the
22 requested stay, and make the showing required by the governing law. If petitioner does not move
23 for a stay and the petition is in fact mixed, the petition will be subject to dismissal on
24 respondent’s motion following service. Petitioner is not required to await an order from this court
25 staying the instant action before returning to state court to properly exhaust his state court
26 remedies.

27 Accordingly, IT IS HEREBY ORDERED that petitioner’s motion to stay is denied
28 without prejudice to a motion in proper form. If plaintiff seeks a stay pending exhaustion of

1 unexhausted claims, he must file a motion for a stay and abeyance within thirty days of the filing
2 of this order. The motion must be in accordance with the appropriate procedures.

3 DATED: July 16, 2015

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5 ALLISON CLAIRE
6 UNITED STATES MAGISTRATE JUDGE
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