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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

ELLIOT SCOTT GRIZZLE,  
Plaintiff,  
v.  
COUNTY OF SAN DIEGO, et al.,  
Defendants.

Case No.: 17-cv-00813-JLS-RBM

**ORDER:**

**(1) DENYING DEFENDANTS’  
MOTION FOR BIFURCATION,  
EXPEDITED EVIDENTIARY  
HEARING, AND ENTRY OF  
JUDGMENT; AND**

**(2) DENYING AS MOOT  
DEFENDANTS’ MOTION TO  
VACATE OR CONTINUE THE  
PRETRIAL DEADLINES**

**[Docs. 144, 145]**

On December 13, 2021, Defendants, County of San Diego, William Gore, Lena Lovelace, and Aaron Boorman (collectively, “Defendants”) filed a motion for bifurcation, expedited evidentiary hearing, and entry of judgment on the affirmative defense of failure to exhaust (“Motion for Bifurcation”). (Doc. 144.) Defendants seek to bifurcate trial by holding an early evidentiary hearing on the issue of exhaustion claiming bifurcation “is

1 appropriate to expedite and economize trial.” (Doc. 144–1 at 2.) Additionally, Defendants  
2 request the Court to enter judgment in their favor at the conclusion of the requested  
3 expedited evidentiary hearing. (*Id.* at 7.)

4 Following Defendants’ Motion for Bifurcation, Defendants filed an ex parte motion  
5 to vacate or continue the pretrial deadlines (“Motion to Vacate”) pending the outcome of  
6 Defendants’ Motion for Bifurcation. (Doc. 145.) Defendants request the Court to vacate  
7 all remaining pretrial dates in the fourth amended scheduling order (Doc. 142) or in the  
8 alternative, continue all dates and deadlines by 90 to 120 days. (Doc. 145 at 2.) Defendants  
9 claim “it would be a waste of resources for the parties to complete the pretrial work . . . if  
10 the case is disposed of at the preliminary hearing requested in the Defendants’ Motion for  
11 Bifurcation . . . .” (*Id.* at 2.)

12 For the reasons discussed below, Defendants’ Motion for Bifurcation is **DENIED**  
13 and Defendants’ Motion to Vacate is **DENIED AS MOOT**.

14 A. Motion for Bifurcation

15 “Exhaustion should be decided, if feasible, before reaching the merits of a prisoner’s  
16 claim.” *Albino v. Baca*, 747 F.3d 1162, 1170 (9th Cir. 2014). The Ninth Circuit has held  
17 that “the appropriate procedural device for pretrial determination of whether administrative  
18 remedies have been exhausted under the PLRA . . . is a motion for summary judgment  
19 under Rule 56.” *Id.* at 1168.

20 Defendants claim a preliminary evidentiary hearing is appropriate in the instant case  
21 as “Plaintiff intentionally created factual issues to avoid summary judgment” and “testified  
22 in a manner designed to avoid summary judgment.” (Doc. 144–1 at 5.) However,  
23 Defendants recently filed a motion for summary judgment (“MSJ”) (Doc. 148) on January  
24 5, 2022, but they did not address exhaustion in their MSJ briefing. Therefore, the Court  
25 *sua sponte* grants Defendants **fourteen (14) calendar days** to file supplemental briefing,  
26 if any, should Defendants wish to address exhaustion. An order setting a briefing schedule  
27 on the supplemental briefing, if any, response to the MSJ, and reply is forthcoming.  
28 Because Defendants may raise the issue of exhaustion in their summary judgment motion,

1 bifurcation of trial and an expedited evidentiary hearing are unnecessary. For the  
2 foregoing reasons, Defendants’ request for bifurcation, expedited evidentiary hearing, and  
3 entry of judgment on the affirmative defense of exhaustion is **DENIED**.

4 B. Motion to Vacate

5 A scheduling order may be modified only upon a showing of good cause and with  
6 the judge’s consent. FED. R. CIV. P. 16(b)(4); *see, e.g., Johnson v. Mammoth Recreations,*  
7 *Inc.*, 975 F.2d 604, 609 (9th Cir. 1992) (stating, “the focus of [the good cause] inquiry is  
8 upon the moving party’s reasons for seeking modification.”).

9 As to the request to vacate or otherwise continue the remaining pretrial dates pending  
10 the outcome of Defendants’ request for bifurcation of trial, evidentiary hearing, and entry  
11 of judgment, the Motion to Vacate is **DENIED AS MOOT**.

12 **IT IS SO ORDERED.**

13 Dated: January 10, 2022

14 

15 HON. RUTH BERMUDEZ MONTENEGRO  
16 UNITED STATES MAGISTRATE JUDGE