No. 19-55937

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LEON THOMAS,
Plaintiff-Appellant,

v.

A.W. JURGENSEN, Associate Warden, official capacity,
Defendant-Appellee,

K. LOPEZ et al.,
Defendants.

Appeal from the United States District Court
Central District of California
No. CV 10-2671 JGB (MRW)

APPELLEE'S ANSWERING BRIEF

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I. INTRODUCTION

In 2010, former federal inmate Leon Thomas sued various Bureau of Prisons (BOP) officials for alleged constitutional violations arising from the purported denial of medical equipment and accessible facilities to accommodate his disabilities. Thomas, who successfully filed thirty administrative remedy requests and appeals before bringing the complaint that forms the basis of this appeal, was readily familiar with the BOP's multi-tiered administrative grievance process at the time he filed suit in this case.

Despite his demonstrated familiarity with the various levels of the BOP's administrative remedy program, Thomas now contests Associate Warden Bradley Jurgensen's right to litigate Thomas's conceded failure to complete the exhaustion process before bringing his complaint in district court as required by the Prison Litigation Reform Act (PLRA). Among other contentions, many of which he raises for the first time on appeal, Thomas insists that Jurgensen somehow waived or forfeited his ability to argue exhaustion notwithstanding that Jurgensen unquestionably pled Thomas's failure to fully exhaust pursuant to the PLRA in his answers to both Thomas's First Amended Complaint and

operative Second Amended Complaint.

Although Thomas relies heavily on representations made by Jurgensen and his counsel over the course of this lengthy litigation that Thomas had exhausted his administrative remedies, it remains undisputed that Jurgensen properly and timely pled Thomas's failure to exhaust as required by the PLRA as an affirmative defense. Additionally, and despite his claimed reliance on Jurgensen's representations, Thomas was always aware that BOP's Office of General Counsel, the final level of administrative review, did not issue its denial of Thomas's appeal until late April 2010, well after Thomas brought this lawsuit in early March 2010. Because this Court has unequivocally held that an inmate's failure to exhaust as of the time of filing suit cannot be cured by later exhaustion, the district court correctly granted judgment in favor of Jurgensen.

II. COUNTER-STATEMENT OF THE ISSUES

1. Whether Thomas failed to exhaust his available administrative remedies as to his claims against Associate Warden Jurgensen prior to bringing suit in district court as required by the Prison Litigation Reform Act.

2. Whether Thomas's failure to exhaust his administrative remedies prior to bringing suit in district court should be excused due to waiver or forfeiture, estoppel, or laches.

III. STATEMENT OF JURISDICTION

The statutory basis for jurisdiction in the district court is 28 U.S.C. § 1331. The statutory basis for jurisdiction in this Court is 28 U.S.C. § 1291.

On June 10, 2019, the district court entered a final and appealable order and entered judgment in favor of Associate Warden Jurgensen the same day. (CR 239, 240; SER 1-12.)[1] Thomas filed his Notice of Appeal on August 9, 2019. (CR 245; SER 13-29.) Thus, the appeal is timely. Fed. R. App. P. 4(a)(1)(B).

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[1] CR refers to the Clerk's Record, and is followed by the document control number. ER refers to Appellant's Excerpts of Record and is followed by the applicable page numbers. SER refers to Appellee's Supplemental Excerpt of Record and is followed by the applicable page numbers. AOB refers to Appellant's Opening Brief.

IV. STATEMENT OF THE CASE

A. Background and Factual Allegations

1. The Bureau of Prisons' Administrative Remedy Process

The Bureau of Prisons employs a four-tiered administrative remedy process for inmate grievances. The first step consists of an informal request to a staff member, who attempts to resolve the issue before the inmate submits a formal Request for Administrative Remedy. 28 C.F.R. § 542.13(a). (SER 68.) If the inmate is unsatisfied with the response to the informal request, the inmate may then submit a formal Request for Administrative Remedy to the Warden of the facility in which the inmate is housed. 28 C.F.R. §§ 542.13, 542.14. (SER 70-71.) If the inmate remains unsatisfied with the Warden's response, the inmate may then appeal to the appropriate Regional Director. 28 C.F.R. § 542.15(a). (SER 71.) Finally, if the inmate is unsatisfied with the Regional Director's response, the inmate may appeal that decision to the Office of General Counsel. 28 C.F.R. § 542.15(a). (SER 71.) Appeal to the General Counsel is the final level of administrative review. (SER 71.)

If accepted,[2] an inmate's administrative remedy request is considered filed on the date it is logged into the SENTRY administrative remedy index[3] as received. 28 C.F.R. § 542.18. (SER 74.) Once an administrative remedy request is logged, SENTRY automatically generates a receipt to inform the inmate of the response deadline, among other things. (SER 32.) Once an appeal to the Office of General Counsel is accepted, the Office of General Counsel's response is due within forty (40) calendar days, which period may be extended once by twenty (20) days if the original time for response is insufficient to make an appropriate decision. 28 C.F.R. § 542.18. (SER 32.) Administrative exhaustion is not complete until the Office of General Counsel either replies to the inmate's appeal on the merits or fails to respond within the time allotted for reply. 28 C.F.R. § 542.18 (providing

[2] An inmate's administrative grievance may be rejected at any level of review for various defects, including the inmate's bypassing an attempt at informal resolution, failure to sign a submission, failure to submit the required copies of a Request, Appeal, or attachments, or failure to enclose the required single copy of lower level submissions. (SER 70, 73.)

[3] SENTRY is the Bureau of Prisons database, which contains inmate sentencing information, location history, and all administrative remedy requests submitted by inmates and processed by the Bureau of Prisons. (SER 30.)

that "[i]f the inmate does not receive a response within the time allotted for reply, including extension, the inmate may consider the absence of a response to be a denial at that level.").

2. Thomas's Administrative Remedy Requests and Appeals

Thomas was housed at the Federal Correctional Complex (FCC) Victorville from August 14, 2008, until March 25, 2011. (SER 31, 129.) Thomas is an amputee, is morbidly obese, and uses a wheelchair. (AOB 4; SER 130.) Upon his arrival at FCC Victorville, Thomas attended an Admission and Orientation that included a class on the law library and the Bureau of Prisons' Administrative Remedy Program. (SER 31.) Approximately one week later, Thomas attended another class on the Administrative Remedy Program. (*Id.*) Thomas also had access to the Administrative Remedy Program Statement that was available to inmates in the institution law library. (SER 32.)

Prior to bringing this lawsuit in early March 2010, Thomas submitted thirty (30) administrative remedy requests and appeals through the administrative remedy program. (SER 33.) Specifically, Thomas submitted nineteen (19) administrative remedy requests at the institutional level, eight (8) appeals to the Regional Director, and three

(3) appeals to the Office of General counsel. (*Id.*)

On December 3, 2009, the Warden's office at FCC Victorville received an administrative remedy request in which Thomas sought a medical transfer and alleged that his medical equipment had been taken and not returned. (SER 33-34.) The Warden denied Thomas's request on December 9, 2009, and the Regional Director received Thomas's appeal of that denial on December 30, 2009.[4] (*Id.*)

The Office of General Counsel received Thomas's appeal of the Regional Director's denial on February 22, 2010. (SER 33-34.) With the twenty (20) day extension allowed by 28 C.F.R. § 542.18, the Office of General Counsel had sixty (60) days, or until April 23, 2010, to respond to Thomas's appeal. (SER 34.) Thomas was advised of this deadline via the automatic receipt generated by SENTRY. (SER 32, 34, 68, 95.) The Office of General Counsel issued its denial of Thomas's appeal on April 28, 2010. (SER 169.)

[4] In his appeal to the Regional Director, Thomas complained that his assigned cell lacked "handicap rails" and mirrors. (SER 116.) Thomas also complained that his bottom shower button was broken, and that he was denied his medical trapeze, back brace, wheelchair cushion, an operable wheelchair, and his prosthetic leg. (*Id.*)

B. Course of Proceedings Below

The district court received Thomas's initial complaint in this case on March 4, 2010.[5] (CR 1-1; SER 214.) The lodged complaint named Associate Warden Jurgensen among several other defendants, and alleged that Jurgensen denied him necessary medical equipment. (CR 1-1; SER 216.) The complaint was marked received on March 4, 2010, and filed on April 20, 2010. (CR 4; SER 174.)

In July 2010, Thomas filed his First Amended Complaint, again alleging that Associate Warden Jurgensen denied him necessary medical equipment. (CR 14; SER 144, 150-51.) Thomas attached the Office of General Counsel's April 28, 2010 denial of his appeal to his First Amended Complaint. (CR 14; SER 159.) In answering the First Amended Complaint, the remaining Federal Defendants, including Jurgensen, asserted that Thomas failed to fully exhaust his available administrative remedies as required by the PLRA as an affirmative defense. (CR 56; SER 140.)

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[5] Thomas first submitted his lodged complaint as an attachment to his request to proceed in forma pauperis. (CR 1-1; SER 214.)

In December 2012, Thomas filed the operative Second Amended Complaint. (CR 84; SER 128-34.) Thomas again named Associate Warden Jurgensen as a defendant, and alleged that Jurgensen was deliberately indifferent to Thomas's serious medical needs in refusing to provide him necessary medical equipment or "handicap rails" around his toilet and in his shower. (CR 84; SER 133.) In answering the Second Amended Complaint, Federal Defendants, including Jurgensen, again asserted an affirmative defense that Thomas failed to fully exhaust his available administrative remedies as required by the PLRA. (CR 85; SER 125.)

In May 2019, Jurgensen brought a Motion for Judgment on the Pleadings, or in the Alternative, Summary Judgment based on Thomas's failure to exhaust his administrative remedies prior to bringing his complaint in district court. (CR 233.) On June 10, 2019, the district court granted the motion and entered judgment in favor of Jurgensen the same day. (CR 239, 240; SER 1-12.) Thomas timely appealed. (CR 245; SER 13-29.)

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V. STANDARD OF REVIEW

This Court reviews an order granting a Rule 12(c) motion for judgment on the pleadings *de novo*. *Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir. 2009) (citing *Heliotrope v. Gen., Inc. v. Ford Motor Co.*, 189 F.3d 971, 978 (9th Cir. 1999). Similarly, this Court reviews a district court's grant of summary judgment *de novo*. *Albino v. Baca*, 747 F.3d 1162, 1168 (9th Cir. 2014). Finally, the Court may affirm "on any basis supported by the record, whether or not relied upon by the district court." *Hall v. N. Am. Van Lines, Inc.*, 476 F.3d 683, 686 (9th Cir. 2007).

VI. SUMMARY OF THE ARGUMENT

The district court correctly concluded that Thomas failed to exhaust his administrative remedies as to his *Bivens* claims against Associate Warden Jurgensen prior to bringing suit in district court. Notably, Thomas does not dispute that he brought his district court action before his claims against Jurgensen were properly exhausted.

Thomas initially argues, for the first time on appeal, that Jurgensen waived or forfeited his failure to exhaust defense. Even if Thomas had meaningfully raised and argued waiver or forfeiture before the district court, his contentions are belied by his acknowledgment

that Jurgensen timely pled failure to exhaust as an affirmative defense in his answer to Thomas's operative Second Amended Complaint.

Thomas's argument that Jurgensen should be estopped from arguing failure to exhaust is similarly unavailing. As with his waiver and forfeiture arguments, Thomas failed to meaningfully argue estoppel in opposing Jurgensen's motion for summary judgment before the district court, and this Court should decline to allow him to do so for the first time on appeal. Regardless, even if this Court chooses to entertain Thomas's estoppel arguments, Thomas failed to establish either that this is the kind of case in which estoppel should be available against an individual government defendant, or that he otherwise satisfies each of the other elements of estoppel.

Finally, Thomas's contention that laches should preclude Jurgensen from arguing his failure to exhaust affirmative defense in a later summary judgment motion lacks merit. Specifically, Thomas failed to cite any relevant authority that a *plaintiff* may use laches in response to a timely defense motion regarding a properly pled affirmative defense. Additionally, the district court correctly recognized that Thomas failed to identify any evidence sufficient to establish that

Jurgensen engaged in affirmative misconduct, as is required in order to assert laches against a government defendant.

In short, based on Thomas's conceded failure to exhaust his administrative remedies *prior* to bringing his lawsuit, as well as Jurgensen's timely assertion of Thomas's failure to exhaust as an affirmative defense in his answer to the operative Second Amended Complaint, the district court correctly entered judgment in favor of Jurgensen. This Court should affirm.

VII. ARGUMENT

A. Thomas Failed to Administratively Exhaust His Claims Prior to Bringing Suit in District Court

The PLRA "requires that a prisoner challenging prison conditions exhaust available administrative remedies *before* filing suit." *Albino*, 747 F.3d at 1165 (emphasis added); *Ross v. Blake*, 136 S. Ct. 1850, 1854-55 (2016) (quoting 42 U.S.C. § 1997e(a)). Specifically, the PLRA provides:

> No action *shall be brought* with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility *until* such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a) (emphasis added).

Congress enacted the PLRA "in the wake of a sharp rise in prisoner litigation in the federal courts," and "[a] centerpiece of the PLRA's efforts 'to reduce the quantity … of prisoner suits' is an 'invigorated' exhaustion provision, § 1997e(a)." *Woodford v. Ngo*, 548 U.S. 81, 85 (2006) (quoting *Porter v. Nussle*, 534 U.S. 516, 524 (2002)). Exhaustion gives an agency "'an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court,'" and also promotes efficiency since "[c]laims generally can be resolved much more quickly and economically in proceedings before an agency than in litigation in federal court." *Id.* at 89 (quoting *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992)). Indeed, "'even where a controversy survives administrative review, exhaustion of the administrative procedure may produce a useful record for subsequent judicial consideration.'" *Id.* (quoting *McCarthy*, 503 U.S. at 145).

An inmate's failure to exhaust under the PLRA is "an affirmative defense the defendant must plead and prove."[6] *Jones v. Bock*, 549 U.S.

[6] In his opening brief, Thomas contends that the district court erred in granting Jurgensen's motion for judgment on the pleadings because exhaustion is an affirmative defense that a defendant must plead and prove rather than a pleading requirement. (*See* AOB 16.) Although the district court did note that Thomas's operative Second Amended

199, 204, 216 (2007). The mandatory language in the PLRA "means a court may not excuse a failure to exhaust," irrespective of any alleged "special circumstances." *Blake*, 136 S. Ct. at 1856-57. Instead, "the exhaustion requirement hinges on the 'availab[ility]' of administrative remedies: An inmate, that is, must exhaust available remedies, but need not exhaust unavailable ones." *Id.* at 1858.

Importantly, exhaustion while a district court action is pending does not satisfy the PLRA, which unequivocally requires that exhaustion be completed *prior* to bringing suit. 42 U.S.C. § 1997e(a); *Lira v. Herrera*, 427 F.3d 1164, 1170 (9th Cir. 2005) ("[A] district court must dismiss a case without prejudice 'when there is no *presuit* exhaustion,' even if there is exhaustion while suit is pending.") (quoting *McKinney v. Carey*, 311 F.3d 1198, 1200 (9th Cir. 2002) (per curiam) (emphasis in original)). As this Court reasoned, requiring dismissal without prejudice when there is no presuit exhaustion provides a strong incentive that will further Congress's objectives in enacting the PLRA.

Complaint was facially deficient in that it lacked any allegations concerning the final denial of Thomas's appeal by the Office of General Counsel, it also indicated that Jurgensen's motion sounded primarily in summary judgment and appears to have granted the motion on that basis alone. (CR 239 at 6; SER 7.)

McKinney, 311 F.3d at 1200-01. Those objectives include decreasing the quantity and improving the quality of prisoner suits, allowing the agency an opportunity to filter out frivolous claims, and allowing judicial review to be facilitated by an administrative record that clarifies the contours of the controversy. *Id.* By contrast, "permitting exhaustion *pendente lite* will inevitably undermine attainment of them." *Id.* at 1201.

Here, Thomas does not dispute that he "brought"[7] his complaint on or about March 3, 2010, when he submitted his initial request to proceed in forma pauperis (CR 1; SER 207-45), and that the Office of General Counsel's initial April 3, 2010 deadline to respond was extended to April 23, 2010. (AOB 13 n.8.) Thus, it is undisputed that Thomas failed to exhaust his administrative remedies prior to bringing suit in district court as required by the PLRA.[8]

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[7] As the district court correctly recognized, a prisoner is deemed to have "brought" his lawsuit at the time he or she sends his complaint to the district court. (CR 239; SER 7.) *See also Vaden v. Summerhill*, 449 F.3d 1047, 1050-51 (9th Cir. 2006).

[8] Thomas does not contend that his administrative remedies were unavailable. (*See generally* AOB.) Nor could he, as Thomas submitted thirty (30) administrative remedy requests and appeals through the

B. Jurgensen Timely Pled an Affirmative Defense that Thomas Failed to Fully Exhaust His Administrative Remedies As Required by the PLRA

1. Jurgensen Did Not Waive or Forfeit His Exhaustion Defense

In opposing Jurgensen's Motion for Judgment on the Pleadings, or in the Alternative, Summary Judgment, Thomas argued generally that statements and motions made by Jurgensen and his counsel over the course of the litigation justified the denial of Jurgensen's motion. (*See* CR 237 at 1-4.) However, Thomas offered no meaningful legal analysis beyond discussing the litigation history of this case, and did not make even passing mention of waiver, estoppel, or forfeiture.[9]

Although the district court generously construed Thomas's opposition as arguing that judicial estoppel should foreclose Jurgensen's motion (*see* CR 239 at 9; SER 10), this Court should decline to entertain Thomas's arguments as to waiver and forfeiture that he articulates for

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administrative remedy program before bringing this lawsuit in early March 2010. (SER 33.)

[9] Although Thomas did argue that he had exhausted his claim because his First Amended Complaint (rather than his original complaint) was the operative complaint for purposes of the analysis, that his "technical" noncompliance should be excused, and that the government should be subject to sanctions (*see generally* CR 237), he has abandoned those arguments on appeal. (AOB 13 n.9.)

the first time on appeal. *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) ("As a general rule, we will not consider arguments that are raised for the first time on appeal."); *Ventress v. Japan Airlines*, 747 F.3d 716, 723 n.8 (9th Cir. 2014) (citing *Western Radio Servs. Co. v. Qwest Corp.*, 678 F.3d 970, 979 (9th Cir. 2012) ("We will not do an appellant's work for it, either by manufacturing its legal arguments, or by combing the record on its behalf for factual support."). Regardless, as set forth below, Jurgensen neither waived nor forfeited his exhaustion affirmative defense.

As the Supreme Court has articulated, "[t]he terms waiver and forfeiture—though often used interchangeably by jurists and litigants—are not synonymous." *Hamer v. Neighborhood Housing Services of Chicago, et al.*, 138 S. Ct. 13, 17 n.1 (2017). Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right. *Id.* (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)).

In general, a party is required to raise all applicable defenses in the first responsive pleading, and defenses not so raised are deemed waived. *See Morrison v. Mahoney*, 399 F.3d 1042, 1046 (9th Cir. 2005)

(citing Fed. R. Civ. P. 8(c), 12(b), 12(g)); *see also* Fed. R. Civ. P. 7(a) (defining "pleadings" as a complaint or an answer, a reply to a counterclaim, an answer to a cross-claim, and a third-party complaint and answer). Here, it is undisputed that Jurgensen timely raised an affirmative defense that Thomas "failed to fully exhaust his available administrative remedies as required by the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(a)" in response to the operative Second Amended Complaint. (SER 125.) Although Thomas characterizes Jurgensen's valid assertion of this defense as "check[ing] the box on exhaustion" (AOB 18), none of the authorities he cites support the proposition that a party waives or forfeits an affirmative defense where the party timely asserted the defense in a responsive pleading and later raised it in a motion for summary judgment.

Instead, each of the cases on which Thomas relies is materially distinguishable from this case. In *Walden v. Nevada*, 945 F.3d 1088, 1095 (9th Cir. 2019), this Court concluded that the state of Nevada, in removing the case to federal court, waived its Eleventh Amendment immunity defense. *Id.* There, the State generically asserted in its answer that it was entitled to "immunity as a matter of law," without

specific reference to state sovereignty or the Eleventh Amendment. *Id.* Unlike in this case, in which Jurgensen asserted a timely affirmative defense and later argued it in a pretrial motion, in *Walden*, a vague reference to immunity was the *only* time the State arguably raised the issue of state sovereign immunity before the district court. *Id. Picht v. Jon R. Hawks, Ltd.*, 236 F.3d 446, 451 (8th Cir. 2001) is similarly inapposite. In that case, a defendant waived an affirmative defense where it pled the defense in its answer but did not press the defense in its response to the plaintiff's motion for summary judgment or in its own motion for summary judgment. *Id.* Finally, Thomas's reliance on *Continental Bank, N.A. v. Meyer*, 10 F.3d 1293 (7th Cir. 1993) is misplaced, as that case involved a party's waiver of a defense of lack of *personal jurisdiction* through the party's active participation in the litigation for a year and a half.[10] *Id.* at 1297.

[10] The two other cases Thomas cites are also distinguishable. In *Wood v. Milyard*, 566 U.S. 463 (2012), the State twice informed the district court that it would not challenge, but was not conceding, the timeliness of a habeas petition. *Id.* at 467. The district court accordingly denied the petition on the merits, but the Tenth Circuit affirmed solely on timeliness grounds. *Id.* at 467-68. The Supreme Court concluded that it was error to override the State's deliberate waiver because it was only on appeal that the Tenth Circuit, acting as a court of first view rather than one of review, ordered briefing on timeliness and denied the

Despite his acknowledgment that Jurgensen timely raised exhaustion as an affirmative defense in his answer to the operative Second Amended Complaint, Thomas relies on statements[11] and motions by Jurgensen and his counsel in contending that Jurgensen either waived or forfeited his exhaustion defense. Thomas first cites the government's motion to dismiss his First Amended Complaint, which argued that Thomas failed to exhaust as to one defendant but did not also argue that Thomas failed to exhaust his claims as to Jurgensen. (AOB 8.) Thomas also relies on an earlier motion for summary

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petition on that ground. *Id.* at 474. Similarly, in *Day v. McDonough*, 547 U.S. 198, 201 (2006), the Supreme Court found no intelligent waiver of a statute of limitations defense, despite the State having failed to assert the defense in its answer, where the district court concluded that the State had simply miscalculated the tolling time. *Id.* at 202.

[11] Specifically, Thomas relies on statements made by Jurgensen's counsel during a status conference that Thomas's then proposed (now operative) Second Amended Complaint appeared to state a claim save for one allegation (different than the claim at issue here) that appeared to be unexhausted. (AOB 9-10; ER 112.) Regardless of such statements, it remains undisputed that in his answer to the Second Amended Complaint, Jurgensen timely asserted an affirmative defense that Thomas failed to fully exhaust his administrative remedies as required by the PLRA. Moreover, during that status conference, the court noted that Defendants were free to raise exhaustion, albeit as to the different claim, "as part of a summary judgment motion just to save it for later on." (AOB 9; ER 113.)

judgment in which Jurgensen argued that Thomas failed to raise a triable issue that he acted with deliberate indifference, and that he was entitled to qualified immunity in any event. (AOB 10.) Finally, Thomas relies on a motion in limine that the district court never decided, in which Jurgensen sought to exclude evidence of any unexhausted claims. (AOB 12.)

In support of two of these motions, Jurgensen submitted declarations stating that Thomas exhausted Administrative Remedy 566304 when the Office of General Counsel denied his appeal on April 28, 2010. (*See* ER 56-57, 68, 159.) However, the question is not whether Thomas *eventually* exhausted his administrative remedies as to his claim against Jurgensen, but instead whether that claim was properly and fully exhausted *before* Thomas brought his complaint in district court as required by the PLRA. As discussed above, *supra* Part VII.A, it was not. That later declarations submitted by Jurgensen reflect that Thomas eventually completed the administrative remedy process when the Office of General Counsel issued its final denial in late April 2010, does not constitute a waiver or forfeiture of Jurgensen's properly pled affirmative defense where Jurgensen raised and argued the defense on

summary judgment.

2. Thomas is Not Entitled to Estoppel

As noted above, *supra* Part VII.B.1, Thomas failed to argue estoppel in opposing Jurgensen's summary judgment motion. (*See generally* CR 237.) Accordingly, he should not be able to do so for the first time on appeal and this Court should decline to consider whether equitable estoppel applies in the first instance. *See Smith*, 194 F.3d at 1052; *Ventress*, 747 F.3d at 723 n.8. Regardless, Thomas fails to satisfy the elements of equitable estoppel as applied to the government.

a. Estoppel Should Not Be Available in This Case

As this Court has recognized, in general, equitable estoppel is not available as a defense against the government unless justice and fair play require it and the effects of estoppel do not unduly damage the public interest. *See Johnson v. Williford*, 682 F.2d 868, 871 (9th Cir. 1982). Here, should this Court choose to entertain Thomas's estoppel argument, it should conclude that this is not the sort of case in which estoppel may be asserted against an individual government defendant.

First, justice and fair play do not merit estoppel.[12] Thomas, who successfully filed *thirty* administrative remedies and appeals *before* he filed suit in this case (SER 33), was well aware of the administrative exhaustion requirement (SER 31-32) and similarly was aware that Jurgensen had asserted his failure to fully exhaust as an affirmative defense in his answers to both the First and Second Amended Complaints.[13] (SER 125, 140.) Moreover, allowing Thomas to assert estoppel in a case where an individual capacity *Bivens* defendant timely asserted a valid affirmative defense and later litigated the defense in a pretrial motion for summary judgment would not serve the public

[12] The brief of Amici Former Prosecutors and Department of Justice Officials submitted in support of Thomas's appeal for reversal relies not on the law as it applies to this case, but instead on a generalized ethos. Specifically, other than expressing disappointment in the Department of Justice's representation of Jurgensen, amici simply emphasize that Department attorneys, as among the few privileged to represent the United States, must be held to the highest ethical and professional standards. (*See generally* Dkt. 21.) Although Jurgensen certainly agrees that Department attorneys should be held to the highest of standards in representing the United States, its agencies, and employees, the law simply does not support reversal in this case, and nothing in amici's submission suggests otherwise.

[13] Notably, by the time Thomas filed his Second Amended Complaint and received Jurgensen's answer thereto, he was no longer *pro se* but instead represented by counsel. (*See* CR 75.)

interest. This is particularly so where, as here, Thomas concedes that he brought his lawsuit before completing his exhaustion of the administrative remedy process. (AOB 13 n.8.)

In concluding that the PLRA's mandatory exhaustion requirement required dismissal without prejudice where there was no presuit exhaustion, this Court recognized that "requiring dismissal may, in some circumstances, occasion the expenditure of additional resources on the part of the parties and the court…." *McKinney*, 311 F.3d at 1200. Accordingly, applying estoppel against Jurgensen under the circumstances of this case, and permitting exhaustion *pendente lite*, will inevitably undermine attainment of Congress's objectives in enacting the PLRA. *Id.* at 1200-01.

b. Thomas Does Not Satisfy the Traditional Requirements of Estoppel

Even assuming this is the kind of case in which estoppel may be applied to a government defendant, Thomas failed to satisfy all of the traditional elements of estoppel. *Johnson*, 682 F.2d at 872. Equitable estoppel requires the following: "(1) The party to be estopped must know the facts; (2) He must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe

it is so intended; (3) The latter must be ignorant of the true facts; and (4) He must rely on the former's conduct to his injury." *United States v. Ruby Co.*, 588 F.2d 697, 703 (9th Cir. 1978); *see also Johnson*, 682 F.2d at 872. To satisfy the fourth element of estoppel, the detrimental reliance must be reasonable. *See Huseman v. Icicle Seafoods, Inc.*, 471 F.3d 1116, 1122 (9th Cir. 2006) (noting that equitable estoppel requires both "actual and reasonable reliance").

Here, Thomas cannot reasonably claim that Jurgensen intended that his conduct would be acted on or acted in a manner that entitled Thomas to believe that Jurgensen so intended. Indeed, Jurgensen *twice* raised Thomas's failure to exhaust as required by the PLRA as an affirmative defense, the second time after Thomas had retained counsel.

More critically, Thomas cannot reasonably contend—and the undisputed evidence does not support—that he was actually ignorant of the fact that he had not completed the exhaustion process as of the time he first brought his complaint to district court.[14] Thomas attached the Office of General Counsel's April 28, 2010 denial of his appeal of

[14] Thomas curiously does not identify this requirement as a separate element, but instead simply maintains that he was "entitled to rely upon the government's word." (*See* AOB 32.)

Administrative Remedy 566304 to his First Amended Complaint (SER 159), well after having "brought" his initial complaint in early March 2010. (SER 214.) Moreover, Thomas, despite his initial status as a *pro se* litigant, was readily familiar with BOP's Administrative Remedy Program, having attended two classes regarding the program upon his arrival at FCC Victorville (SER 31), and having successfully filed thirty administrative remedies and appeals before he brought his complaint in this case. (SER 33.)

Lastly, Thomas's asserted detrimental reliance was not reasonable. Jurgensen twice asserted an affirmative defense that Thomas failed to fully exhaust his administrative remedies as required by the PLRA. *Huseman*, 471 F.3d at 1122. Thomas obviously knew that his claim was not exhausted until the Office of General Counsel denied his appeal in April 2010, as he attached that decision to his First Amended Complaint. (SER 159.) Moreover, Thomas was represented by counsel by the time he received Jurgensen's answer to his operative Second Amended Complaint (CR 75), which again asserted that Thomas failed "to fully exhaust his available administrative remedies as required by the Prison Litigation Reform Act (PLRA), 42 U.S.C.

§ 1997e(a)." (SER 125.) Thomas's failure to satisfy all of these elements forecloses any entitlement to estoppel. *See Ruby Co.*, 588 F.2d at 704 ("[W]e have found no case which would allow the application of estoppel when there has been a failure of proof as to the required elements.").

c. Thomas Failed to Establish Affirmative Misconduct by Jurgensen

In addition to the aforementioned traditional elements of estoppel, there must be an affirmative misrepresentation or affirmative concealment of a material fact when estoppel is applied to the government. *Ruby Co.*, 588 F.2d at 703-04. Affirmative misconduct is "a deliberate lie…or a pattern of false promises." *Mukherjee v. I.N.S.*, 793 F.2d 1006, 1009 (9th Cir. 1986).

In considering Thomas's argument that laches should foreclose Jurgensen's motion, the district court correctly concluded that Thomas failed to identify anything that would constitute affirmative misconduct. (CR 239 at 19; SER 11.) Although Thomas continues to rely on Jurgensen's representations that Thomas had exhausted his administrative remedies (AOB 29), such representations cannot be construed as affirmative misconduct where Jurgensen, on more than one occasion, timely asserted failure to exhaust as an affirmative

defense. *See Sulit v. Schiltgen*, 213 F.3d 449, 454 (9th Cir. 2000) ("Neither the failure to inform an individual of his or her legal rights nor the negligent provision of misinformation constitute affirmative misconduct."); *Cortez-Felipe v. I.N.S.*, 245 F.3d 1054, 1057 (9th Cir. 2001) (holding that estoppel applied to the government requires affirmative misconduct, and that "such a conclusion is not lightly inferred."). And although Thomas, relying on *Watkins v. U.S. Army*, 875 F.2d 699, 707 (9th Cir. 1989), contends that affirmative misconduct does not require intent, (AOB 28), this Court has held that mere negligence does not amount to affirmative misconduct. *Cortez-Felipe*, 245 F.3d at 1057.

Regardless, the declarations on which Thomas relies clearly state that Thomas's administrative remedy request was not exhausted until the Office of General Counsel denied his appeal on April 28, 2010. (*See* ER 68, 159.) But again, the question was not *when* Thomas eventually completed exhaustion, but rather whether he did so *before* bringing suit in district court. Because Jurgensen's assertion in his answer that Thomas "failed to fully exhaust his available administrative remedies as required by the Prison Litigation Reform Act" preserved that

argument (SER 125), Thomas is not entitled to equitable estoppel.

3. Jurgensen's Properly Pled Affirmative Defense is Not Subject to Laches

Thomas begins his laches argument by quoting a case decided by this Court for the proposition that laches is an equitable defense that prevents *a party*, who with full knowledge of the facts, acquiesces in a transaction and sleeps upon his rights. (AOB 21 (quoting *Evergreen Safety Council v. RSA Network Inc.*, 697 F.3d 1221, 1226 (9th Cir. 2012) and substituting "party" for "plaintiff").) Thomas's alteration is critical to the analysis, as courts that have considered the issue, including this Court, have concluded that laches is not available to *plaintiffs*, but instead is an equitable defense asserted by *defendants*. *See, e.g.*, *Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 835 (9th Cir. 2002) ("Laches is an equitable time limitation on a party's right *to bring suit*.…A party asserting laches must show that it suffered prejudice as a result of the *plaintiff's* unreasonable delay *in filing suit*.") (emphasis added) (internal citations omitted); *Northern Pac. Ry. Co. v. United States*, 277 F.2d 615, 624 (10th Cir. 1960) ("[L]aches is available only as a bar to affirmative relief. It cannot be invoked by plaintiff to bar rights asserted by defendant merely by way of defense."). Accordingly,

Thomas's laches argument fails for this reason alone.

Even assuming laches is available to bar a defendant's assertion of an affirmative defense that was first raised in the answer to the complaint and later raised in a defense motion, Thomas fails to establish an entitlement to laches. As this Court has articulated, "[l]aches is an equitable defense that prevents a plaintiff, who 'with full knowledge of the facts, acquiesces in a transaction and sleeps upon his rights.'" *Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 950-51 (9th Cir. 2001) (quoting *S. Pac. Co. v. Bogert*, 250 U.S. 483, 500 (1919)). In order to demonstrate laches, the "defendant must prove both an unreasonable delay by the plaintiff and prejudice to itself." *Id.* (quoting *Couveau v. Am. Airlines, Inc.*, 218 F.3d 1078, 1083 (9th Cir. 2000)). Moreover, this Court has concluded that when asserted against the government, laches, like estoppel, should be "subject to at least the same strictures as estoppel," including the requirement of affirmative misconduct. *Ruby Co.*, 588 F.2d at 705 n.10.

Even assuming Jurgensen's timely motion for summary judgment was brought with undue delay, and assuming further Thomas was prejudiced, he nevertheless failed to establish any affirmative

misconduct by Jurgensen. *See supra* Part VII.B.2.c. Indeed, Thomas failed to point to anything resembling a "deliberate lie" or "a pattern of false promises" by either Jurgensen or his counsel. *Mukherjee*, 793 F.2d at 1009. Although the declarations Jurgensen submitted indicated that Thomas exhausted the administrative remedy at issue when the Office of General Counsel issued its final denial of Thomas's appeal in late April 2010, Jurgensen never represented that Thomas did so before bringing this action as required by the PLRA. Accordingly, Thomas's laches argument fails as well.[15]

[15] As the district court correctly recognized, Jurgensen's assertions that Thomas exhausted his administrative remedies are not judicial admissions, which generally apply to complaints, answers, or pretrial orders. *Am. Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988). Although a district court *may* consider a statement of fact set forth in a brief as an admission of the party, *id.* at 227, here the court correctly concluded that exhaustion is a question of law. *See Ngo*, 548 U.S. at 88 (referring to exhaustion as a term of art and a legal doctrine). Although *when* Thomas completed exhaustion may be a question of fact, whether he exhausted his administrative remedies in accordance with the PLRA is a legal conclusion. Finally, Thomas is not entitled to judicial estoppel, which "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (quoting *Pegram v. Herdrich*, 530 U.S. 211, 227 n.8 (2000)). Here, because the district court never ruled on Jurgensen's motion in limine (*see* SER 10), it was not persuaded to accept any earlier inconsistent position.

VIII. CONCLUSION

For the foregoing reasons, Defendant-Appellee Bradley Jurgensen respectfully requests that this Court affirm the district court's judgment in his favor.

Dated: March 5, 2019

Respectfully submitted,

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STATEMENT OF RELATED CASES

Counsel for Appellee is not aware of any related cases currently pending in this Court.

Dated: March 5, 2019

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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