



1 On August 14, 2018, the Court granted in part and denied in part Defendants' motion for  
2 summary judgment. (ECF No. 98.) Among other things, the Court held that disputed issues of  
3 fact precluded the Court from concluding that administrative remedies were available to  
4 Plaintiff, and that Defendants were entitled to an evidentiary hearing on that issue. (Id. at 16.)  
5 Defendants were permitted an opportunity to request an evidentiary hearing, within thirty days.  
6 (Id.)

7 On September 5, 2018, Defendants filed a timely motion requesting an evidentiary  
8 hearing. (ECF No. 99.) On September 7, 2018, the motion was granted, and the Court set an  
9 evidentiary hearing on the issue of exhaustion of administrative remedies for September 27, 2018  
10 at 2:00 p.m. in Courtroom 9 of the United States Courthouse in Fresno, California. (ECF No.  
11 100.)

12 On September 7, 2018, the Court issued an order and writ of habeas corpus ad  
13 testificandum, ordering the warden of California State Prison, Los Angeles County ("CSP-  
14 LAC"), where Plaintiff is housed, to produce Plaintiff for the September 27, 2018 hearing. (ECF  
15 No. 101.)

16 On September 19, 2018, Plaintiff filed an *ex parte* motion requesting the appointment of  
17 counsel for the evidentiary hearing, and seeking to postpone the hearing. (ECF No. 104.) On  
18 September 21, 2018, that motion was denied. (ECF No. 105.) The order was served via email  
19 on the Litigation Coordinator at CSP-LAC so that it could be hand-delivered to Plaintiff, due to  
20 the time-sensitive nature of the ruling. (ECF No. 106.)

21 On September 26, 2018, the Court was informed by the Department of Corrections and  
22 Rehabilitation ("CDCR") that Plaintiff refused to be transported for the September 27, 2018  
23 hearing. (ECF No. 108.)

24 As a result, the Court *sua sponte* found that the interests of justice required Plaintiff to  
25 appear via video conferencing at the hearing. The Court requested that defense counsel work  
26 with CDCR and the Court's IT Department to facilitate Plaintiff's video conference appearance  
27 on an expedited basis. Defense counsel and CDCR expeditiously complied, which the Court  
28 greatly appreciated. Despite their efforts Plaintiff refused to appear for the hearing even though

1 video appearance but then changed his mind shortly before the actual hearing.

2 **III.**

3 **EVIDENTIARY HEARING**

4 On September 27, 2018, the Court conducted an evidentiary hearing on the issue of  
5 exhaustion of administrative remedies. (ECF No. 109.) Plaintiff appeared *pro se*, via video  
6 telephone conference, on behalf of himself, and Amy I. Myers, Tulare County Counsel, appeared  
7 on behalf of Defendants.

8 **A. Plaintiff's Failure to Appear**

9 At the outset of the hearing, the Court informed the parties that it had information from  
10 CDCR that Plaintiff refused to be transported for the evidentiary hearing. The Court questioned  
11 Plaintiff on the matter.

12 Plaintiff stated that he understood that he would have to transfer prisons to attend the  
13 hearing, and that he did not find that the schedule would accommodate him. The Court found  
14 that Plaintiff willfully refused to attend the evidentiary hearing. Nevertheless, in an abundance  
15 of caution, it accommodated Plaintiff on a one-time basis by allowing him to appear by video  
16 conference. Defendants did not object to Plaintiff appearing and giving testimony by video  
17 conference. As noted at the hearing, the Court appreciates counsel accommodating the change in  
18 proceedings.

19 Plaintiff was warned, and is expressly warned here again, that for all future proceedings,  
20 he will be required to appear in person and be transported to the United States Courthouse in  
21 Fresno, with transportation arrangements to be made in CDCR's discretion. Further, Plaintiff's  
22 failure to appear and refusal to prosecute this action may result in sanctions, up to and including  
23 dismissal of this action.

24 **B. Exhaustion of Available Administrative Remedies**

25 During the hearing, Plaintiff submitted as evidence Defendants' Answer to the amended  
26 complaint; specifically, Plaintiff submitted Defendants' admission in the Answer that Plaintiff  
27 submitted a grievance on the claim at issue, as alleged in his amended complaint. (Def.'s  
28 Answer, ECF No. 35, ¶ 1.) Previously, Plaintiff submitted that portion of Defendants' Answer

1 as an exhibit to his opposition to Defendants’ motion for summary judgment for the failure to  
2 exhaust administrative remedies. Plaintiff cited the Answer as support for his argument that he  
3 submitted a grievance in compliance with the requirements of the Prison Litigation Reform Act  
4 (“PLRA”), 42 U.S.C. § 1997e(a). (Pl.’s Opp’n, ECF No. 95, Ex. F.)

5 Plaintiff clarified at the hearing that by citing to this admission in Defendants’ Answer,  
6 he meant to raise that he was unaware, until Defendants brought their summary judgment  
7 motion, that there was any dispute regarding his exhaustion of available administrative remedies.  
8 Further, there was an admission in the record on the issue, and he argues that he is disadvantaged  
9 under the circumstances.

10 **IV.**  
11 **DISCUSSION**

12 “There is no question that exhaustion is mandatory under the PLRA and that unexhausted  
13 claims cannot be brought in court.” Jones v. Bock, 549 U.S. 199, 211, 127 S. Ct. 910, 918–19,  
14 166 L. Ed. 2d 798 (2007) (citing Porter v. Nussle, 534 U.S. 516, 524, 122 S. Ct. 983, 988, 152 L.  
15 Ed. 2d 12 (2002)); see also Woodford v. Ngo, 548 U.S. 81, 85, 126 S. Ct. 2378, 2382, 165 L. Ed.  
16 2d 368 (2006) (same). Nevertheless, “[f]ailure to exhaust under the PLRA is ‘an affirmative  
17 defense the defendant must plead and prove.’” Albino v. Baca, 747 F.3d 1162, 1166 (9th Cir.  
18 2014) (citing Jones, 549 U.S. 199, 204 (2007)); see also Reed Elsevier, Inc. v. Muchnick, 559  
19 U.S. 154, 166 & n. 6, 130 S. Ct. 1237, 1246-47, 176 L. Ed. 2d 18 (2010) (citing Jones and  
20 Woodford as examples of cases in which the Supreme Court treated exhaustion under the PLRA  
21 as a non-jurisdictional threshold requirement). A party’s responsive pleading under Federal Rule  
22 of Civil Procedure 8(c) must contain the affirmative defenses it wishes to assert, or those  
23 affirmative defenses are deemed waived. E.g., In re Adbox, Inc., 488 F.3d 836, 841 (9th Cir.  
24 2007). Thus, the failure to exhaust administrative remedies is an affirmative defense that is  
25 waived if the Defendant does not plead it in a responsive pleading, and prove it. Lira v. Herrera,  
26 427 F.3d 1164, 1171 (9th Cir. 2005) (citing Wyatt v. Terhune, 315 F.3d 1108, 1117-18 & n.9  
27 (9th Cir. 2003)).

28 Here, the Court finds that Defendants admitted that Plaintiff exhausted available

1 administrative remedies for the claims raised in this suit, and failed to raise the affirmative  
2 defense of the failure to exhaust available administrative remedies, in their Answer.  
3 Nevertheless, at the hearing, defense counsel argued that Defendants' admission and failure to  
4 raise the defense was done in error, and that there was reasonable justification for the error.

5 Ordinarily, motions to amend the pleadings are governed by Federal Rule of Civil  
6 Procedure 15(a). That Rule provides that unless a party can amend its pleading as a matter of  
7 course (which is not applicable here), the party "may amend its pleading only with the opposing  
8 party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2). The Rule further provides  
9 that "[t]he court should freely give leave when justice so requires." Id.

10 However, once a court has entered a pretrial scheduling order pursuant to Federal Rule of  
11 Civil Procedure 16, the standards of Rule 16, rather than Rule 15, govern amendment of the  
12 pleadings. See Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 607-08 (9th Cir. 1992).  
13 Under Rule 16, scheduling orders may be modified "only for good cause and with the judge's  
14 consent." Fed. R. Civ. P. 16(b)(4).

15 In this case, a Discovery and Scheduling Order was entered on June 10, 2016, setting the  
16 deadline to amend the pleadings as October 11, 2016. (ECF No. 36.) Plaintiff moved to extend  
17 that deadline for sixty days until December 11, 2016, (ECF No. 49), which was granted, (ECF  
18 No. 50.) Defendants have not made any motion for leave to amend their Answer, and the  
19 deadline has now passed, but the potential of good cause for the failure to seek leave to amend at  
20 an earlier date was raised by defense counsel at the evidentiary hearing. No evidence has yet  
21 been presented on that issue, nor have the parties fully argued whether Defendants may now  
22 amend their responsive pleading.

23 In the interests of justice, the Court finds that Defendants may move for leave amend  
24 their responsive pleading within **fourteen (14) days** of this order, and must make a showing of  
25 good cause for leave to amend. Plaintiff may file a response to that motion within **fourteen (14)**  
26 **days** of service and filing. No reply will be permitted, and the Court will rule upon the motion  
27 once the deadline to file any response has passed. Local Rule 230(l).

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1 If Defendants fail to make a timely motion, or fail to show good cause for leave to amend  
2 their Answer, then the defense of the failure to exhaust available administrative remedies will be  
3 deemed waived. The Court will then proceed to set this matter for trial.

4 If Defendants file the motion for leave to amend, and it is granted, then Court will also  
5 grant Plaintiff a reasonable opportunity to pursue discovery only on the limited issue of whether  
6 administrative remedies were effectively unavailable in this case. Specifically, this includes only  
7 evidence regarding the factual dispute as to whether Deputy Timothy Abbot gave Plaintiff a  
8 grievance form on or about August 28, 2014, whether Plaintiff submitted that form to Deputy  
9 Abbot, and whether that form was lost, destroyed or otherwise not acted upon. Plaintiff will also  
10 be allowed a reasonable opportunity to supplement his opposition to Defendants' motion for  
11 summary judgment based on any newly discovered evidence.

12 V.

13 **CONCLUSION**

14 For the reasons explained, it is HEREBY ORDERED that Defendants must file a motion  
15 to amend their responsive pleading within **fourteen (14) days**, or the defense of the failure to  
16 exhaust available administrative remedies will be deemed waived, as discussed above.

17  
18 IT IS SO ORDERED.

19 Dated: October 8, 2018

  
UNITED STATES MAGISTRATE JUDGE