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3 UNITED STATES DISTRICT COURT  
4 WESTERN DISTRICT OF WASHINGTON  
5 AT TACOMA

6 TIMOTHY CHARLES THOMPSON,

7 Plaintiff,

8 v.

9 CAROLYN W. COLVIN, Acting  
10 Commissioner of Social Security,

11 Defendant.

Case No. 3:16-cv-05442-KLS

ORDER GRANTING DEFENDANT'S  
CONVERTED MOTION FOR SUMMARY  
JUDGMENT

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13 This matter is before the Court on defendant's converted motion for summary judgment  
14 under Federal Rule of Civil Procedure (FRCP) 56. Dkt. 10. Defendant originally filed a motion  
15 to dismiss under FRCP 12(b)(6), or in the alternative under FRCP 56, arguing plaintiff's  
16 complaint should be dismissed as untimely. *Id.* Because defendant included matters outside the  
17 pleadings that the Court found necessary to consider prior to ruling on defendant's motion, that  
18 motion was converted to a motion for summary judgment, and plaintiff was given an opportunity  
19 to present any additional material he deemed pertinent to the converted motion. Dkt. 11. As the  
20 time for presenting such material has passed, this matter is ripe for consideration. For the reasons  
21 set forth below, the Court agrees with defendant that plaintiff's complaint should be dismissed as  
22 untimely.  
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24 Summary judgment shall be rendered if the pleadings, exhibits, and affidavits show that  
25 there is no genuine issue as to any material fact and that the moving party is entitled to judgment  
26 as a matter of law. FRCP 56(c). In deciding whether summary judgment should be granted, the

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1 Court “must view the evidence in the light most favorable to the nonmoving party,” and draw all  
2 inferences “in the light most favorable” to that party. *T.W. Elec. Serv., Inc. v. Pacific Elec.*  
3 *Contractors Ass’n*, 809 F.2d 626, 630-31 (9th Cir. 1987). When a summary judgment motion is  
4 supported as provided in FRCP 56, an adverse party may not rest upon the mere allegations or  
5 denials of his pleading, but his or her response, by affidavits or as otherwise provided in FRCP  
6 56, must set forth specific facts showing there is a genuine issue for trial. FRCP 56(e)(2).  
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8 If the nonmoving party does not so respond, summary judgment, if appropriate, shall be  
9 rendered against that party. *Id.* The moving party must demonstrate the absence of a genuine  
10 issue of fact for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986). Mere  
11 disagreement or the bald assertion that a genuine issue of material fact exists does not preclude  
12 summary judgment. *California Architectural Building Prods., Inc. v. Franciscan Ceramics, Inc.*,  
13 818 F.2d 1466, 1468 (9th Cir. 1987). A “material” fact is one which is “relevant to an element of  
14 a claim or defense and whose existence might affect the outcome of the suit,” and the materiality  
15 of which is “determined by the substantive law governing the claim.” *T.W. Electrical Serv.*, 809  
16 F.2d at 630.  
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18 Mere “[d]isputes over irrelevant or unnecessary facts,” therefore, “will not preclude a  
19 grant of summary judgment.” *Id.* Rather, the nonmoving party “must produce at least some  
20 ‘significant probative evidence tending to support the complaint.’” *Id.* (quoting *Anderson*, 477  
21 U.S. at 290); *California Architectural Building Prods.*, 818 F.2d at 1468 (“No longer can it be  
22 argued that any disagreement about a material issue of fact precludes the use of summary  
23 judgment.”). In other words, the purpose of summary judgment “is not to replace conclusory  
24 allegations of the complaint or answer with conclusory allegations of an affidavit.” *Lujan v.*  
25 *National Wildlife Fed’n*, 497 U.S. 871, 888 (1990).  
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1 A civil action seeking judicial review of a final decision of the Commissioner “must be  
2 instituted within 60 days after the Appeals Council’s notice of denial of request for review of the  
3 administrative law judge’s [(ALJ’s)] decision or notice of the decision by the Appeals Council is  
4 received by” the claimant, unless “extended by the Appeals Council upon a showing of good  
5 cause.” 20 C.F.R. § 422.210(c). The date of receipt of the notice of the decision of the Appeals  
6 Council by the claimant or the claimant’s representative is “presumed to be 5 days after the date  
7 of such notice, unless there is a reasonable showing to the contrary.” *Id.*; 20 C.F.R. § 404.901  
8 (“Date you receive notice means 5 days after the date on the notice, unless you show us that you  
9 did not receive it within the 5-day period.”); 20 C.F.R. § 404.1715(b) (“A notice or request sent  
10 to your representative, will have the same force and effect as if it had been sent to you.”).

12 “The 60–day period is not jurisdictional, but instead constitutes a statute of limitations.”  
13 *Vernon v. Heckler*, 811 F.2d 1274, 1277 (9th Cir. 1987). Because “it is a condition on the waiver  
14 of sovereign immunity,” the 60-day period “must be strictly construed.” *Bowen v. City of New*  
15 *York*, 476 U.S. 467, 479 (1986); *see also Tate v. United States*, 437 F.2d 88, 89 (9th Cir. 1971)  
16 (action commenced two days late properly dismissed); *Davila v. Barnhart*, 225 F.Supp.2d 337,  
17 340 (S.D.N.Y. 2002) (dismissing complaint although filed “only one day late,” observing that  
18 “courts have not hesitated to enforce the 60-day period as a firm limit”) (citations omitted);  
19 *O’Neill v. Heckler*, 579 F.Supp. 979, 980-81 (E.D. Pa. 1984) (“Even one day’s delay in filing  
20 the action is fatal”) (citation omitted).

23 In this case, the ALJ issued his unfavorable decision on October 15, 2015. Dkt. 10-1, pp.  
24 6-21. In a Notice of Appeals Council Action dated March 30, 2016, the Appeals Council denied  
25 plaintiff’s request for review of the ALJ’s decision, and informed plaintiff that if he disagreed  
26 with the Appeals Council’s action, he could request judicial review of that action by filing a civil

1 action in federal court within 60 days. *Id.* at pp. 22-25. Accordingly, plaintiff was presumed to  
2 have received the Notice on April 4, 2016, five days after the date on the Notice, and would thus  
3 have had to file his complaint by no later than June 3, 2016, to be timely. Plaintiff’s counsel at  
4 the time, however, did not file the complaint until June 6, 2016. Dkt. 1.

5 The complaint alleges, however, that the Notice was received on April 5, 2016, instead of  
6 April 4, 2016, the presumed receipt date. *Id.* at p. 2. “A claimant can rebut [the] presumption  
7 [that the Notice was received five days after the date of the Notice,] by making a ‘reasonable  
8 showing to the contrary’ that he did not receive such notice within five days.” *McCall v. Bowen*,  
9 832 F.2d 862, 864-65 (5th Cir. 1987) (quoting 20 C.F.R. § 422.210(c)). In *McCall*, the plaintiff  
10 “sought to rebut the presumption that he received notice [five days after the date it was mailed,]  
11 by offering his affidavit and his attorney’s affidavit stating that neither of them received notice”  
12 until several months later. 832 F.2d at 864.

13 In finding the submission of the affidavits to be “insufficient to rebut the presumption of  
14 notice,” the Fifth Circuit stated:  
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16 Although the court presumes that these statements, like all statements made or  
17 offered by an officer of the court, are made in good faith, they cannot provide  
18 a substitute for a more concrete showing that the plaintiff or her attorney  
19 actually did not receive the [Commissioner]’s notice within five days of the  
20 date of mailing. Otherwise, this court would be creating an exception to the  
21 [Social Security] Act by which a tardy claimant could avoid the jurisdictional  
22 requirements by merely asserting a late delivery of the notice of the  
23 [Commissioner]’s decision.

24 *Id.* (quoting *Rouse v. Harris*, 482 F.Supp. 766, 769 (D.N.J. 1980)); *see also Pettway v. Barnhart*,  
25 233 F.Supp.2d 1354, 1356 and n.3 (S.D. Ala. 2002) (noting that “[c]ourts have repeatedly  
26 concluded that a bald denial of timely receipt by the plaintiff and/or her attorney, even if made  
under oath, is insufficient to constitute a ‘reasonable showing’ sufficient to rebut the regulatory  
presumption.”). Similarly, here plaintiff offers nothing more than the bare assertion that neither

1 he nor his attorney received the Notice within the presumed time period. Accordingly, the Court  
2 finds plaintiff has failed to rebut that presumption.

3 Failure to file the complaint within the mandated time period is an affirmative defense,  
4 which “is properly raised in a responsive pleading.” *Vernon*, 811 F.2d at 1278 (citing FRCP  
5 8(c)). Because the Commissioner raised that defense in her responsive pleading, it is not waived.  
6 See *Johnson v. Shalala*, 2 F.3d 918, 923 (9th Cir. 1993) (“The requirement that a claimant appeal  
7 an adverse decision within 60 days . . . is waivable.”). On the other hand, “as a statute of  
8 limitations” the mandated time period “is subject to equitable tolling.” *Vernon*, 811 F.2d at 1277.  
9 Equitable tolling applies, however, “when the plaintiff is prevented from asserting a claim by  
10 wrongful conduct on the part of the defendant, or when extraordinary circumstances beyond the  
11 plaintiff’s control made it impossible to file a claim on time.” *Stoll v. Runyon*, 165 F.3d 1238,  
12 1242 (9th Cir. 1999). Plaintiff has not made any such showing.

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15 For the reasons set forth above, plaintiff’s complaint is untimely. Defendant’s motion for  
16 summary judgment (Dkt. 10) therefore is GRANTED, and plaintiff’s complaint is DISMISSED.

17 DATED this 19th day of October, 2016.

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22 Karen L. Strombom  
23 United States Magistrate Judge  
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