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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Charles Edward Byrd,	}	No. CV 04-2701-PHX-NVW-ECV
Plaintiff,	}	<b>ORDER</b>
vs.	}	
Joseph Arpaio, et al.,	}	
Defendants.	}	

Before the Court is Defendants’ Motion to Dismiss for failure to exhaust (Doc. # 62). For the reasons that follow, Defendants’ motion will be denied.

**I. Waiver of Affirmative Defenses**

Affirmative defenses are waived if the party fails to assert them at the time specified by the rules. See Simpson v. Alaska State Com’n for Human Rights, 608 F.2d 1171, 1174 (9th Cir. 1979). If a defendant decides to assert a Rule 12(b) defense by motion, he must do so before filing the answer. Fed. Rule Civ. P.12(b). Under Federal Rule of Civil Procedure 12(a)(1), a defendant shall serve an answer within 60 days after the request for a waiver was sent. Thus, it follows that an unenumerated 12(b) motion to dismiss for nonexhaustion that is filed after the 60 day time frame provided under Rule 12 is untimely.

Here, Defendants did not raise exhaustion as an affirmative defense in their answer, nor did Defendants timely file a motion to dismiss for nonexhaustion within the 60 day time frame provided by Rule 12 (Doc. # 28).

1 **II. Untimeliness of the Motion**

2 Defendants' motion is also untimely under the Court's May 22, 2006 Case  
3 Management Order (Doc. # 37). That order required that all dispositive motions be filed no  
4 later than March 26, 2007. Defendants have not filed a motion to extend the time to file a  
5 new dispositive motion. Consequently, such a motion is untimely and will not be considered.

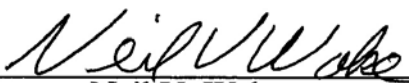
6 **III. Amendment**

7 The Court *may* consider Defendants' motion as a motion to amend to add the  
8 affirmative defense of nonexhaustion. "The following factors guide a court's  
9 determination of whether a motion to amend should be granted: (1) undue delay; (2) bad  
10 faith; (3) futility of amendment; and (4) prejudice to the opposing party." Forsyth v.  
11 Humana, Inc., 114 F.3d 1467, 1482 (9th Cir. 1997). Three of the four factors, however,  
12 weigh against providing leave to amend. This case is approaching three years old and  
13 Defendants certainly have had the opportunity to file a motion to dismiss for nonexhaustion  
14 before the eve of trial. Moreover, Defendants' request is futile as their motion is clearly  
15 barred by the Court's Case Management Order. Finally, this motion does prejudice Plaintiff  
16 in that the Court has already imposed firm deadlines for the final preparations for trial in this  
17 case, discovery is long closed, and Plaintiff would be unable to take discovery on this new  
18 defense in time for trial. Defendant's attempt to bring up a new defense after the close of  
19 discovery, after the deadline for dispositive motions, and on the eve of trial is an extreme  
20 example of an unjustified late defense.

21 In view of the rapidly approaching deadlines in preparation for trial in this case and  
22 the clearly untimeliness of the Motion to Dismiss, the Court will rule upon the motion  
23 without awaiting a response.

24 **IT IS THEREFORE ORDERED THAT** Defendants' Motion to Dismiss (Doc. #  
25 62) is **DENIED**.

26 DATED this 20<sup>th</sup> day of June, 2007.

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Neil V. Wake  
United States District Judge