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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

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Arthur L. Vitasek,

No. CV 10-1777-PHX-RCB (JRI)

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Plaintiff,

**ORDER**

11

vs.

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Maricopa County Sheriff's Office, et al.

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Defendants.

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Plaintiff Arthur L. Vitasek brought this civil rights action under 42 U.S.C. § 1983 against three Maricopa County Sheriff's Office employees: Sheriff Joseph Arpaio; Detention Officer R. Gilbert; and Transportation Officer Deana Lopez (Doc. 12). Before the Court are Gilbert and Lopez's Motion to Dismiss (Doc. 23) and Plaintiff's Motion for Court Orders (Doc. 27).

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The Court will deny both motions.

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**I. Background**

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Plaintiff's claims arose during his confinement at the Fourth Avenue Jail in Phoenix, Arizona (Doc. 12 at 1). In Count I of his First Amended Complaint, Plaintiff alleged that Arpaio sets the policies applicable in the jails and is responsible for training officers (*id.* at 3). Plaintiff claimed that the violations alleged in Counts II and III arose due to the policies adopted by Arpaio and his failure to adequately train Gilbert and Lopez (*id.*).

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In Count II, Plaintiff averred that on June 8, 2010, Gilbert opened and read Plaintiff's legal mail and then refused to give the legal mail to Plaintiff (*id.* at 4). Plaintiff further

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1 averred that Gilbert threatened to read all of Plaintiff's mail in the future. Plaintiff claimed  
2 that as a result, he was unable to communicate privately with his witnesses for months until  
3 the trial court judge issued an order regarding Plaintiff's mail (id.).

4 In Count III, Plaintiff alleged that on the morning of March 18, 2010, while he was  
5 speaking to a detention officer about transport to court for his hearing later that day, Lopez  
6 approached, told Plaintiff to shut up, searched Plaintiff, and asked the detention officer for  
7 handcuffs (id. at 5). Plaintiff stated that he informed Lopez he could not carry his box of  
8 legal materials while handcuffed, but Lopez responded that this was Plaintiff's problem (id.).  
9 Plaintiff alleged that Lopez refused Plaintiff's request for a sergeant and, later, did not return  
10 to transport Plaintiff to his hearing. According to Plaintiff, Lopez claimed that Plaintiff  
11 refused transport; however, after Plaintiff filed a grievance and a motion with the trial court,  
12 Lopez then claimed that Plaintiff had been disruptive. Plaintiff stated that the trial court  
13 judge issued an order requiring Plaintiff to be transported in the future (id.).

14 The Court screened the amended pleading and found that Plaintiff set forth a claim  
15 against Arpaio in Count I based upon municipal policy and failure to train, and that Plaintiff  
16 stated a First Amendment claim against Gilbert in Count II and an access-to-the-courts claim  
17 against Lopez in Count III (Doc. 13).

18 On December 29, 2010, Arpaio filed a Motion to Dismiss (Doc. 21). Plaintiff  
19 submitted a response and a supplemental response to Arpaio's motion (Docs. 24-25). Arpaio  
20 then withdrew his motion (Doc. 28). Meanwhile, on January 7, 2011, Gilbert and Lopez  
21 filed their Motion to Dismiss (Doc. 23). With his response to Gilbert and Lopez' motion,  
22 Plaintiff submitted his Motion for Court Orders (Doc. 27).

## 23 **II. Gilbert and Lopez' Motion**

### 24 **A. Defendants' Contentions**

25 Defendants move for dismissal of Counts II and III on the ground that Plaintiff failed  
26 to exhaust his administrative remedies as required under the Prison Litigation Reform Act  
27 (PLRA), 42 U.S.C. § 1997e(a) (Doc. 23). In support, they submit the affidavit of Selethia  
28 L. Down, a MCSO sergeant assigned to the Inmate Hearing Unit (id., Ex. 2, Down Aff. ¶ 1).

1 Down attests that the inmate grievance procedure at the jail is a three-tiered system that  
2 includes (1) the initial grievance and decision by the Bureau Hearing Officer; (2) the  
3 Institutional appeal; and (3) the External appeal (id. ¶ 4). Down attests that all inmates are  
4 notified of the grievance procedures upon their receipt of the MCSO Rules and Regulations  
5 at booking (id.). According to Down, a search of the inmate grievance records maintained  
6 by MCSO reflects that plaintiff filed numerous grievances on various issues while housed  
7 at the jail facilities (id. ¶¶ 6-7). Attached to the affidavit is a computer generated list of  
8 approximately 40 grievances Plaintiff filed during his confinement (id., Ex. D). This list  
9 includes the date of each grievance, the grievance number, and a brief description of the  
10 complaint, and some entries include a comment describing MCSO's response (id.). Down  
11 states that none of Plaintiff's grievances pertain to allegations raised in this lawsuit;  
12 specifically, there are no grievances about Gilbert opening and reading Plaintiff's mail and  
13 no grievances about Lopez denying Plaintiff transport to court (id. ¶ 8).

14 Defendants rely on this evidence to argue that Plaintiff did not exhaust remedies for  
15 his claims in Counts II and III; therefore, the claims raised in those counts should be  
16 dismissed with prejudice (Doc. 23 at 4).

#### 17 **B. Plaintiff's Response**

18 As stated, Plaintiff had filed a response and supplemental response to Arpaio's Motion  
19 to Dismiss, which was subsequently withdrawn (see Docs. 21, 24-25, 28). Arpaio's motion  
20 had also raised a nonexhaustion argument (Doc. 21 at 5). In his response to Gilbert and  
21 Lopez' Motion to Dismiss, Plaintiff incorporates his response and supplemental response to  
22 Arpaio's motion (Doc. 26 at 1).

23 In his first response Plaintiff avers that previously, on January 14, 2010, his legal mail  
24 was seized before he could read it (Doc. 25 at 2). He states that he filed a grievance, which  
25 is attached to his response (id., Attach. A). In response to his grievance, Lieutenant  
26 Velazquez discussed the issue with Plaintiff and made an agreement that detention officers  
27 would not read Plaintiff's legal mail and Plaintiff would not submit a motion on the issue to  
28 the trial court (id.). Plaintiff explains that pursuant to this agreement, he signed off on the

1 grievance as resolved (id.). In his response to Gilbert and Lopez’ motion, Plaintiff notes that  
2 this particular grievance is listed on page four of Defendants’ Exhibit D, the computer  
3 generated list of Plaintiff’s grievances (Doc. 26 at 2, ref. Doc. 23, Ex. D at 4 (describing Jan.  
4 15, 2010 grievance regarding legal mail and discussion with Lt. Velazquez)). Plaintiff  
5 contends that once his grievance was resolved, the issue was exhausted (Doc. 26 at 2).  
6 Plaintiff adds that MCSO has a strict policy against submitting duplicate grievances;  
7 therefore, he could not submit another grievance on the same issue (Doc. 25 at 3). Plaintiff  
8 argues that with the agreement and resolution of the January 2010 grievance and the  
9 prohibition of duplicate grievances, when Defendants subsequently broke that agreement, he  
10 had no other remedy available and had exhausted (id.).

11 Plaintiff avers that because a new grievance would have been dismissed as a duplicate,  
12 he filed an inmate request form to Sergeant Williams (id.). In this request, Plaintiff cited the  
13 rules governing detention officers and the handling of inmate legal mail and the discussion  
14 he had with Lt. Velazquez (id.). Plaintiff proffers a copy of this inmate request form, which  
15 is dated June 8, 2010 (id., Ex. B). Plaintiff states that there was no response to this request  
16 form (id.). Thus, Plaintiff maintains that he had no other remedy so he filed a “Motion for  
17 Court Order and Motion for Sanctions” in the state trial court (id., Ex. C). Plaintiff submits  
18 a copy of the Minute Entry dated August 2, 2010, which addresses his motion and, according  
19 to Plaintiff, provided the relief he sought regarding his legal mail (id., Ex. D). Plaintiff  
20 concludes that he exhausted remedies for his legal mail claim and MCSO employees  
21 breached the agreement concerning the mail (id. at 4).

22 With his supplemental response, Plaintiff submits a copies of his inmate grievance,  
23 Institutional appeal, and External appeal, and all responses thereto, pertaining to his claim  
24 against Lopez (Doc. 24, Attach. A). Plaintiff asserts that the transportation issue was not  
25 only grieved through every level, it was addressed by Sgt. Downs, who signed the External  
26 appeal before returning it to Plaintiff (Doc. 26 at 2, ref. to Doc. 24, Attach. A (External  
27 appeal resp. at 5)).

28 Plaintiff submits that the MCSO uses its grievance process as a “revolving conveyor

1 belt that is never resolved,” so that lawsuits cannot be filed (Doc. 24 at 6). He alleges that  
2 in this system, an inmate grieves an issue, gets a favorable resolution by superiors, but that  
3 resolution is then denied or ignored by detention officers (*id.*). The inmate is told to file a  
4 grievance, and the process repeats as long as the grievance is not rejected as a duplicate (*id.*).  
5 Plaintiff states that this circular processing has no end and provides no final resolution (*id.*).

6 **C. Gilbert and Lopez’ Reply**

7 In light of Plaintiff’s evidence of exhaustion as to the claim against Lopez, Defendants  
8 withdraw their Motion to Dismiss as to Count III (Doc. 31 at 2).

9 As to the legal-mail claim against Gilbert, Defendants argue that in both his First  
10 Amended Complaint and his Response to Gilbert and Lopez’ Motion to Dismiss, Plaintiff  
11 concedes that he filed no grievance against Gilbert (*id.* at 1-2). They submit that because  
12 there is no evidence that Plaintiff filed a grievance against Gilbert for opening legal mail,  
13 Count II must be dismissed (*id.* at 2).

14 **D. Plaintiff’s Amended Response**

15 Plaintiff filed his first response to Gilbert and Lopez’ Motion to Dismiss before the  
16 Court issued the Notice required under Wyatt v. Terhune, 315 F.3d 1108, 1120 n. 14 (9th Cir.  
17 2003), which informs pro se prisoner litigants of the obligation to respond to motion seeking  
18 dismissal for failure to exhaust. Therefore, the Court issued the requisite Notice on January  
19 19, 2011, after Gilbert and Lopez’ Reply, and provided Plaintiff the opportunity to file an  
20 amended response (Doc. 33).

21 In his Amended Response, Plaintiff restates that he filed a grievance in January 2010  
22 about officers reading his legal mail, he reached agreement with Lt. Velazquez and resolved  
23 the grievance, and then in June 2010 Gilbert violated that agreement and read Plaintiff’s mail  
24 (Doc. 37 at 1-2). Plaintiff argues that the MCSO grievance policy requires inmates to file  
25 grievances to attempt to resolve *issues* and that he grieved the issue of officers reading his  
26 legal mail (*id.* at 2-3). He maintains that the language in the policy does not require him to  
27 grieve each individual detention officer who violates the previous agreement made pursuant  
28 to his initial grievance resolution (*id.* at 3). Plaintiff submits that the issue was properly

1 grieved and resolved, thereby ending the grievance process (id. at 3-4). He notes that nothing  
2 in the MCSO grievance policy explains what an inmate must do if MCSO does not adhere  
3 to the proposed resolution (id. at 4-5).

#### 4 **E. Gilbert and Lopez' Amended Reply**

5 Gilbert and Lopez repeat that there is no evidence that Plaintiff filed a grievance  
6 against Gilbert (Doc. 38 at 2). Defendants contend that Plaintiff is wrong to conclude that  
7 the filing of an inmate request form to Sgt. Williams excused or waived his obligation to  
8 exhaustion administrative remedies (id.). They state that the inmate request form is not a  
9 grievance and does not supersede the exhaustion requirement (id. at 3). They also state that  
10 the case law is clear that exhaustion is mandatory (id. at 2). Defendants refer to the MCSO  
11 grievance policy, which provides that grievance forms must be submitted within 48 hours of  
12 the event being grieved (id. at 3, citing Doc. 23, Ex. 1). Defendants argue that because  
13 Plaintiff failed to comply with the PLRA and the MCSO grievance policy, this claim must  
14 be dismissed (Doc. 38 at 3).

### 15 **IV. Exhaustion**

#### 16 **A. Legal Standard**

17 Under the PLRA, a prisoner must exhaust available administrative remedies before  
18 bringing a federal action. See 42 U.S.C. § 1997e(a); Griffin v. Arpaio, 557 F.3d 1117, 1119  
19 (9th Cir. 2009). Exhaustion is required for all suits about prison life, Porter v. Nussle, 534  
20 U.S. 516, 523 (2002), regardless of the type of relief offered through the administrative  
21 process, Booth v. Churner, 532 U.S. 731, 741 (2001). A prisoner must complete the  
22 administrative review process in accordance with the applicable rules. See Woodford v.  
23 Ngo, 548 U.S. 81, 92 (2006).

24 Exhaustion is an affirmative defense. Jones v. Bock, 549 U.S. 199, 212 (2007). Thus,  
25 the defendant bears the burden of raising and proving the absence of exhaustion. Wyatt, 315  
26 F.3d at 1119. Because exhaustion is a matter of abatement in an unenumerated Rule 12(b)  
27 motion, a court may look beyond the pleadings to decide disputed issues of fact. Id. at 1119-  
28 20. Further, a court has broad discretion as to the method to be used in resolving the factual

1 dispute. Ritza v. Int'l Longshoremen's & Warehousemen's Union, 837 F.2d 365, 369 (9th  
2 Cir. 1988) (quotation omitted). If a court finds that the plaintiff failed to exhaust  
3 administrative remedies, the proper remedy is dismissal without prejudice. Wyatt, 315 F.3d  
4 at 1120. Dismissal of the entire complaint is not required if a plaintiff exhausts some, but not  
5 all, claims included in the complaint. See Jones, 549 U.S. at 222-24.

6 **B. Analysis**

7 The request for dismissal only applies to Plaintiff's claim in Count II. The specific  
8 exhaustion question raised is whether Plaintiff's January 15, 2010 grievance, which  
9 concerned officers opening and reading his legal mail, served to exhaust Plaintiff's claim  
10 against Gilbert that arose in June 2010. Plaintiff submits a copy of the January 2010  
11 grievance (Doc. 25, Attach. A), and Defendants describe this grievance in their grievance list  
12 attached to Down's affidavit (Doc. 23, Ex. 2, Down Aff. ¶ 7, Ex. D at 4). This evidence  
13 reflects that in his January 2010 grievance, Plaintiff complained about his legal mail being  
14 opened and seized, that Lt. Velazquez met with Plaintiff and "discussed legal issues and  
15 [Plaintiff's] mail," and that Plaintiff's grievance was resolved (id.). With this resolution,  
16 Plaintiff exhausted his January 2010 grievance about detention officers' handling of his legal  
17 mail. See Harvey v. Jordan, 605 F.3d 681, 685 (9th Cir. 2010) ("[a]n inmate has no  
18 obligation to appeal from a grant of relief, or a partial grant that satisfies him, in order to  
19 exhaust his administrative remedies").

20 Because the burden is on Defendants to demonstrate nonexhaustion, Gilbert must  
21 show that when the legal mail issue arose again in June 2010, relief remained available to  
22 Plaintiff through the grievance system. See Brown v. Valoff, 422 F.3d 926, 936-37 (9th Cir.  
23 2005). The information concerning MCSO's grievance policy "is pertinent because it  
24 informs our determination of whether relief was, as a practical matter, 'available.'" Id. at  
25 937. Plaintiff asserts that there is no provision within MCSO policy that informed him how  
26 to proceed after his grievance was resolved but the issue recurred with Gilbert's actions.  
27 Gilbert does not respond to this assertion or point to any provision within the policy that  
28 instructed Plaintiff what he could have done. Nor does Gilbert respond to Plaintiff's

1 contention that he was required only to grieve the *issue* about which he complained, rather  
2 that grieve each individual officer upon his or her involvement with that issue. Instead,  
3 Gilbert merely repeats that Plaintiff failed to file a grievance against Gilbert within 48 hours  
4 of the incident being grieved (Doc. 38 at 2-3).

5 Plaintiff is correct that he does not have to name individual defendants in an inmate  
6 grievance; he is only required to put jail officials on notice of a problem. Griffin, 557 F.3d  
7 at 1120. His January 2010 grievance clearly put jail officials on notice of the problem with  
8 detention officers opening and reading his legal mail (Doc. 25, Attach. A). And, again, the  
9 evidence shows that MCSO addressed the problem and Plaintiff obtained the relief he  
10 desired. Gilbert’s claim that Plaintiff should have re-grieved the legal mail issue in June  
11 2010 when Gilbert opened Plaintiff’s legal mail is contradicted by Ninth Circuit case law.  
12 In Harvey, the Court rejected prison officials’ arguments that when an inmate is granted  
13 relief in the administrative process but it is not actually provided, the inmate must pursue  
14 additional administrative remedies. Harvey, 605 F.3d at 685 (citing Abney v. McGinnis, 380  
15 F.3d 663, 669 (2d Cir. 2004) (“[a] prisoner who has not received promised relief is not  
16 required to file a new grievance where doing so may result in a never-ending cycle of  
17 exhaustion”). Indeed, Plaintiff specifically contends that Defendants’ position—that  
18 Plaintiff had to grieve Gilbert individually—denotes a system with a “kind of circular  
19 processing” where an inmate files a grievance and it is resolved favorably, and then the  
20 resolution is ignored and the inmate is told to file another grievance (Doc. 24 at 6). See  
21 Woodford, 548 U.S. at 102-03 (emphasizing that in holding that proper exhaustion is  
22 required, the Court was not addressing those situations where an inmate contends that  
23 officials devised procedural requirements for the purpose of tripping up inmates as they try  
24 to navigate the grievance system). Defendants, again, fail to respond to Plaintiff’s  
25 contention.

26 In sum, given the evidence of Plaintiff’s January 2010 exhausted grievance on the  
27 relevant issue and the applicable case law, Defendants have failed to meet their burden to  
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1 establish nonexhaustion of the claim in Count II against Gilbert. The Motion to Dismiss will  
2 therefore be denied.

### 3 **III. Motion for Court Orders**

#### 4 **A. Parties' Contentions**

##### 5 **1. Plaintiff's Motion**

6 Plaintiff moves for the Court to (1) direct MCSO to preserve evidence related to his  
7 claims, (2) order MCSO to show cause why it should not be held in contempt for destroying  
8 evidence (of Plaintiff's exhausted grievance), (3) prohibit MCSO from submitting computer  
9 generated evidence given its unreliability, (4) order MCSO to investigate and report why  
10 evidence was deleted from their computer system, (5) issue a search warrant to have MCSO's  
11 computer searched by an expert, (6) prohibit MCSO detention officers from searching  
12 Plaintiff's property without his presence, and (7) sanction MCSO for destruction of evidence  
13 (Doc. 27 at 3-4<sup>1</sup>).

##### 14 **2. Defendants' Response**

15 Arpaio asserts that there is no systemic problem affecting the institutional grievance  
16 monitoring system and the documents pertaining to Plaintiff's grievance on the transportation  
17 issue were simply not included with the copies of Plaintiff's grievances that were first  
18 provided to defense counsel (Doc. 30 at 1-2). For these reasons, Arpaio requests that the  
19 Court deny Plaintiff's Motion for Sanctions (id. at 2).

20 Gilbert and Lopez respond that the information regarding this one grievance was  
21 overlooked at the time that the list of grievance materials was provided to defense counsel  
22 (Doc. 32 at 1-2). They submit that the system, being maintained by humans, is not infallible  
23 and there is no reason to order sanctions or the other relief Plaintiff requested in his motion  
24 (id. at 2). Gilbert and Lopez also assert that they are not personally responsible for  
25 maintaining the grievance records so there is no basis for sanctioning them (id.). Finally,  
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27 <sup>1</sup>Plaintiff's Motion for Court Orders is part of Plaintiff's first response to Gilbert and  
28 Lopez' Motion to Dismiss (Doc. 26 at 3-4). For clarity, the Court has docketed the response  
filing separately as a Motion at Document 27.

1 they argue that Plaintiff has not made the necessary factual or legal showings to obtain the  
2 requested relief (*id.*).

### 3 **3. Plaintiff's Reply**

4 In reply, Plaintiff points out that while Lopez claims no responsibility or liability for  
5 the MCSO computer records that omitted reference to the exhausted grievance about  
6 transport, she came to Plaintiff and discussed the grievance and then signed the grievance  
7 herself (Doc. 36 at 1-2). Plaintiff states that is not rational for the defense to blame the error  
8 on MCSO's computer when Lopez had personal knowledge of the grievance (*id.* at 2).  
9 Plaintiff suggests that this situation is an example of the systemic problems at MCSO, with  
10 the primarily problem being responsibility—the sheriff claims he is not responsible for his  
11 employees or for his computer system, the employees are not responsible for jail procedures,  
12 and now defense counsel is not responsible for submitting unreliable evidence (*id.* at 2-3).  
13 Plaintiff requests that, in light of Defendants' tampering with evidence, his motion for relief  
14 and sanctions be granted (*id.* at 3).

#### 15 **B. Analysis**

16 Plaintiff's motion makes requests for injunctive relief and raises discovery issues. To  
17 warrant injunctive relief, Plaintiff must show “that he is likely to succeed on the merits, that  
18 he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance  
19 of equities tips in his favor, and that an injunction is in the public interest.” Winter v. Natural  
20 Res. Def. Council, Inc., 129 S. Ct. 365, 374 (2008); Am. Trucking Ass'n, Inc. v. City of Los  
21 Angeles, 559 F.3d 1046, 1052 (9th Cir. 2009). Plaintiff does not address these four factors,  
22 and he presents no specific facts or evidence to demonstrate that Defendants or other jail  
23 officials have performed or will perform unlawful searches of his property. Nor does  
24 Plaintiff demonstrate that he is likely to suffer irreparable harm as a result of conduct he  
25 speculates Defendants may attempt during litigation.

26 As to discovery matters, the Federal Rules of Civil Procedure outline the parties'  
27 obligations in discovery and provide Plaintiff with the tools to seek specific evidence or  
28 information. See Fed. R. Civ. P. 26-34. The Rules also allow for Plaintiff to move for

1 an order compelling disclosure and for appropriate sanctions. See Fed. R. Civ. P. 37.  
2 Defendants are already subject to a duty to make proper representations to the Court, Fed.  
3 R. Civ. P. 11(b), and to preserve evidence. See State of Idaho Potato Comm'n v. G & T  
4 Terminal Packaging, Inc., 425 F.3d 708, 720 (9th Cir. 2005) (a party to litigation bears a  
5 general obligation to preserve evidence).

6 For the above reasons, Plaintiff's motion will be denied.

7 **IT IS ORDERED:**

8 (1) The reference to the Magistrate Judge is **withdrawn** as to Gilbert and Lopez'  
9 Motion to Dismiss (Doc. 23) and Plaintiff's Motion for Court Orders (Doc. 27).

10 (2) Gilbert and Lopez' Motion to Dismiss (Doc. 23) is **denied**.

11 (3) Plaintiff's Motion for Court Orders (Doc. 27) is **denied**.

12 DATED this 31st day of March, 2011.

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16 Robert C. Broomfield  
17 Senior United States District Judge  
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