



1 Warden S. Johnson (“Defendant”) on Plaintiff’s claim relating to an unclothed body search (ECF  
2 No. 20). Before the Court now is Defendant’s motion for summary judgment (ECF No. 50) and  
3 Plaintiff’s motion to strike declarations presented with Defendant’s motion for summary  
4 judgment (ECF No. 55). Because the Ninth Circuit has already ruled on the issue of exhaustion  
5 in this case, both motions will be denied.

6 **I. BACKGROUND**

7 On October 9, 2013, Defendant filed a motion to dismiss, alleging that Plaintiff failed to  
8 exhaust his administrative remedies. (ECF No. 24). To support the motion, Defendant attached:  
9 1) The declaration of J. Lozano; 2) A report dated September 9, 2013, from the “Inmate / Parolee  
10 Appeals Tracking System – Level III” (Exhibit A); 3) What appears to be a record of an inmate  
11 grievance process initiated by Plaintiff (Log # CSPC-3-11-01220), including a copy of the Third  
12 Level Appeal Decision, a copy of Plaintiff’s appeal form, a copy of the Formal Level Appeal  
13 Response, and a copy of the Second Level Appeal Response (Exhibit B); 4) What appears to be a  
14 second record of an inmate grievance process initiated by Plaintiff (Log # COR-11-02175),  
15 including a copy of the Third Level Appeal Decision, a copy of Plaintiff’s appeal form, a copy of  
16 the First Level Response, and a copy of the Second Level Response (Exhibit C); 5) What appears  
17 to be a third record of an inmate grievance process initiated by Plaintiff (Log # COR-11-02883),  
18 including a copy of the Third Level Appeal Decision, a copy of Plaintiff’s appeal form, and a  
19 copy of the First Level Response (Exhibit D); and 6) What appears to be a fourth record of an  
20 inmate grievance process initiated by Plaintiff (Log # COR-12-00040), including a copy of the  
21 Third Level Appeal Decision, a copy of Plaintiff’s appeal form, a copy of the First Level  
22 Response, and a copy of the Second Level Response (Exhibit E).

23 On October 30, 2013, Plaintiff filed his opposition to the motion to dismiss, alleging that  
24 he did exhaust his administrative remedies (ECF No. 28). Plaintiff submitted evidence to support  
25 his opposition, including his declaration. (Id.).

26 On February 26, 2014, the Court<sup>2</sup> granted Defendant’s motion to dismiss. (ECF No. 29).

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28 <sup>2</sup> Magistrate Judge Gary S. Austin was the presiding magistrate judge until June 24, 2016.

1 The Court noted that, at the motion to dismiss stage, it could look beyond the pleadings and  
2 decide disputed issues of fact (Id. at p. 5 n. 4), and “thoroughly review[ed] the pleadings and  
3 exhibits” in reaching its decision (Id. at p. 6).

4 On March 24, 2014, Plaintiff filed a notice of appeal of the Court’s order dismissing the  
5 case. (ECF No. 33). On June 2, 2016, the Ninth Circuit Court of Appeals issued a memorandum  
6 vacating the order dismissing the case, and remanding the case.<sup>3</sup> (ECF No. 39). The  
7 memorandum states “[t]herefore, although Blacher did not comply with prison regulations, his  
8 administrative appeals alleging unreasonable searches and a failure to remedy the problem  
9 received a response at the third and final level informing him that his administrative remedies  
10 were exhausted.” (Id. at p. 2).

11 On August 8, 2016, Defendant filed an answer to the Complaint (ECF No. 49) and a  
12 motion for summary judgment (ECF No. 50). On August 19, 2016, Plaintiff filed opposition to  
13 Defendant’s motion for summary judgment, specific denials concerning Defendant’s statement of  
14 undisputed facts, and a motion to strike declarations presented with Defendant’s motion for  
15 summary judgment (ECF Nos. 52-54). On August 26, 2016, Defendant filed a reply to Plaintiff’s  
16 opposition. (ECF No. 57). On September 6, 2016, Plaintiff filed another opposition to  
17 Defendant’s motion for summary judgment. (ECF No. 59).

## 18 II. DISCUSSION

19 Magistrate Judge Gary S. Austin already considered Defendant’s exhaustion argument.  
20 (ECF No. 29). This included a thorough review of the evidence submitted by Plaintiff and  
21 Defendant. (Id. at p. 6). While Magistrate Judge Austin found that Plaintiff failed to exhaust  
22 (Id.), the Ninth Circuit Court of Appeals disagreed, and found that Plaintiff fully exhausted his  
23 administrative remedies (ECF No. 39, p. 2).

24 Accordingly, the issue of whether Plaintiff exhausted his administrative remedies has  
25 already been adjudicated. While Defendant states that the case the Ninth Circuit Court of  
26 Appeals relied on to reach its decision to overrule Magistrate Judge Gary S. Austin’s ruling is

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27 <sup>3</sup> The judgment did not take effect until June 27, 2016. (ECF No. 45).  
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1 now under review (ECF No. 57, p. 2), it does not appear that the case has been overruled at this  
2 time. Additionally, if Defendant wanted to continue to litigate the issue of exhaustion in this case  
3 he should have done so at the appellate level. This Court must follow the order of the Appellate  
4 Court.

5 Therefore, Defendant's motion for summary judgment will be denied. Because the Court  
6 is denying Defendant's motion for summary judgment, Plaintiff's motion to strike declarations  
7 presented with Defendant's motion for summary judgment will be denied as moot.

8 **III. CONCLUSION**

9 Accordingly, IT IS ORDERED that Defendant's motion for summary judgment (ECF No.  
10 50) is DENIED.

11 IT IS FURTHER ORDERED that Plaintiff's motion to strike declarations presented with  
12 Defendant's motion for summary judgment (ECF No. 55) is DENIED as moot.

13 IT IS SO ORDERED.  
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15 Dated: October 17, 2016

/s/ Eric P. Gray  
16 UNITED STATES MAGISTRATE JUDGE

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