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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DAVON E. McCOY,
Plaintiff,
v.
J. STRATTON, et al.,
Defendants.

No. 2:12-cv-1137 WBS DB

ORDER

Plaintiff, a state prisoner proceeding pro se, filed this civil rights action seeking relief under 42 U.S.C. § 1983. Defendants moved for summary judgment based on plaintiff’s alleged failure to exhaust his available administrative remedies prior to filing suit as required. (ECF No. 36.) United States District Judge William B. Shubb adopted the findings and recommendations of then-Magistrate Judge Dale A. Drozd in granting in part and denying in part defendants’ motion. (ECF No. 44.) In their summary judgment motion, defendants requested permission to file a second motion for summary judgment on the merits if the first one concerning exhaustion was not granted in full. (ECF No. 36 at 6 n. 1.) The court did not address that request in the findings and recommendation or the order on summary judgment.

After filing an answer (ECF No. 45) to plaintiff’s complaint, defendants filed a second motion for summary judgment (ECF No. 51) addressing the merits of plaintiff’s complaint. Plaintiff filed an opposition (ECF No. 64) to the motion, but also filed a motion to strike (ECF

1 No. 66) the second summary judgment for failure to comply with the Federal Rules of Civil
2 Procedure and the Local Rules of the Eastern District of California.

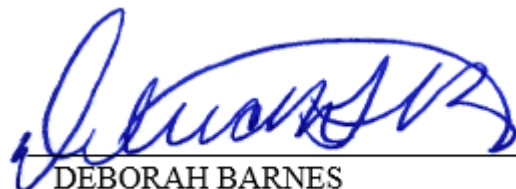
3 For the following reasons, plaintiff's motion to strike is denied.

4 District courts in the Ninth Circuit "have discretion to permit successive motions for
5 summary judgment." Hoffman v. Tonnemacher, 593 F.3d 908, 911 (9th Cir. 2010). "[A]
6 successive motion for summary judgment is particularly appropriate on an expanded factual
7 record." Id. Furthermore, where a district court addresses only the issue of exhaustion of
8 administrative remedies in the first summary judgment motion, "allowing a party to file a second
9 motion for summary judgment is logical, and it fosters the just, speedy, and inexpensive
10 resolution of suits." Hill v. Davis, --- F. App'x ---, No. 15-15923, 2016 WL 4499806 (9th Cir.
11 Aug. 26, 2016) (quoting Hoffman, 593 F.3d at 911-12).

12 Plaintiff's motion to strike is denied because the first summary judgment motion in this
13 matter addressed only the administrative remedies issue. In Albino v. Baca, the Ninth Circuit
14 recently held that "[e]xhaustion should be decided, if feasible, before reaching the merits of a
15 prisoner's claim," and that a summary judgment motion may be "directed solely to the issue of
16 exhaustion." 747 F.3d 1162, 1170 (9th Cir. 2014) (en banc). Pursuant to Albino, the court
17 addressed the administrative remedies issue at the outset without considering the merits of the
18 case. Now, pursuant to Hoffman, the court has discretion to allow a second motion for summary
19 judgment based upon an expanded record. There is now an expanded record on which to address
20 the merits of the case, so, accordingly, the court grants defendants' request to file a second
21 summary judgment on the merits and denies plaintiff's motion to strike. The court will address
22 the second motion for summary judgment in a forthcoming findings and recommendations.

23 IT IS HEREBY ORDERED that plaintiff's motion to strike is denied.

24 Dated: November 2, 2016

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DEBORAH BARNES
UNITED STATES MAGISTRATE JUDGE

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