

1 In their objections, Defendants argue that it is undisputed that Plaintiff did not actually
2 exhaust administrative remedies concerning the incident at issue in this action and that there is a
3 disputed factual question that is not readily ascertainable and rests on a credibility determination
4 such that an evidentiary hearing should be held. (*Id.*)

5 However, as correctly stated in the Findings and Recommendations, Plaintiff submitted
6 evidence to show that he filed the July 21, 2009 inmate appeal ("IA") regarding being attacked
7 when wrongly assigned to a cell with a known gang enemy which was never responded to and
8 that he did not know what to do when prison staff did not respond to an IA until September of
9 2010. (Doc. 57, F&R, 7:6-8:2.) As also correctly cited in the Findings and Recommendations, "a
10 remedy becomes unavailable if prison employees do not respond to a properly filed grievance . . .
11 ." *Dole v. Chandler*, 438 F.3d 804, 809 (7th Cir. 2006) (internal quotations and citations omitted)
12 cited with approval in *Sapp v. Kimbrell*, 623 F.3d 813, 822 (9th Cir. 2010).

13 Defendants submitted evidence which showed that, before 2011, IAs submitted at the
14 informal level and those that were rejected were not given a log number or formally tracked; nor
15 were copies of the appeals or rejection forms kept and that they were only able to access "*some*
16 information concerning rejected appeals from [their] computer system." (Doc. 57, 8:25-9:5, citing
17 Doc. 43-3, p. 3 (emphasis added in F&R).) Defendants also failed to submit any information to
18 show that Plaintiff was provided with information regarding procedures to be followed in 2009 if
19 he did not receive a response to an IA. (*See Id.*, at 9:8-11, citing *Brown v. Valoff*, 422 F.3d 926,
20 937 (9th Cir. 2005).)

21 Thus, the Findings and Recommendations correctly found that Defendants did not meet
22 their burden as the moving party since their evidence did not definitively show that Plaintiff did
23 not submit an IA on July 21, 2009 that had been lost, mishandled, or otherwise misplaced by
24 prison staff and/or that there were procedures in place that had been given to Plaintiff as to what
25 he should do if he did not receive a response to an IA he filed in 2009 that Plaintiff failed to
26 follow. There is no credibility determination to be made on issues where Defendants failed to
27 submit evidence. An evidentiary hearing is thus not necessary.

28 Pursuant to 28 U.S.C. § 636(b)(1)(C), the Court has conducted a *de novo* review of this

1 case. Having carefully reviewed the entire file, the Court finds the Findings and
2 Recommendations to be supported by the record and proper analysis.

3 Accordingly, IT IS HEREBY ORDERED that:

- 4 1. the Findings and Recommendations, filed on November 6, 2014 (Doc. 57), is
5 adopted in full;
- 6 2. Defendants' motion for summary judgment, filed on May 9, 2014 (Doc. 43), is
7 DENIED;
- 8 3. Defendants' request for an evidentiary hearing as contained in their objections
9 which were filed on December 8, 2014 (Doc. 58), is DENIED; and
- 10 4. the case is referred back to the Magistrate Judge for discovery and scheduling
11 purposes.

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13 IT IS SO ORDERED.

14 Dated: December 31, 2014

/s/ Lawrence J. O'Neill
UNITED STATES DISTRICT JUDGE