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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

JOHN WASHINGTON,
Plaintiff,

No. 2:08-cv-0386-KJM-CMK-P

vs.

FINDINGS AND RECOMMENDATIONS

SALEM MOHAMMED, et al.,
Defendants.

_____ /

Plaintiff, a state prisoner proceeding pro se, brings this civil rights action pursuant to 42 U.S.C. § 1983.

In response to plaintiff’s amended complaint, the defendants originally filed a motion to dismiss for failure to exhaust administrative remedies. The undersigned issued findings and recommendations that the motion to dismiss be granted. The District Court adopted that recommendation, and the motion was granted. Plaintiff appealed that decision, and the Ninth Circuit Court of Appeals vacated the judgment and remanded the case for further development of the record. The parties then filed supplemental briefs with additional evidence supporting their positions regarding exhaustion. The undersigned then issued new findings and recommendations that the motion to dismiss be granted. The District Court did not adopt that

1 recommendation, denied the motion to dismiss, and referred the matter back to the undersigned
2 for further proceedings.

3 Defendants have now filed a new motion to dismiss for failure to exhaust
4 administrative remedies. In addition, they are requesting discovery and an evidentiary hearing on
5 the motion to dismiss. Defendants argue the court should order an evidentiary hearing to
6 evaluate the credibility of witnesses and make a credibility determination. However, the District
7 Court has already determined “it is improper for the court entertaining a 12(b) motion to make
8 credibility determinations when, as in the instant case, the court is presented with differing
9 versions of events.” (Order, Doc. 52 at 2, citing Data Disc, Inc. v. Sys. Tech. Assocs., Inc., 557
10 F.2d 1280, 1284-85 (9th Cir. 1973)).

11 As the District Court has already addressed the issue defendants raise in the
12 current motion to dismiss, the undersigned finds no basis in which to grant their request.

13 Based on the foregoing, the undersigned recommends that the motion to dismiss
14 (Doc. 54) be denied, and the defendants be ordered to file an answer.

15 These findings and recommendations are submitted to the United States District
16 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 14 days
17 after being served with these findings and recommendations, any party may file written
18 objections with the court. Responses to objections shall be filed within 14 days after service of
19 objections. Failure to file objections within the specified time may waive the right to appeal.
20 See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

21
22 DATED: December 30, 2013

23 
24 **CRAIG M. KELLISON**
25 UNITED STATES MAGISTRATE JUDGE
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