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

George Reed, III, ) No. CV 1-08-00910-MHM  
Plaintiff, )  
vs. )  
Captain Williams; Counselor Sprady; R.)  
Shannon; C. Hudson; J. Herrera; CC II; S.)  
Kern; H. Martinez CCII; Appeals)  
Coordinators for Pleasant Valley State)  
Prison, et al. )  
Defendants. )

Currently before the Court is Defendant's<sup>1</sup> Motion to Dismiss. (Doc. 20-1). After reviewing all documents submitted by the parties and the relevant law, the Court issues the following order.

## I. BACKGROUND

Plaintiff, who presently resides at the Pleasant Valley State Prison, initiated this action pursuant to 42 U.S.C. § 1983 on June 27, 2008. (Doc. 1). On April 17, 2009, this Court issued an order dismissing Plaintiff's complaint with leave to amend for failing to comply

<sup>1</sup>As of this Court's order dated November 6, 2009, J. Herrera is the only remaining Defendant.

1 with Rules 8 and 10 of the Federal Rules of Civil Procedure. (Doc. 11). Plaintiff filed his  
2 First Amended Complaint on May 13, 2009. (Doc. 12). Six months later, on November 6,  
3 2009, this Court issued an order dismissing all of Plaintiff's claims except one. (Doc. 13).  
4 The surviving claim alleged that Defendant withheld a package from Plaintiff, thus depriving  
5 Plaintiff of his property without due process of law. (Doc. 12). In the November 6 order,  
6 the Court issued the following warning: "If Plaintiff fails to timely comply with every  
7 provision of this Order . . . the Court may dismiss this action without further notice." Id.

8 On May 7, 2010, Defendant filed a Motion to Dismiss Plaintiff's due process claim  
9 pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. (Doc. 20-1). Plaintiff did  
10 not respond to Defendant's motion. Accordingly, on June 7, 2010, Defendant filed a  
11 Declaration of Counsel in Lieu of Reply to Opposition to Defendant Herrera's Motion to  
12 Dismiss. (Doc. 21) On October 25, 2010, this Court issued a notice pursuant to Wyatt v.  
13 Terhune, 315 F.3d 1108, 1120 n.4 (9<sup>th</sup> Cir. 2003), instructing Plaintiff that he had until  
14 November 15, 2010, to respond to Defendant's motion, and, pursuant to Local Rule 230(l),  
15 failure to do so could "be deemed a waiver of any opposition to the granting of the motion  
16 and [could] result in the imposition of sanctions, including dismissal of the action." (Doc.  
17 24). Plaintiff nonetheless failed to file a response to Defendant's motion.

18 **II. DISCUSSION**

19 Local Rule of Civil Procedure 230(l) provides that failure "of the responding party to  
20 file an opposition or to file a statement of no opposition may be deemed a waiver of any  
21 opposition to the granting of the motion." Local Rule 230(l). Plaintiff may not escape this  
22 rule simply by virtue of his being a pro se litigant. See King v. Atiyeh, 814 F.2d 565, 567  
23 (9th Cir. 1986) (holding that "[p]ro se litigants must follow the same rules of procedure that  
24 govern other litigants.") Accordingly, the key inquiry for the Court is whether granting  
25 dismissal in this case would be appropriate.

26 The Ninth Circuit has created a "five-part 'test' to determine whether a dismissal  
27 sanction is just: (1) the public's interest in expeditious resolution of the litigation; (2) the  
28 court's need to manage its dockets; (3) the risk of prejudice to the party seeking sanctions;

1 (4) the public policy favoring disposition of cases on the merits; and (5) the availability of  
2 less drastic sanctions.” Valley Eng’rs Inc. v. Elec. Eng’g Co., 158 F.3d 1051, 1057 (9th Cir.  
3 1998). Under this test, “where a court order is violated, factors 1 and 2 support sanctions and  
4 4 cuts against case-dispositive sanctions, so 3 and 5 . . . are decisive.” Id. Factor 5 “involves  
5 consideration of three subparts: whether the court explicitly discussed alternative sanctions,  
6 whether it tried them, and whether it warned the recalcitrant party about the possibility of  
7 dismissal.” Id.

8 Based on the aforementioned test, the Court’s inquiry necessarily centers on factors  
9 3 and 5. Under factor 3, the Court must consider the “risk of prejudice to the party seeking  
10 sanctions.” Valley Eng’rs, 158 F.3d at 1057. In this case, the risk of prejudice to the  
11 Defendant is continued expense and delay in connection with this litigation. Defendant  
12 appears to have made all reasonable efforts to ensure that the case is resolved efficiently and  
13 expeditiously. Plaintiff’s failure to respond to Defendant’s motion frustrates those efforts  
14 and prolongs the litigation process. Accordingly, factor 3 weighs in favor of granting  
15 dismissal.

16 Next, the Court must consider factor 5 and its three subparts. Although the Court has  
17 neither explicitly discussed alternative sanctions nor tried them, it has on several occasions  
18 warned Plaintiff about the possibility of dismissal. To the extent that the alternative sanction  
19 in this case would likely be an extension, the Court finds that it has already given Plaintiff  
20 sufficient time to respond to Defendant’s motion. Therefore, in light of this Court’s repeated  
21 warnings and the six months that Plaintiff has already had to answer Defendant’s motion,  
22 factor 5 weighs in favor of granting dismissal.

23 **III. PLAINTIFF’S OTHER MOTIONS**

24 To the extent that the Court finds that granting dismissal in this case would be  
25 appropriate, Plaintiff’s additional motions for production of documents, appointment of  
26 counsel, extension of time, and leave to amend (Doc. 25) are moot and the Court need not  
27 consider them.

28 **IV. CONCLUSION**

1       For the foregoing reasons, the Court finds that granting dismissal in this case would  
2 be just.

3       **Accordingly,**

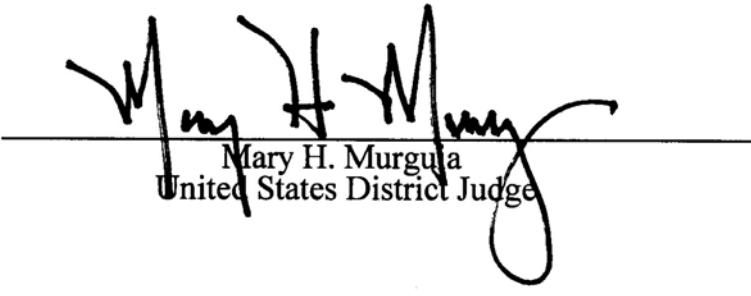
4       **IT IS ORDERED** granting Defendant's Motion to Dismiss. (Doc. 20)

5       **IT IS FURTHER ORDERED** dismissing Plaintiff's amended complaint without  
6 prejudice.

7       **IT IS FURTHER ORDERED** denying Plaintiff's Motion for Production of  
8 Documents, Appointment of Counsel, Extension of Time, and Leave to Amend as moot.  
9 (Doc. 25)

10      **IT IS FURTHER ORDERED** directing the Clerk of Court to terminate this matter.

11      DATED this 22<sup>nd</sup> day of March, 2011.

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Mary H. Murguia  
United States District Judge