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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MICHAEL BRODHEIM,

Plaintiff,

v.

LOUIE DININNI, et al.,

Defendants.

NO. CIV. S-05-1512 LKK/GGH

MICHAEL BRODHEIM,

Plaintiff,

v.

M. VEAL, et al.,

Defendants.

NO. CIV. S-06-2326 LKK/GGH

O R D E R

Plaintiff in the civil rights case is a California state
prisoner serving a term of imprisonment of 25 years to life with
the possibility of parole, for the crime of murder. Brodheim v.
Dininni, Civ. S-05-1512, Amended Complaint ("Complaint") (ECF No.

1 47) ¶ 5.¹ He has filed this civil rights case alleging that
2 California's parole system violates his rights under the Due
3 Process and Ex Post Facto clauses of the U.S. Constitution.

4 On March 29, 2012, the Magistrate Judge ordered plaintiff to
5 "show cause why it [the civil rights complaint] should not be
6 dismissed in whole or in part as duplicative of, or subsumed
7 within, the class action in Gilman v. Brown, Case No. Civ-S-05-0830
8 LKK GGH, or simply dismissed as moot."² Order of March 29, 2012
9 ("OSC") (ECF No. 51) at 2.

10 On May 7, 2012, the Magistrate Judge filed Findings and
11 Recommendations, finding that plaintiff was a class member of
12 Gilman, and recommending to this court that the civil rights
13 complaint should accordingly be dismissed in its entirety, without
14

15 ¹ On May 23, 2005, plaintiff joined the lawsuit filed by
16 Richard M. Gilman, as a co-plaintiff. See Gilman v. Welch, ECF
17 No. 5 (amended complaint), 2:05-cv-830 LKK (E.D. Cal. May 23,
18 2005). On July 27, 2005, the Magistrate Judge assigned to the case
19 severed plaintiff from the Gilman action, which at the time was an
20 individual action, not a class action. Order of July 27, 2007 (ECF
21 No. 14). On March 7, 2007, the Magistrate Judge stayed all
22 discovery in this case. Order of March 7, 2007 (ECF No. 42). On
23 March 4, 2009, this court certified the Gilman matter as a Rule
24 23(b)(2) class action. Gilman v. Davis, ECF No. 182, 2:05-cv-830
25 LKK (E.D. Cal. March 4, 2009) (Karlton, J.).

26 ² In the related habeas case, Brodheim v. Dickinson, 2:06-cv-
2326 LKK (E.D. Cal.), plaintiff notified the court that the Board
of Parole Hearings had determined to grant him parole at a January
11, 2012 hearing. However, on June 8, 2012, the Governor reversed
the Board, and plaintiff was accordingly denied parole. See
Brodheim v. Dickinson, supra, ECF No. 92 (Joint Status Report).
It appears that the Board ruled in plaintiff's favor again on
January 8, 2013, but the Governor will have until June 2013 to
review (reverse, affirm or remand) that ruling (assuming the Board
does not re-visit its decision before then). See Brodheim v.
Dickinson, supra, ECF No. 102.

1 prejudice to the ruling in the Gilman class. Order of May 7, 2012
2 (ECF No. 56). On August 24, 2012, this court adopted the Findings
3 and Recommendations in full, and ordered this civil rights case
4 dismissed "without prejudice to the ruling in the Gilman class."
5 Order of August 24, 2012 (ECF No. 61).

6 Plaintiff now seeks reconsideration of the August 24, 2012
7 Order on the grounds that after that Order issued, this court de-
8 certified the Gilman class with respect to the Due Process claims,
9 and the Gilman plaintiffs have abandoned their Due Process claims.³
10 Plaintiff's Motion for Reconsideration of August 24, 2012 Order
11 (ECF No. 63). Defendants have not filed an opposition (nor a
12 Statement of Non-Opposition).

13 The court may grant plaintiff relief from a prior order if
14 applying it prospectively "is no longer equitable," or for "any
15 other reason that justifies relief." Fed. R. Civ. P. 60(b)(5)
16 & (b)(6). The basis for this court's prior dismissal of
17 plaintiff's entire case - including the Due Process claims - was
18 that it was subsumed within the Gilman class action. That basis
19 has now been undermined by subsequent events. Specifically,
20 plaintiff's Due Process claims are no longer subsumed within
21 Gilman, as that class has been decertified and the Gilman
22 plaintiffs have abandoned those claims. See Gilman v. Brown,
23 supra, ECF Nos. 445 (de-certifying the class) & 432 at 4-5

24
25 ³ Plaintiff has not sought reconsideration of the court's
26 dismissal of his ex post facto claims, nor has he sought permission
to opt out of the Gilman classes as they relate to the ex post
facto claims.

1 (abandoning "the remaining due process claims" that survive
2 Swarthout v. Cooke, 131 S. Ct. 859 (2011)).

3 Accordingly:

4 1. Plaintiff's motion for reconsideration (ECF No. 63), is
5 **GRANTED**;


6 2. The Clerk is directed to re-open this case; and

7 3. Plaintiff may, within 21 days of the date of this order,
8 file an amended complaint omitting his ex post facto claims.⁴

9 IT IS SO ORDERED.

10 DATED: May 6, 2013.

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LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT

22
23 ⁴ The Due Process claims do not appear to be frivolous on
24 their face. See Gilman v. Brown, 2012 WL 1969200 (E.D. Cal. 2012)
25 (Karlton, J.) (denying defendants' motion to dismiss prisoners' Due
26 Process claims regarding the California parole system on the basis
of Greenholtz v. Inmates of the Nebraska Penal and Correction
Complex, 442 U.S. 1 (1979), and Swarthout v. Cooke, 131 S. Ct. 859
(2011)). Accordingly, amendment of the complaint appears
appropriate.