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

ROBERT P. BENYAMINI,

Plaintiff,

No. CIV S-09-2602 LKK GGH P

vs.

MENDOZA, et al.,

Defendants.

ORDER &

FINDINGS AND RECOMMENDATIONS

_____ /

Plaintiff is a state prisoner proceeding pro se and in forma pauperis with an action filed pursuant to 42 U.S.C. § 1983. By order filed on November 5, 2010, Senior District Judge Karlton adopted the October 19, 2010 findings and recommendations and ordered no stay to be re-imposed pursuant to plaintiff's filings, and that this matter proceed pursuant to the September 28, 2010 order of the undersigned. By order filed September 28, 2010, certain claims and a defendant were dismissed from plaintiff's July 23, 2010 amended complaint with leave to file a further amended complaint. Plaintiff was informed that failure to file an amended complaint by October 25, 2010, in accordance with both the September 28, 2010 order and the order filed on July 27, 2010, would result in a recommendation of dismissal of defendant Hamilton, as well as a recommendation of dismissal of any claim relating to a deprivation of exercise with respect to defendants Ramirez, Hurtado, Leese, Formasi, Northerner, as well as any claim, including both

1 an Eighth Amendment cruel and unusual punishment claim and/or a First Amendment retaliation
2 claim, regarding the manner or basis for his cell extraction, along with any claim of an Eighth
3 Amendment violation for no access to television or radio for a few days. Plaintiff has failed to
4 file any further amended complaint and the time for doing so has expired.

5 Within the September 28, 2010 order, the undersigned found the amended
6 complaint stated a cognizable claim for relief pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §
7 1915A(b) to the extent that he therein claims that defendants Correctional Officer (C/O)
8 Mendoza, C/O Brown, C/O Baumberger, C/O Paul, C/O Ramirez, C/O Hurtado, Corr. Sergeant
9 S. Leese , C/O Formasi, C/O M. Northerner violated his Eighth Amendment rights by refusing
10 his requests to be allowed to clean and finish decontaminating himself after having been sprayed
11 with o.c. spray by denying him access to a shower for approximately ten days, during the period
12 of time from May 4, 2005, until May 14, 2005. The court also found colorable plaintiff's claim
13 against defendants Mendoza, Brown, Baumberger, Paul that he was kept in his Administrative
14 Segregation (Ad Seg) cell throughout this period, twenty-four hours a day, based on plaintiff's
15 claim that he has claustrophobia, which he identifies as a neurological disorder which comes
16 within the protection of the Americans with Disabilities Act (ADA), and not allowed either yard
17 or even one hour out of his cell. If these allegations of the amended complaint are proven,
18 plaintiff has a reasonable opportunity to prevail on the merits of this action.

19 In accordance with the above, IT IS HEREBY ORDERED that:

20 1. Service is appropriate for the following defendants: C/O Mendoza, C/O
21 Brown, C/O Baumberger, C/O Paul, C/O Ramirez, C/O Hurtado, Corr. Sergeant S. Leese , C/O
22 Formasi, C/O M. Northerner with respect to the claims set forth as colorable above.

23 2. The Clerk of the Court shall send plaintiff nine (9) USM-285 forms, one
24 summons, an instruction sheet and a copy of the amended complaint filed July 23, 2010 (docket
25 # 22).

26 3. Within twenty-eight days from the date of this order, plaintiff shall complete

1 the attached Notice of Submission of Documents and submit the following documents to the
2 court:

- 3 a. The completed Notice of Submission of Documents;
- 4 b. One completed summons;
- 5 c. One completed USM-285 form for each defendant listed in number 1
6 above; and
- 7 d. Ten (10) copies of the endorsed amended complaint filed July 23, 2010
8 (docket # 22).

9 4. Plaintiff need not attempt service on defendants and need not request waiver of
10 service. Upon receipt of the above-described documents, the court will direct the United States
11 Marshal to serve the above-named defendants pursuant to Federal Rule of Civil Procedure 4
12 without payment of costs.

13 IT IS RECOMMENDED that, for the reasons set forth in the order filed on
14 September 28, 2010, that the following be dismissed from this action: defendant Hamilton; any
15 claim relating to a deprivation of exercise with respect to defendants Ramirez, Hurtado, Leese,
16 Formasi, Northerner; any claim, including both an Eighth Amendment cruel and unusual
17 punishment claim and/or a First Amendment retaliation claim, regarding the manner or basis for
18 plaintiff's cell extraction; and any claim of an Eighth Amendment violation for no access to
19 television or radio for a few days.

20 These findings and recommendations are submitted to the United States District
21 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen
22 days after being served with these findings and recommendations, plaintiff may file written
23 objections with the court. Such a document should be captioned "Objections to Magistrate
24 Judge's Findings and Recommendations." Plaintiff is advised that failure to file objections

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1 within the specified time may waive the right to appeal the District Court's order. Martinez v.
2 Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 DATED: November 16, 2010

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/s/ Gregory G. Hollows

UNITED STATES MAGISTRATE JUDGE

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

ROBERT P. BENYAMINI,

Plaintiff,

No. CIV S-09-2602 LKK GGH P

vs.

MENDOZA, et al.,

Defendants.

NOTICE OF SUBMISSION

OF DOCUMENTS

_____ /

Plaintiff hereby submits the following documents in compliance with the court's
order filed _____:

1 completed summons form

9 completed USM-285 forms

10 copies of the July 23, 2010
Amended Complaint

DATED:

Plaintiff