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

KENNETH ARDELL SMITH,

No. CIV S-10-1584 EFB

Plaintiff,

vs.

SOCIAL SECURITY DEPARTMENT,

ORDER AND
FINDINGS AND RECOMMENDATIONS

Defendant.

_____/

On June 23, 2010, defendant removed this action from Sacramento County Superior Court. Dckt. No. 1. Also on June 23, 2010, the undersigned issued a scheduling order setting forth, among other things, deadlines for the parties to file motions for summary judgment. Dckt. No. 2. However, on August 23, 2010, defendant filed a motion to dismiss this action for lack of subject matter jurisdiction. Dckt. No. 5. Therefore, on August 31, 2010, the undersigned issued an order suspending the deadlines set forth in the June 23 scheduling order and setting a briefing schedule on the motion to dismiss. Dckt. No. 7. Specifically, the August 31 order required plaintiff to file an opposition or a statement of non-opposition to defendant's motion to dismiss on or before September 27, 2010. *Id.*

On October 1, 2010, because plaintiff had not filed an opposition nor a statement of non-opposition to defendant's motion to dismiss, the undersigned issued an order to plaintiff to

1 show cause, on or before October 27, 2010, why sanctions should not be imposed for his failure
2 to timely file an opposition or a statement of non-opposition to the pending motion. Dckt. No. 9.
3 The undersigned also directed plaintiff to file an opposition to the motion or a statement of non-
4 opposition thereto on or before October 27, 2010, and informed plaintiff that failure to file an
5 opposition “will be deemed a statement of non-opposition to the pending motion, and may result
6 in a recommendation that this action be dismissed for lack of prosecution. *See* Fed. R. Civ. P.
7 41(b).” *Id.*

8 Although the deadlines have now passed, the court docket reflects that plaintiff has not
9 filed a response to the order to show cause, an opposition to defendant’s motion, or a statement
10 of non-opposition to the motion. In light of plaintiff’s failures, the undersigned will recommend
11 that this action be dismissed for failure to prosecute and that defendant’s motion to dismiss be
12 denied as moot. *See* Fed. R. Civ. P. 41(b); L.R. 110.

13 Accordingly, IT IS HEREBY ORDERED that the Clerk of the Court is directed to
14 randomly assign a United States District Judge to this case.

15 IT IS FURTHER RECOMMENDED that:

- 16 1. This action be dismissed pursuant to Federal Rule of Civil Procedure 41(b), based on
17 plaintiff’s failure to prosecute the action;
18 2. Defendant’s motion to dismiss, Dckt. No. 5, be denied as moot; and
19 3. The Clerk be directed to close this case.

20 These findings and recommendations are submitted to the United States District Judge
21 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
22 after being served with these findings and recommendations, any party may file written
23 objections with the court and serve a copy on all parties. Such a document should be captioned
24 “Objections to Magistrate Judge’s Findings and Recommendations.” Failure to file objections

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1 within the specified time may waive the right to appeal the District Court's order. *Turner v.*
2 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

3 Dated: November 19, 2010.

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5 EDMUND F. BRENNAN
6 UNITED STATES MAGISTRATE JUDGE
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