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

ALBERTO WINFFEL,

Plaintiff,

No. CIV S-10-1709 MCE GGH P

vs.

A. POMAZAL, et al.,

Defendants.

FINDINGS & RECOMMENDATIONS

_____ /

Plaintiff is a state prisoner proceeding pro se with a civil rights action pursuant to 42 U.S.C. § 1983. Pending before the court is defendants’ motion for summary judgment filed August 22, 2011. In addition, defendants’ filed a motion to dismiss for lack of prosecution on September 28, 2011.

Plaintiff has not filed an opposition to defendants’ motion. In the order directing service filed August 31, 2010, the court stated that “[i]f plaintiff does not serve and file a written opposition to the motion or a request to postpone consideration of defendants’ motion, the court may consider the failure to act as a waiver of opposition to defendant’s motion.” See Local Rule 230 (l). Defendants’ notice of motion also directed plaintiff to Local Rule 230 for information regarding summary judgment.

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1 A district court may not grant a motion for summary judgment simply because the
2 nonmoving party does not file opposing material, even if the failure to oppose violates a local
3 rule. Martinez v. Stanford, 323 F.3d 1178 (9th Cir. 2003); Brydges v. Lewis, 18 F.3d 651, 652
4 (9th Cir. March 9, 1994), citing Henry v. Gill Industries, Inc., 983 F.2d 943, 950 (9th Cir. 1993).
5 However, when the local rule does not require, but merely permits the court to grant a motion for
6 summary judgment, the district court has discretion to determine whether noncompliance should
7 be deemed consent to the motion. Id.

8 In the instant case, plaintiff has been warned that his failure to oppose a motion
9 for summary judgment may be deemed a waiver of opposition to the motion. Based on
10 plaintiff's failure to file an opposition, or otherwise communicate with the court, the court
11 concludes that plaintiff has consented to defendants' motion for summary judgment. In the
12 alternative, the court finds that defendants' motion has merit.

13 Accordingly, IT IS HEREBY RECOMMENDED that defendants' August 22,
14 2011, motion for summary judgment and defendant's September 28, 2011, motion to dismiss for
15 lack of prosecution both be granted and this case closed.

16 These findings and recommendations are submitted to the United States District
17 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen
18 days after being served with these findings and recommendations, any party may file written
19 objections with the court and serve a copy on all parties. Such a document should be captioned
20 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections
21 shall be served and filed within fourteen days after service of the objections. The parties are

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

3 DATED: October 24, 2011

4 /s/ Gregory G. Hollows
5 UNITED STATES MAGISTRATE JUDGE

6 GGH: AB
7 winf1709.46.ggh

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