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E-FILED - 10/5/10

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

KYLE WHELAN AVERY,)	No. C 03-4233 RMW (PR)
)	
Plaintiff,)	ORDER GRANTING IN PART
)	AND DENYING IN PART
vs.)	DEFENDANT’S MOTION FOR
)	SUMMARY JUDGMENT
CORRECTIONAL OFFICER)	
THOMPSON,)	(Docket No. 51)
)	
Defendant.)	

Plaintiff Kyle Whelan Avery, a state prisoner, brought this case under 42 U.S.C. § 1983 against officials at San Quentin State Prison (“SQSP”), where he was incarcerated at the time of the underlying events. Plaintiff alleges that defendant Thompson unlawfully deprived him of property and violated his First Amendment rights to freedom of speech and religion. The Court ordered service of plaintiff’s second amended complaint (“SAC”) upon Thompson. On September 11, 2009, Thompson filed a motion for summary judgment on the grounds that no triable issue of material fact exists and that he is entitled to judgment as a matter of law. Plaintiff filed an opposition and Thompson replied.

Having carefully considered the underlying pleadings and for the reasons discussed below, Thompson’s motion for summary judgment is GRANTED IN PART and DENIED IN PART.

1 **BACKGROUND¹**

2 On June 28, 2002, after plaintiff attended a court hearing, he was placed in SQSP ad seg
3 while waiting for transport back to his institution at Tehachapi State Prison. (SAC at ¶ 6.) When
4 he arrived at SQSP, his property was taken to be inventoried. (Id.) All property is to be
5 inventoried upon arrival; however, only permitted property items are allowed while in
6 administrative segregation. (Id.) Only when a prisoner is released from administrative
7 segregation may he recover any remaining items which may have been confiscated or stored.
8 (Id.) At that time, Defendant Thompson was responsible for processing and storing property
9 belonging to new inmates. (Id.; Decl. Thompson at ¶ 2.)

10 On July 1, 2002, plaintiff received all of his permitted property as well as a receipt of the
11 inventory list which stated, “no hot property”. (SAC at ¶ 7.) After looking through his property,
12 plaintiff noticed that his religious-based study materials were missing. (Id.) In fact, prison
13 officials confiscated 265 pamphlets, all of which were published by 14 Word Press. (MSJ at 3.)
14 14 Word Press² is a publishing a company founded by white-supremacist David Lane. (Request
15 for Judicial Notice, Ex. A.)³ The company sold white supremacist paraphernalia as well as
16 Lane’s many writings. (Id.)

17 Plaintiff inquired about his missing materials and, on July 2, 2002, Thompson replied,
18 “It’s with I.S.U.” (SAC at ¶ 7.) I.S.U. stands for Investigative Services Unit. Plaintiff filed
19 several inmate appeals asking why his materials were confiscated and finally received a response
20

21 ¹ The following facts are undisputed except where indicated.

22 ² “14 Words” is a motto created by Lane, meaning, “We must secure the existence of our
23 people and a future for white children.” (Request for Judicial Notice, Ex. A.)

24 ³ Federal Rule of Evidence 201 allows a court to take judicial notice of a fact “not
25 subject to reasonable dispute in that it is either (1) generally known within the territorial
26 jurisdiction of the trial court, or (2) capable of accurate and ready determination by resort to
27 sources whose accuracy cannot reasonably be questioned.” “A court shall take judicial notice if
28 requested by a party and supplied with the necessary information.” Fed. R. Evid. 201(c). A
court “may take judicial notice of a record of a state agency not subject to reasonable dispute.”
City of Sausalito v. O’Neil, 386 F.3d 1186, 1223 n. 2 (9th Cir. 2004). Thompson’s unopposed
Request for Judicial Notice is granted.

1 that the materials were confiscated because I.S.U. concluded the materials were not religious-
2 based but propagated “neo-Nazi” and white supremacy beliefs instead. (Id. at ¶¶ 8-9; Opp. Ex.
3 4; Decl. Quinn ¶ 5.)

4 Plaintiff disputed this finding, arguing that the material was not racist; rather his religious
5 belief maintains that “it is racial genocide to involve one’s self with or by mixing cultures.”
6 (Opp. Ex. 4.) Plaintiff goes on to explain that Odinism is an Aryan culture but it was not
7 synonymous with “neo-Nazi.” (Id.) Finally, plaintiff suggests that if he could not have his
8 property returned, he would like to be compensated either by payment of \$265.00 – the cost to
9 replace the pamphlets – or a 13 inch television set, head phones, a cable, and splitter. (Id.) After
10 plaintiff was interviewed, on September 30, 2002, his first level review was denied because he
11 failed to provide proof that the pamphlets met the criteria for being legitimate religious
12 materials. (Id.)

13 Plaintiff appealed this decision. (Id.) He stated that he was a firm believer in his
14 Wotanism faith. (Id.) Plaintiff asserted that he had “already replenished the literature [sic] and
15 now have pretty much a bundle of the same type of materials that I re-coped [sic].” He
16 explained that he was continuing with the grievances because I.S.U. violated his right to free
17 exercise and the press, he wanted to be compensated for the materials, “as a lesson that
18 [deprivation of the materials] is not going to be tolerated without repercussions, and to ensure
19 that no one else of his faith [was] “bullied” by I.S.U.’s policies.” (Id.) On December 13, 2002,
20 the second level reviewer rejected plaintiff’s arguments, explaining that after interviewing
21 Officer Feudner, the I.S.U. officer who reviewed the confiscated materials, it was determined
22 that plaintiff failed to support his complaint with sufficient facts to demonstrate that the
23 pamphlets were considered religious materials and not that of “Neo-Nazi, SkinHead and White
24 Supremacist (Racial Hatred).” (Id.) The reviewer found that, based on a reasonable penological
25 interest, it was reasonable to conclude that the pamphlets were contraband and, therefore, not
26 permitted while plaintiff was incarcerated at SQSP. (Id.) The reviewer instructed plaintiff to fill
27 out a Trust Withdrawal Form with a forwarding address by January 24, 2003, if plaintiff wished
28 to mail the pamphlets somewhere outside the institution. (Id.) Plaintiff did not do so.

1 Plaintiff appealed this decision to the Director's level, stating that the policy for non-
2 permitted items in the institution should not affect his religious materials. (Id.) Plaintiff
3 requested that he either be reimbursed for the deprivation or permitted to keep the materials.
4 (Id.) Plaintiff's appeal was denied on the grounds that the decision to confiscate the materials
5 was based on a reasonable penological interest. (Id.)

6 LEGAL STANDARD

7 Summary judgment is properly granted when no genuine and disputed issues of material
8 fact remain and when, viewing the evidence most favorably to the non-moving party, the movant
9 is clearly entitled to prevail as a matter of law. Fed. R. Civ. P. 56; Celotex Corp. v. Catrett, 477
10 U.S. 317, 322-23 (1986); Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir.
11 1987).

12 The moving party bears the burden of showing that there is no material factual dispute.
13 Therefore, the court must regard as true the opposing party's evidence, if supported by affidavits
14 or other evidentiary material. Celotex, 477 U.S. at 324; Eisenberg, 815 F.2d at 1289. The court
15 must draw all reasonable inferences in favor of the party against whom summary judgment is
16 sought. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Intel
17 Corp. v. Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991).

18 Material facts which would preclude entry of summary judgment are those which, under
19 applicable substantive law, may affect the outcome of the case. The substantive law will identify
20 which facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Where the
21 moving party does not bear the burden of proof on an issue at trial, the moving party may
22 discharge its burden of showing that no genuine issue of material fact remains by demonstrating
23 that "there is an absence of evidence to support the nonmoving party's case." Celotex, 477 U.S.
24 at 325. The burden then shifts to the opposing party to produce "specific evidence, through
25 affidavits or admissible discovery material, to show that the dispute exists." Bhan v. NME
26 Hosps., Inc., 929 F.2d 1404, 1409 (9th Cir. 1991). A complete failure of proof concerning an
27 essential element of the non-moving party's case necessarily renders all other facts immaterial.
28 Celotex, 477 U.S. at 323.

1 **ANALYSIS**

2 Plaintiff raised three cognizable claims. First, plaintiff alleges that his First Amendment
3 right to free exercise of religion was violated because his religious and cultural materials were
4 confiscated from him without relation to any penological interest and without those materials,
5 plaintiff maintains that he cannot practice his religion. Second, plaintiff alleges that Thompson
6 confiscated those materials based upon political bias and violated his right to free speech.
7 Finally, plaintiff asserts that he was deprived of his property pursuant to an authorized state
8 procedure without procedural due process of law.

9 I. First Amendment claims

10 Thompson argues that he is entitled to judgment as a matter of law. Specifically, he
11 states that while prisoners retain some constitutional protections, prison regulations including the
12 one at issue here authorizing confiscation of plaintiff’s materials, are valid if they are reasonably
13 related to legitimate penological interests.⁴ Thompson asserts that publications by the 14 Word
14 Press were confiscated because the materials “promoted neo-Nazi, skinhead and white-
15 supremacist ideologies” which threatened the security of inmates and prison staff. (Decl. Quinn
16 at ¶ 5.) Therefore, he concludes, prison officials found that the 265 pamphlets by 14 Word Press
17 were so inflammatory that they were likely to incite prison violence.

18 Plaintiff claims that Thompson’s deprivation of his materials violated his right to free
19 exercise of religion because he has no funds to re-purchase the materials and the only way to
20 practice Odinism is through study of materials. (SAC at ¶ 12.) Plaintiff insists that without the
21 materials, he cannot practice his faith. (Id.) Plaintiff further argues that withholding the
22 materials based on their content violated his right to free speech. Plaintiff refutes Thompson’s
23 assertion that the 265 pamphlets advocated any violence or “call to arms.” (Opp. at 6-7.) “The
24 pamphlets may contain a separatist ideology as to the preservation of ones [sic] culture and race
25 as a means to avoid cultural genocide, but it also in advocating that, teaches Odinism and norse

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27 ⁴ The court notes that Thompson does not dispute that plaintiff’s belief in Odinism is
28 “sincerely held” and “rooted in religious belief.” See Shakur v. Schriro, 514 F.3d 878, 883-84
(9th Cir. 2008). Thus, there is no dispute that the Free Exercise Clause applies to plaintiff’s
claim. See id.

1 mythology and history.” (Id. at 6.)

2 “Prison walls do not form a barrier separating prison inmates from the protections of the
3 Constitution.” Turner v. Safley, 482 U.S. 78, 84 (1987). Where prison rules or regulations
4 impede the exercise of a prisoner’s constitutional rights, federal courts must discharge their duty
5 to protect those rights. See id. However, courts must be aware that they are “ill equipped to deal
6 with the increasingly urgent problems of prison administration and reform.” Id. (citation and
7 internal quotation marks omitted). Where the regulations of a state prison are involved, “federal
8 courts have . . . additional reason to accord deference to the appropriate prison authorities.” Id.
9 at 85 (citation and internal quotation marks omitted).

10 In order to establish a free exercise violation, a prisoner must show a defendant burdened
11 the practice of his religion without any justification reasonably related to legitimate penological
12 interests. See Shakur v. Schriro, 514 F.3d 878, 883-84 (9th Cir. 2008). A prison regulation that
13 limits a prisoner’s exercise of his constitutional rights will thus be upheld where it “reasonably
14 relate[s] to a legitimate penological interest.” Turner, 482 U.S. at 89-90. This determination
15 entails consideration of four factors: (1) whether there is a rational relationship between the
16 regulation and the proffered legitimate government interest; (2) whether inmates have alternative
17 means of exercising their asserted rights; (3) how accommodation of the claimed constitutional
18 right will affect guards, a prisoner’s fellow inmates, and the allocation of prison resources; and
19 (4) whether the policy is an “exaggerated response” to the prison’s concerns. Id.

20 The Supreme Court requires that prison officials be given broad discretion in limiting the
21 possession of publications in a volatile prison environment because of the concern that materials
22 targeted to a general audience can circulate among prisoners and cause disruption and disorder.
23 See Thornburgh v. Abbott, 490 U.S. 401, 413 (1989) (“The problem is not . . . in the individual
24 reading the materials in most cases. The problem is in the material getting into the prison.”).

25 In Stefanow v. McFadden, 103 F.3d 1466 (9th Cir. 1996), the Ninth Circuit applied the
26 Turner factors and upheld the confiscation of a publication entitled, “Christianities Ancient
27 Enemy.” Id. at 1472-1475. The court concluded that prison officials’ security concerns
28 regarding possession of the book inside the institution was not unreasonable. Id. at 1473. It

1 found that the book promoted the idea that “white Christians are being opposed by a worldwide
2 conspiracy – a conspiracy that controls the government of the United States and, by implication,
3 the prisons. The book issues a call to arms for white Christians to fight back in a ‘war for
4 survival.’” Id. Thus, the court deferred to the prison officials’ concern that the material was so
5 inflammatory that it would reasonably incite violence in the institution. Id.

6 On the other hand, in McCabe v. Arave, 827 F.2d 634 (9th Cir. 1987), the Ninth Circuit
7 applied the Turner factors and rejected a ban on storing Church Jesus Christ Christian (“CJCC”)
8 literature in the chapel library. Id. at 637-638. CJCC promoted beliefs of the Aryan Nation and
9 its Reverend encouraged racial hatred and revenge. Id. at 636. However, the Ninth Circuit
10 reiterated that while prisons may sometimes constitutionally regulate content, those regulations
11 are not without limit. Id. at 638. “[L]iterature advocating racial purity, but not advocating
12 violence or illegal activity as a means of achieving this goal, and not so racially inflammatory as
13 to be reasonably likely to cause violence at the prison, cannot be constitutionally banned as
14 rationally related to rehabilitation.” Id.

15 The court notes that neither party submitted any evidence regarding the specific content
16 of any of the pamphlets, much less all 265 of them.⁵ Without such evidence, there are genuine
17 issues of material fact as to whether any of the 265 pamphlets advocated violence or were
18 reasonably likely to cause violence at the prison and whether the decision to confiscate those
19 pamphlets was rationally related to a legitimate government interest. Accordingly, defendant’s
20 motion for summary judgment is DENIED WITHOUT PREJUDICE. Defendant may bring a
21 renewed summary judgment motion on this issue if he can make the proper evidentiary showing.
22 Plaintiff is permitted to also file a summary judgment if he can support an argument that he is
23 entitled to judgment as a matter of law.

24 II. Procedural Due Process

25 Defendant argues he did not destroy plaintiff’s documents. He took them to a storage
26 room for review and then the pamphlets were forwarded to I.S.U. (Decl. Quinn at ¶ 5.) Plaintiff
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28 ⁵ While the plaintiff did submit a copy of a pamphlet published by 14 Word Press, it is unclear whether it is a copy of one of the 265 pamphlets confiscated. (Opp. Ex. 1.)
Order Granting in Part and Denying in Part Defendants’ Motion for Summary Judgment
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1 was told that the material was considered contraband and was given the opportunity to mail them
2 to somewhere outside the prison. (Id.) Further, Thompson argues that the seizing of his
3 materials was part of normal prison procedure.

4 Plaintiff insists that Thompson failed to abide by the prison regulations. Specifically,
5 Thompson neglected to write “hot property” on plaintiff’s receipt, thus, failing to notify him that
6 any of his property had been stored as contraband. Thus, contends plaintiff, he was deprived of
7 his pre-deprivation procedures as provided by the regulations. (Opp. at 10-12.) Plaintiff also
8 alleges that the CDCR adopted regulations to ensure due process and Thompson violated those
9 regulations.

10 The Due Process Clause of the Fourteenth Amendment protects individuals against
11 governmental deprivations of “life, liberty or property,” as those words have been interpreted
12 and given meaning over the life of our republic, without due process of law. Board of Regents v.
13 Roth, 408 U.S. 564, 570-71 (1972). In order to state a claim of deprivation of due process, a
14 plaintiff must allege the existence of a liberty or property interest for which the protection is
15 sought. See id. at 569. Due process protects against the deprivation of property where there is a
16 legitimate claim of entitlement to the property. See id. at 577.

17 If the deprivation is the result of “established state procedure,” the availability of some
18 post-termination tort action does not necessarily provide due process. See Logan v. Zimmerman
19 Brush Co., 455 U.S. 422, 435-37 (1982) (failure on part of state commission to hold hearing
20 within statutory time limits not permitted to terminate timely filed claim). Parratt does not apply
21 where the state has procedures designed to control the actions of state officials and the officials
22 act pursuant to those procedures. See Zimmerman v. City of Oakland, 255 F.3d 734, 738 (9th
23 Cir. 2001) (citing Parratt v. Taylor, 451 U.S. 527, 535-44 (1981)). In those instances, the
24 Fourteenth Amendment requires “‘an opportunity . . . granted at a meaningful time and in a
25 meaningful manner,’ . . . for a hearing appropriate to the nature of the case.” Logan, 455 U.S. at
26 437. Due process is violated where a deprivation is predictable and pre-deprivation process
27 possible, but state officials, acting under apparent authority of state procedures, provide no pre-
28 deprivation procedure and are specifically charged with the authority to effect the deprivation

1 complained of. See Zimmerman, 255 F.3d at 739.

2 Where a prisoner alleges the deprivation of a property interest caused by the
3 unauthorized action of a prison official, however, there is no claim cognizable under 42 U.S.C. §
4 1983 if the state provides an adequate post-deprivation remedy. See Zinermon v. Burch, 494
5 U.S. 113, 128-32 (1990) (where state cannot foresee, and therefore provide meaningful hearing
6 prior to, deprivation statutory provision for post-deprivation hearing or common law tort remedy
7 for erroneous deprivation satisfies due process). A state’s post-deprivation remedy may be
8 adequate even though it does not provide relief identical to that available under § 1983. See id.
9 at 531 n.11. California law provides such an adequate post-deprivation remedy. See Barnett v.
10 Centoni, 31 F.3d 813, 816-17 (9th Cir. 1994) (citing Cal. Gov’t Code §§ 810-895).

11 Here, the parties do not dispute that plaintiff had a protectable property interest in his 265
12 pamphlets. Viewing the evidence in the light most favorable to plaintiff, there is no dispute that
13 Thompson was supposed to make a notation of “hot property” on plaintiff’s receipt, pursuant to
14 authorized prison procedure. Thus, because his failure to do so was unauthorized and contrary to
15 prison policy, plaintiff does not state a due process claim. See Parratt, 451 U.S. at 535-44
16 (concluding that there is no due process claim for a random and unauthorized deprivation by
17 state officials); see, e.g., Daniels v. Williams, 474 U.S. 327, 330-331 (1986) (negligent conduct
18 causing deprivation of life, liberty or property does not implicate Fourteenth Amendment
19 concerns); Hudson v. Palmer, 468 U.S. 517, 533 (1984) (unauthorized intentional destruction of
20 inmate’s property does not violate due process); cf. Sorrells, 290 F.3d at 972-73.

21 Even assuming Thompson’s actions were pursuant to an authorized state policy,
22 plaintiff’s claim does not survive summary judgment. Specifically, plaintiff states that after he
23 was told that his property had been sent to I.S.U., he sought administrative remedies through the
24 first, second, and Director’s levels of review. Prior to the final review, plaintiff was given an
25 opportunity to send the property to an outside address. Despite receiving these opportunities to
26 be heard, plaintiff still contends that he was entitled to more process. However, he fails to
27 support such a claim with sufficient evidence or facts. Cf. Hewitt v. Helms, 459 U.S. 460, 476
28 (1983) (in the context of administrative segregation, requiring only “some notice of the charges

1 against him and an opportunity to present his views to the prison official charged with the
2 decision of transfer). The record demonstrates that plaintiff was provided with notice (although
3 plaintiff was informed that his property was confiscated only after he inquired about it) and an
4 opportunity to be heard, which is the procedural process plaintiff was due. Cf. Toussaint v.
5 McCarthy, 801 F.2d 1080, 1100 (9th Cir. 1986), abrogated in part on other grounds by Sandin
6 v. Conner, 515 U.S. 472 (1995). Thus, there are no genuine issues of material fact and
7 Thompson's motion for summary judgment as to plaintiff's procedural due process claim is
8 GRANTED.

9 CONCLUSION

10 1. Defendant's motion for summary judgment is GRANTED in part and DENIED in
11 part. The motion is GRANTED as to plaintiff's procedural due process claim. However,
12 summary judgment is DENIED without prejudice to re-filing as to plaintiff's First Amendment
13 claims.

14 2. No later than **sixty (60) days** from the date of this order, the parties shall file a
15 motion for summary judgment with respect to the First Amendment claims based on additional
16 evidence, or notify the court that they are of the opinion that this case cannot be resolved by such
17 a motion.

18 Any motion for summary judgment shall be supported by adequate factual documentation
19 and shall conform in all respects to Rule 56 of the Federal Rules of Civil Procedure. **The**
20 **parties are advised that summary judgment cannot be granted, nor qualified immunity**
21 **found, if material facts are in dispute. If either party is of the opinion that this case cannot**
22 **be resolved by summary judgment, he shall so inform the court prior to the date the**
23 **summary judgment motion is due.**

24 3. The opposition to dispositive motions shall be filed with the court and served on
25 defendant no later than **thirty (30) days** from the date the motion is filed.

1 In the event a defendant files a motion for summary judgment, the Ninth Circuit has held
2 that the following notice should be given to plaintiffs:⁶

3 The defendants have made a motion for summary judgment by which
4 they seek to have your case dismissed. A motion for summary judgment under
Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your case.

5 Rule 56 tells you what you must do in order to oppose a motion for
6 summary judgment. Generally, summary judgment must be granted when there is
7 no genuine issue of material fact--that is, if there is no real dispute about any fact
8 that would affect the result of your case, the party who asked for summary
9 judgment is entitled to judgment as a matter of law, which will end your case.
10 When a party you are suing makes a motion for summary judgment that is
11 properly supported by declarations (or other sworn testimony), you cannot simply
12 rely on what your complaint says. Instead, you must set out specific facts in
declarations, depositions, answers to interrogatories, or authenticated documents,
as provided in Rule 56(e), that contradict the facts shown in the defendants'
declarations and documents and show that there is a genuine issue of material fact
for trial. If you do not submit your own evidence in opposition, summary
judgment, if appropriate, may be entered against you. If summary judgment is
granted in favor of defendants, your case will be dismissed and there will be no
trial.

13 See Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). Plaintiff is advised to read
14 Rule 56 of the Federal Rules of Civil Procedure and Celotex Corp. v. Catrett, 477 U.S. 317
15 (1986) (holding party opposing summary judgment must come forward with evidence showing
16 triable issues of material fact on every essential element of his claim). Plaintiff is cautioned that
17 failure to file an opposition to defendant's motion for summary judgment may be deemed to be a
18 consent by plaintiff to the granting of the motion, and granting of judgment against plaintiff
19 without a trial. See Ghazali v. Moran, 46 F.3d 52, 53-54 (9th Cir. 1995) (per curiam); Brydges
20 v. Lewis, 18 F.3d 651, 653 (9th Cir. 1994).

21 4. The parties shall file a reply brief no later than **fifteen (15) days** after any
22 opposition is filed.

23 5. The motion shall be deemed submitted as of the date the reply brief is due. No
24 hearing will be held on the motion unless the court so orders at a later date.

25 6. All communications by the plaintiff with the court must be served on defendant's
26 counsel, by mailing a true copy of the document to defendant's counsel.

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28 ⁶The following notice is adapted from the summary judgment notice to be given to pro se
prisoners as set forth in Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). See
Wyatt v. Terhune, 315 F.3d at 1120 n.14.

1 7. Discovery may be taken in accordance with the Federal Rules of Civil Procedure.
2 No further court order is required before the parties may conduct discovery.

3 8. It is plaintiff's responsibility to prosecute this case. Plaintiff must keep the court
4 and all parties informed of any change of address and must comply with the court's orders in a
5 timely fashion. Failure to do so may result in the dismissal of this action for failure to prosecute
6 pursuant to Federal Rule of Civil Procedure 41(b).

7 This order terminates docket number 51.

8 IT IS SO ORDERED.

9 DATED: 10/4/10



RONALD M. WHYTE
United States District Judge

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