

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO

DENNIS A. ORR, and PATRICK )  
SMRZ, )  
)  
Plaintiffs, )  
)  
vs. )  
)  
APRIL DAWSON, KATIE HALL, )  
RANDY BLADES, STEVE FEASTER )  
CARL BOYER, C. DEPPEN, TERRI )  
ROSENTHAL, PAM SONNEN, et al., )  
)  
Defendants. )  
\_\_\_\_\_)

Case No. CV-06-53-S-BLW

**ORDER**

Pending before the Court are the following motions: (1) Plaintiffs’ Motion for Reconsideration (Docket No. 27); (2) Plaintiffs’ Motion for Reconsideration of in Forma Pauperis Determination (Docket No. 28); (3) Plaintiffs’ Motion for Judgment on the Pleadings (Docket No. 46); (4) Plaintiffs’ Motion for Extension of Time (Docket No. 52); (5) Plaintiff Burstein’s Motion to Proceed in Forma Pauperis (Docket No. 53); and (6) Plaintiff Orr’s Motion to Dismiss (Docket No. 59).

Having carefully reviewed the record, the Court has determined that Plaintiff Nelson’s Motion for Reconsideration will be granted, along with Plaintiff Orr’s Motion for Voluntary Dismissal. Plaintiffs’ additional motions shall be denied, pending a review of the *Defendants’* Martinez report. The Court will also request that Plaintiffs Nelson, Burstein, and Smrz file notices regarding their intention to pursue the claims set forth in

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the Amended Complaint.

### **BACKGROUND**

Plaintiffs Orr, Nelson, and Smrz are the inmates who originally filed this action. They are currently in the custody of the Idaho Department of Correction (IDOC). An Amended Complaint was later filed, and Inmate Gregory Nelson's name appeared in the body of the Complaint, but he was not listed in the caption, nor did he sign the Amended Complaint. *See Docket No. 24*. The Court's Initial Review Order authorized Orr and Smrz to proceed with specific claims set forth in their Amended Complaint, and also instructed Roy Burstein to file an application for indigent filing status, if he intended to participate as a Plaintiff in the action. The Court determined that Defendant Nelson's request for indigent filing status was moot because he did not appear to be a Plaintiff in the action.

The Court's Initial Review Order also created a deadline for Defendants' submission of a *Martinez* report on the Plaintiffs' allegations relating to inadequate food and the failure to provide medical diets to inmates. The parties were also ordered to refrain from filing any further motions until after the Court had reviewed the Defendants' report. Defendants complied with the Court's Order, and filed the *Martinez* report. *See Docket Nos. 43, 44, and 45*. After the report was filed, Plaintiff Orr filed a Motion for Extension of Time to respond to the report.

After requesting additional time to respond to the *Martinez* report, Plaintiff Orr filed a Motion to Withdraw as a Plaintiff in this action. Orr alleges that the *Martinez*

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report is inaccurate, and he believes that the relief requested in the Complaint will not be granted by this Court. Defendant Orr states that he contacted Co-Plaintiff Smrz as to whether he wanted to continue as a Plaintiff in the action, and Smrz was unsure as to whether he wanted to proceed with the lawsuit. Defendants filed notices of non-opposition to Plaintiff Orr's Motion to Withdraw. *Docket Nos. 61, 62.*

## **PENDING MOTIONS**

### **Plaintiff Nelson's Motion for Reconsideration**

Plaintiff Nelson asked for reconsideration of the Court's denial of his indigent filing request. He claims that he was not listed as a Plaintiff in the Amended Complaint and was unable to sign it because he had a different incarceration assignment within the IDOC facilities. He appears to be alleging that he is aware of the contents of the Amended Complaint and would have signed it if he were in the same IDOC unit as Plaintiffs Orr and Smrz.

The Court construes Nelson's Motion to Reconsider as one filed pursuant to Rule 59(e) which provides for reconsideration of a prior ruling when new evidence is presented. *See Kona Enterprises, Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000)(holding that newly presented evidence provides the basis for reconsideration of a prior ruling). It appears that good cause exists to grant Plaintiff Nelson's motion and allow him to proceed as a Plaintiff in this action with the benefit of an indigent filing status. Therefore, the Court will conditionally grant Plaintiff Nelson's motion and order him to provide an affidavit, indicating that he has read the Amended Complaint and

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requesting that his signature be added to the body of the Complaint. He will then be directed to file the signature page for the Amended Complaint.

As previously set forth, Plaintiff Orr has requested voluntary dismissal as a party to this action. In the event Plaintiff Nelson elects to proceed as a Plaintiff, the filing fee will be shared among Plaintiffs Smrz, Burstein, and Nelson.

### **Plaintiff Orr's Motions**

Plaintiffs Orr and Smrz filed a Motion for Reconsideration of the Court's Initial Review Order. This was done in violation of the Court's Order, directing the parties to refrain from filing any motions until after the Defendants' *Martinez* Report had been reviewed. Plaintiff Orr subsequently filed a Motion for Voluntary Dismissal, and therefore, it is unclear whether the request for reconsideration is still applicable to Plaintiffs' lawsuit.

The Court will deny Plaintiff Orr's Motion for Reconsideration at this time, and to the extent the issues raised in it are relevant after the Court has reviewed the Defendants' *Martinez* Report, then the remaining Plaintiff(s) may re-file it.

Plaintiff Orr's Motion for Judgment on the Pleadings was also filed in violation of the Court's Order pertaining to the Defendants' *Martinez* report. Therefore, it will be denied for the reasons set forth above.

Plaintiff Orr's most recent motion requested voluntary dismissal from the action, and Defendants filed notices of non-opposition to the motion. Accordingly, Plaintiff's motion is granted.

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**Plaintiff Burstein's Motion**

The Court previously authorized Plaintiff Burstein to proceed as a Plaintiff in this action, and he was ordered to submit an application for *in forma pauperis* filing status. Based on Plaintiff Burstein's submission, it appears that good cause exists to grant his request for indigent filing status.

**Plaintiff Orr's Motion for Extension of Time**

Plaintiffs Orr and Smrz filed a motion requesting an extension of time within which to respond to Defendants' *Martinez* report. Because Plaintiff Orr is being dismissed from the lawsuit, the Court will grant the request as to the remaining Plaintiffs, Smrz, Nelson, and Burstein. Plaintiffs will be given an additional sixty (60) days within which to respond to Defendants' *Martinez* report. Plaintiffs are further advised that the report and the response will be used as the basis for a further determination under 28 U.S.C. § 1915 (e)(2) (B) as to the sufficiency of the Complaint's allegations. In the alternative, the Court may decide to evaluate the report and its response pursuant to the standards set forth in Federal Rule of Civil 12 (b)(6) or 56. After Plaintiffs' response is filed, the Court will provide notice to the parties in the event it decides to use the record before it as a basis for dismissal of the Amended Complaint.

**ORDER**

NOW THEREFORE IT IS HEREBY ORDERED that Plaintiff Nelson's Motion for Reconsideration (Docket No. 27) is GRANTED as set forth above. The affidavit described above shall be submitted within thirty (30) days.

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IT IS FURTHER HEREBY ORDERED that Plaintiffs' Motion for Reconsideration (Docket No. 28) is DENIED.

IT IS FURTHER HEREBY ORDERED that Plaintiffs' Motion for Judgment on the Pleadings (Docket No. 46) is DENIED.

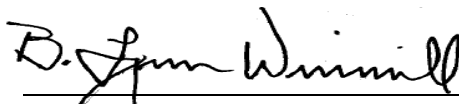
IT IS FURTHER HEREBY ORDERED that Plaintiffs' Motion for Extension of Time (Docket No. 52) is GRANTED. Plaintiffs shall file a response to the Defendants' *Martinez* report within sixty (60) days.

IT IS FURTHER HEREBY ORDERED that Plaintiff Burstein's Motion to Proceed in Forma Pauperis (Docket No. 53) is GRANTED as set forth above.

IT IS FURTHER HEREBY ORDERED that Plaintiff Orr's Motion to Dismiss (Docket No. 59) is GRANTED.



DATED: **August 27, 2007**

  
Honorable B. Lynn Winmill  
Chief U. S. District Judge