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8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE DISTRICT OF ARIZONA**

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11 Frank Pate and Leila Pate,
12 **Plaintiffs,**
13 v.
14 Laura Cheng,
15 **Defendant.**

No. CV-14-02202-TUC-CRP
ORDER

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17 The Magistrate Judge has jurisdiction over this matter pursuant to the parties'
18 consent. See 28 U.S.C. § 636(c). (*See* Doc. 22).

19 Pending before the Court is Defendant's Motion to Dismiss for Lack of Personal
20 Jurisdiction and Motion for Sanctions (Doc. 7). After Defendant's Motion was fully
21 briefed, Plaintiffs filed a Notice of Dismissal Without Prejudice (Doc. 23).

22 As discussed below, Plaintiffs' Notice of Dismissal Without Prejudice
23 automatically terminated this action and, thus, all other motions are moot.

24 **BACKGROUND**

25 Plaintiffs, acting *pro se*, filed the instant action alleging diversity of citizenship
26 and that Defendant, *inter alia*, had threatened them. (Doc. 1). In response, Defendant
27 filed a Motion to Dismiss (Doc. 7) for lack of personal jurisdiction. Defendant also seeks
28 sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure, arguing that the

1 lawsuit is frivolous. (Doc. 7). After filing a response to Defendant’s Motion, Plaintiffs
2 obtained legal counsel (Doc. 18) and, thereafter, filed a Notice of Dismissal Without
3 Prejudice¹ (Doc. 23) pursuant to Rule 41(a)(1)(A)(i) of the Federal Rules of Civil
4 Procedure. Defendant objects to dismissal unless the action is dismissed “with prejudice,
5 or conditioned on the payment of reasonable costs and expenses incurred defending
6 Plaintiffs’ frivolous claims as requested in her motions for sanctions.” (Defendant’s
7 Objection to Plaintiffs’ Notice of Dismissal Without Prejudice (Doc. 24), p. 2) (emphasis
8 omitted).

9 **DISCUSSION**

10 Under Rule 41 of the Federal Rules of Civil Procedure, “the plaintiff may dismiss
11 an action without a court order by filing...a notice of dismissal before the opposing party
12 serves either an answer or a motion for summary judgment...” Fed.R.Civ.P.

13 41(a)(1)(A)(i). The Ninth Circuit has been clear that Rule 41 confers on the plaintiff

14 an absolute right to voluntarily dismiss his [or her] action prior to service
15 by the defendant of an answer or a motion for summary judgment. A
16 plaintiff may dismiss his [or her] action so long as the plaintiff files a notice
17 of dismissal prior to the defendant's service of an answer or motion for
18 summary judgment. The dismissal is effective on filing and no court order
19 is required....The filing of a notice of voluntary dismissal with the court
automatically terminates the action as to the defendants who are the
subjects of the notice....Such a dismissal leaves the parties as though no
action had been brought.

20 *American Soccer Co., Inc. v. Score First Enterprises*, 187 F.3d 1108, 1110 (9th Cir. 1999)
21 (quoting *Wilson v. City of San Jose*, 111 F.3d. 688, 692 (9th Cir. 1997)) (reversing district
22 court’s order vacating voluntary dismissal); *see also Pedrina v. Chun*, 987 F.2d 608, 610
23 (9th Cir. 1993) (the plaintiff’s filing of the notice of dismissal under Rule 41(a)(1)(A)(i)

24 ¹ Plaintiffs state that their “counsel offered Defendant’s counsel a stipulation to transfer
25 the case to the Northern District of California where Defendant resides...” and defense
26 counsel rejected that offer. (Plaintiffs’ Reply in Support of Plaintiffs’ Dismissal Without
27 Prejudice (Doc. 25), p. 5). Instead of moving for a change of venue, “Plaintiffs have
28 decided to dismiss this case and refile with the help of counsel where personal
jurisdiction exists, namely in the Northern District of California.” (*Id.*).

1 “closes the file”). Further, because the language of Rule 41(a)(1)(A)(i) is unequivocal,
2 the “‘absolute right’ for a plaintiff voluntarily to dismiss an action when the defendant
3 has not yet served an answer or a summary judgment motion leaves no role for the court
4 to play.” *American Soccer Co., Inc.*, 187 F.3d at 1110. Therefore, in light of Plaintiffs’
5 Notice of Dismissal Without Prejudice (Doc. 23), there is no role for this Court to play
6 other than to ensure that the Clerk of Court terminates this action. *See id.* The Ninth
7 Circuit has observed that such practice “does not prejudice defendants. If defendants
8 ‘desire to prevent plaintiffs from invoking their unfettered right to dismiss actions under
9 rule 41(1)(a) [they] may do so by taking the simple step of filing an answer.’” *Id.* at 1112
10 (quoting *Carter v. United States*, 547 F.2d 258, 259 (5th Cir. 1977)).

11 Additionally, Rule 41(a)(1)(B) provides that:

12 Unless the notice [of voluntary dismissal]...states otherwise, the dismissal
13 is without prejudice. But if the plaintiff previously dismissed any federal-
14 or state-court action based on or including the same claim, a notice of
dismissal operates as an adjudication on the merits.

15 Fed.R.Civ.P. 41(a)(1)(B). Defendant points out that in 2010, Plaintiffs filed a complaint
16 against her in the United States District Court for the Northern District of California and
17 “[t]hat suit was dismissed for lack of jurisdiction.” (Doc. 7, p. 2). Plaintiffs’ California
18 action was dismissed upon motion by Defendant, and not by notice of voluntary dismissal
19 by Plaintiffs. (*See* Doc. 7, Exh. 1-D; *see also* Doc. 37 filed in *Pate, et. al. v. Cheng*, No.
20 3:10-cv-3968-JSW, (N.D. Cal. May 10, 2011 Order) (“May 11, 2011 Order”). The
21 District Court for the Northern District of California held that Plaintiffs’ allegations of
22 money laundering as alleged failed to state a claim and dismissed the action for lack of
23 jurisdiction because Plaintiffs failed to establish that they were authorized to bring a
24 private cause of action under 26 U.S.C. §7401 for tax collection or penalty. (May 11,
25 2011 Order, pp.3-4). Consequently, there is no showing on the instant record that
26 Plaintiffs’ “previously dismissed any federal-or state-court action based on or including
27 the same claim....” Fed.R.Civ.P. 41(a)(1)(B). In light of Rule 41(a)(1)(B), Plaintiffs’
28 Notice of Dismissal Without Prejudice (Doc. 23), results in dismissal of this action

1 without prejudice.

2 Arguably, Defendant's request for sanctions under Rule 11 is moot in light of
3 Plaintiffs' Notice of Dismissal Without Prejudice. Plaintiffs also point out that
4 Defendant failed to file her motion for sanctions separately from her Motion to Dismiss
5 as required by Rule 11(c)(2) ("A motion for sanctions must be made separately from any
6 other motion...."), and that she failed to comply with Rule 11's safe harbor provision
7 requiring that prior to filing the motion, the movant must first serve the motion on the
8 opposing party and give the opposing party 21 days to withdraw or appropriately correct
9 "the challenged paper...." Fed.R.Civ.P. 11(c)(2); (*see also* Doc. 25, p. 4).

10 The record is clear that, in contravention of Rule 11(c)(2), Defendant combined
11 her request for Rule 11 sanctions together with her motion to dismiss for lack of personal
12 jurisdiction. Nor has Defendant argued that she complied with the safe harbor provision
13 of Rule 11. "[T]he procedural requirements of Rule 11[(c)(2)]'s 'safe harbor' are
14 mandatory." *Radcliffe v. Rainbow Constr. Co.*, 254 F.3d 772, 789 (9th Cir. 2001)
15 (quoting *Barber v. Miller*, 146 F.3d 707, 710-11 (9th Cir. 1998)); *see also Holgate v.*
16 *Baldwin*, 425 F.3d 671, 478 (9th Cir. 2005) ("We enforce this safe harbor provision
17 strictly."). Failure to comply with the safe harbor provision precludes the moving party
18 from obtaining an award of sanctions. *See Radcliffe*, 254 F.3d at 789 (reversing district
19 court's grant of Rule 11 sanctions where the moving party failed to comply Rule
20 11(c)(2)'s safe harbor provision); *see also Holgate*, 425 F.3d at 677 ("We must reverse
21 the award of sanctions when the...[moving] party failed to comply with the safe harbor
22 provisions, even when the underlying filing is frivolous."). Even if Defendant's request
23 for sanctions were not rendered moot by Plaintiffs' Notice of Dismissal, Defendant's
24 failure to comply with the safe harbor provision precludes consideration of her request
25 for sanctions.

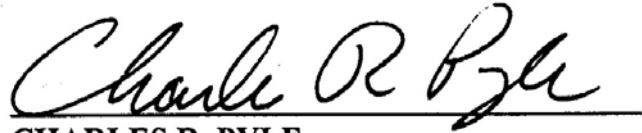
26 Accordingly, for the foregoing reasons,

27 IT IS ORDERED that in light of Plaintiff's Notice of Dismissal Without Prejudice
28 (Doc. 23), the Clerk of Court is DIRECTED to enter dismissal without prejudice pursuant

1 to Rules 41(a)(1)(A)(i) and 41(a)(1)(B) of the Federal Rules of Civil Procedure.

2 IT IS FURTHER ORDERED that in light of Plaintiff's voluntary dismissal,
3 Defendant's pending Motion to Dismiss for Lack of Personal Jurisdiction and for
4 Sanctions (Doc. 7) is DENIED as moot.

5 DATED this 24th day of February, 2015.

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8 **CHARLES R. PYLE**

9 **UNITED STATES MAGISTRATE JUDGE**

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