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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION**

DUANE PAUL,
CDCR #E-01335,

Plaintiff,

vs.

JOHN/JANE DOE, et al.,

Defendant.

Civil No. 08-1047 MLH (RBB)

**ORDER GRANTING PLAINTIFF’S
MOTION FOR VOLUNTARY
WITHDRAWAL OF CIVIL SUIT
CONSTRUING IT AS A NOTICE OF
VOLUNTARY DISMISSAL
PURSUANT TO FED.R.CIV.P.
41(a)(1) [Doc. No. 12]**

**I.
PROCEDURAL HISTORY**

On July 22, 2008, Plaintiff, an inmate currently incarcerated at Pelican Bay State Prison located in Crescent City, California and proceeding pro se, filed a civil rights Complaint pursuant to 42 U.S.C. § 1983. Plaintiff did not prepay the \$350 filing fee mandated by 28 U.S.C. § 1914(a) to commence a civil action; instead, he filed a Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2]. The Court granted Plaintiff’s Motion to Proceed *IFP* on July 24, 2008 [Doc. No. 6].

1 On November 25, 2008, this matter was reassigned to District Judge Marilyn L. Huff for all
2 further proceedings [Doc. No. 9]. The Court sua sponte dismissed Plaintiff's Complaint for failing to
3 state a claim on January 7, 2009. See Jan. 7, 2009 Order at 5. Nonetheless, the Court granted Plaintiff
4 leave to file a First Amended Complaint in order to correct the deficiencies of pleading identified by the
5 Court in its Order. *Id.* Instead of filing an Amended Complaint, Plaintiff filed a "Motion to Voluntary
6 Withdrawal" [Doc. No. 12].

7 **II.**

8 **VOLUNTARY DISMISSAL PURSUANT TO FRCP 41**

9 Rule 41(a)(1) of the Federal Rules of Civil Procedure provides that "an action may be dismissed
10 by the plaintiff without order of court by filing a notice of dismissal at any time before service by the
11 adverse party of an answer or of a motion for summary judgment...." Fed.R.Civ.P. 41(a)(1). "Under
12 Rule 41(a)(1), a plaintiff has an absolute right voluntarily to dismiss his action prior to service by the
13 defendant of an answer or a motion for summary judgment..... The dismissal is effective on filing and
14 no court order is required." *Concha v. London*, 62 F.3d 1493, 1506 (9th Cir. 1995), *cert. dismissed*, 116
15 S. Ct. 1710 (1996); see *Pedrina v. Chun*, 987 F.2d 608, 610 (9th Cir. 1993).

16 In this matter, there has been no answer or motion for summary judgment. Accordingly, the
17 Court hereby construes Plaintiff's Request [Doc. No. 12] as a voluntary dismissal pursuant to
18 Fed.R.Civ.P. 41(a)(1) and dismisses Plaintiff's action without prejudice.


19 **III.**

20 **CONCLUSION**

21 For all the foregoing reasons, the Court hereby:

22 Construes Plaintiff's "Motion for Voluntary Withdrawal" [Doc. No. 12] as a Notice of
23 Voluntary Dismissal pursuant to FED.R.CIV.P. 41(a)(1) and dismisses Plaintiff's action without
24 prejudice. The Clerk shall close the file.

25 DATED: February 19, 2009

26 
27 HON. MARILYN L. HUFF
28 United States District Judge