

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CECIL MESSER,

Plaintiff,

VS.

UNITED STATES PENITENTIARY
ATWATER FOOD SERVICE
DEPARTMENT, et al.,

Defendants

1:13-cv-01300-GSA-PC

ORDER GRANTING MOTION TO
DISMISS PURSUANT TO RULE 41
(Doc. 27.)

**ORDER DISMISSING ACTION IN ITS
ENTIRETY WITHOUT PREJUDICE**

**ORDER DIRECTING CLERK TO CLOSE
FILE**

Cecil Messer (“Plaintiff”) is a federal prisoner proceeding pro se and in forma pauperis with this civil rights action pursuant to Bivens vs. Six Unknown Agents, 403 U.S. 388 (1971). Plaintiff filed the Complaint commencing this action on August 16, 2013. (Doc. 1.) On October 15, 2013, Plaintiff consented to Magistrate Judge jurisdiction pursuant to 28 U.S.C. § 636(c), and no other parties have made an appearance. (Doc. 7.) Therefore, pursuant to Appendix A(k)(4) of the Local Rules of the Eastern District of California, the undersigned shall conduct any and all proceedings in the case until such time as reassignment to a District Judge is required. Local Rule Appendix A(k)(3).

On March 30, 2015, Plaintiff filed a motion to dismiss this action “upon request from Plaintiff.” (Motion, Doc. 27.) Plaintiff states that he “is not knowledgeable enough to continue this arguement (sic).” (Id.)

1 The court construes Plaintiff's motion as a motion to dismiss under Rule 41(a)(1). In
2 Wilson v. City of San Jose, the Ninth Circuit explained:

3 Under Rule 41(a)(1), a plaintiff has an absolute right to voluntarily
4 dismiss his action prior to service by the defendant of an answer or a motion for
5 summary judgment. Concha v. London, 62 F.3d 1493, 1506 (9th Cir. 1995)
6 (citing Hamilton v. Shearson-Lehman American Express, 813 F.2d 1532, 1534
7 (9th Cir. 1987)). A plaintiff may dismiss his action so long as the plaintiff files
8 a notice of dismissal prior to the defendant's service of an answer or motion for
9 summary judgment. The dismissal is effective on filing and no court order is
10 required. Id. The plaintiff may dismiss some or all of the defendants, or some
11 or all of his claims, through a Rule 41(a)(1) notice. Id.; Pedrina v. Chun, 987
12 F.2d 608, 609-10 (9th Cir. 1993). The filing of a notice of voluntary dismissal
13 with the court automatically terminates the action as to the defendants who are
14 the subjects of the notice. Concha, 62 F.2d at 1506. Unless otherwise stated,
15 the dismissal is ordinarily without prejudice to the plaintiff's right to commence
16 another action for the same cause against the same defendants. Id. (citing
17 McKenzie v. Davenport-Harris Funeral Home, 834 F.2d 930, 934-35 (9th Cir.
18 1987)). Such a dismissal leaves the parties as though no action had been
19 brought. Id.

20 Wilson v. City of San Jose, 111 F.3d 688, 692 (9th Cir. 1997). No defendant has filed an
21 answer or motion for summary judgment in this action. Therefore, Plaintiff's motion shall be
22 granted.

23 Accordingly, IT IS HEREBY ORDERED that:

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- 1 Plaintiff's motion to dismiss this case is GRANTED;
- 2 This action is DISMISSED in its entirety without prejudice; and
- 3 The Clerk of the Court is DIRECTED to close the file in this case and adjust the
docket to reflect voluntary dismissal of this action pursuant to Rule 41(a).

29 IT IS SO ORDERED.

30 Dated: March 31, 2015

31 /s/ Gary S. Austin
32 UNITED STATES MAGISTRATE JUDGE