UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CHARLES WINDHAM,) Case No.: 1:16-cv-00979-AWI-SAB (PC)
Plaintiff, v. C. RODRIGUEZ, Defendant.	ORDER DIRECTING DEFENDANT TO RESPOND TO PLAINTIFF'S NOTICE OF WITHDRAWAL FROM THE PROSECUTION OF THIS CASE [ECF No. 51]

Currently before the Court is Plaintiff's notice of withdrawal from the prosecution of this case, filed on January 19, 2018. (ECF No. 51.) Plaintiff asserts that prison officials and defense counsel have destroyed evidence and stolen completed and prepared court documents, and he believes the Court has not sufficiently responded to his allegations. As a result, it appears Plaintiff seeks to voluntarily dismiss this action.

Under Rule 41(a)(1)(A)(i) of the Federal Rules of Civil Procedure, 'a plaintiff has an absolute right to voluntarily dismiss his action prior to service by the defendant of an answer or a motion for summary judgment.' "Commercial Space Mgmt. Co., Inc. v. Boeing Co., Inc., 193 F.3d 1074, 1077 (9th Cir. 1999) (quoting Wilson v. City of San Jose, 111 F.3d 688, 692 (9th Cir. 1997)). Here, Defendants have filed a motion for summary judgment so Plaintiff cannot voluntarily dismiss this action pursuant to Rule 41(a)(1)(A)(i).

Federal Rule of Civil Procedure 41(a)(1)(A)(ii) provides that a "plaintiff may dismiss an action without a court order by filing a stipulation of dismissal signed by all parties who have appeared." Fed. R. Civ. P. 41(a)(1)(A)(ii). Therefore, Plaintiff may dismiss this action by filing a stipulation of dismissal that is signed by all parties who have appeared.

A party may also dismiss an action by filing a motion requesting the Court to dismiss the action. Fed. R. Civ. P. 41(a)(2). A motion for voluntary dismissal under Rule 41(a)(2) is addressed to the sound discretion of the district court. Hamilton v. Firestone Tire & Rubber Co. Inc., 679 F.2d 143, 145 (9th Cir. 1982). Here, the Court construes Plaintiff's notice of withdrawal as a motion for voluntary dismissal of the action. Accordingly, the Court finds it appropriate to require Defendant Rodriguez to respond to this notice.

Based on the foregoing, on or before **Friday**, **January 26**, **2018**, Defendant shall file a response to the notice or a stipulation to dismiss this action pursuant to Federal Rule of Civil Procedure 41.

IT IS SO ORDERED.

Dated: **January 22, 2018**

UNITED STATES MAGISTRATE JUDGE