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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

BRYAN ROSSY, MARK GUTIERREZ,
JARED WAASDORP, and DOUGLAS
MAIRS,

Plaintiffs,

v.

CITY OF BISHOP, CHRIS CARTER, TED
STEC, JIM TATUM, and PAT GARDNER,

Defendants.

Case No. 1:17-cv-01244-SAB

ORDER DISREGARDING NOTICE OF
VOLUNTARY DISMISSAL

(ECF No. 70)

SEVEN DAY DEADLINE

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Plaintiffs Bryan Rossy, Mark Gutierrez, Jared Waasdorp, and Douglas Mairs filed this action against Defendants City of Bishop, Chris Carter, Ted Stec, Jim Tatum, and Pat Gardner on September 15, 2017. (ECF No. 1.) After an order denying Defendants' motion to dismiss was filed, Defendants filed an answer to the complaint on April 17, 2018. (ECF Nos. 18, 20.)

On February 22, 2019, the district judge issued an order granting in part and denying in part Defendants' motion for summary judgment after which the parties consented to the jurisdiction of a United States magistrate judge and the action was reassigned to the undersigned. (ECF Nos. 49, 55, 56, 58.) On May 15, 2019, the parties engaged in a settlement conference before United States Magistrate Judge Barbara A. McAuliffe during which they reached a settlement agreement and they were ordered to file dispositional documents by May 29, 2019. (ECF No. 59.)

1 On May 28, 2019, the parties lodged their settlement agreement. (ECF No. 68.) On May 29,
2 2019, an order issued directing the parties to file dispositional documents within seven days. (ECF
3 No. 69.) On June 4, 2019, Plaintiffs filed a notice of voluntary dismissal of Defendant Tatum
4 pursuant to Rule 41(a) of the Federal Rules of Civil Procedure.¹ (ECF No. 70.)

5 Under Rule 41(a)(1)(A)(i) of the Federal Rules of Civil Procedure, ‘a plaintiff has an absolute
6 right to voluntarily dismiss his action prior to service by the defendant of an answer or a motion for
7 summary judgment.’ ” Commercial Space Mgmt. Co., Inc. v. Boeing Co., Inc., 193 F.3d 1074,
8 1077 (9th Cir. 1999) (quoting Wilson v. City of San Jose, 111 F.3d 688, 692 (9th Cir. 1997)). Rule
9 41(a) also allows a party to dismiss some or all of the defendants in an action through a Rule 41(a)
10 notice. Wilson, 111 F.3d at 692.

11 Here, Plaintiff filed a notice of dismissal pursuant to Rule 41(a), however the form itself
12 informs that a dismissal under 41(a) must be before service of an answer or or motion for summary
13 judgment. Defendants have filed an answer and a motion for summary judgment, so Plaintiffs
14 cannot voluntarily dismiss a defendant pursuant to Rule 41(a)(1)(A)(i).

15 Federal Rule of Civil Procedure 41(a)(1)(A)(ii) provides that a “plaintiff may dismiss an
16 action without a court order by filing a stipulation of dismissal signed by all parties who have
17 appeared.” Fed. R. Civ. P. 41(a)(1)(A)(ii). The notice of motion filed is not a stipulation signed
18 by all parties who have appeared so it is not a dismissal under Rule 41(a)(1)(A)(ii).

19 A party may also dismiss an action by filing a motion requesting the Court to dismiss the
20 action. Fed. R. Civ. P. 41(a)(2). A motion for voluntary dismissal under Rule 41(a)(2) is addressed
21 to the sound discretion of the district court. Hamilton v. Firestone Tire & Rubber Co. Inc., 679
22 F.2d 143, 145 (9th Cir. 1982).

23 Plaintiffs’ notice of voluntary dismissal is defective under Rule 41(a) because it is not a signed
24 stipulation by all parties who have appeared and it is not a motion under Rule 41(a)(2). If Plaintiffs
25 wish to dismiss Defendant Tatum from this action, they are required to comply with the procedures
26 set forth in Rule 41 by filing a stipulation that complies with Rule 41(a)(1)(A)(ii) or a motion under

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28 ¹ The form used by Plaintiffs also refers to Rule 41(c) which provides that counterclaims, cross-claims and third-party claims may be dismissed. However, there are no such claims raised in this action.

1 Rule 41(a)(2).

2 Accordingly, Plaintiffs' notice of dismissal pursuant to Federal Rules of Civil Procedure 41(a)
3 or (c) is HEREBY DISREGARDED. Plaintiffs shall file a request for dismissal of Defendant
4 Tatum that complies with Rule 41 within **seven (7) days** from the date of entry of this order.

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6 IT IS SO ORDERED.

7 Dated: June 5, 2019



UNITED STATES MAGISTRATE JUDGE

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