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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

PRIME HEALTHCARE SERVICES,  
INC., a Delaware corporation,  
  
Plaintiff,

vs.

SERVICE EMPLOYEES  
INTERNATIONAL UNION, a Labor  
Union; et al.,  
  
Defendants.

CASE NO. 11cv2652-GPC(RBB)  
**ORDER GRANTING  
DEFENDANTS' 41(b) MOTION  
TO DISMISS**

[Dkt. No. 88]

Presently before the Court is a Federal Rules of Civil Procedure 41(b) motion to dismiss filed by Defendants Service Employees International Union (“SEIU”) and Service Employees International Union - United Healthcare Workers West (“SEIU-UHW”). (Dkt. No. 88.) For the reasons provided below, this Court GRANTS Defendants’ 41(b) motion and DISMISSES WITH PREJUDICE Plaintiff’s First Amended Complaint (“FAC”).

**BACKGROUND**

On September 21, 2012, Plaintiff filed a FAC in the present action. (Dkt. No. 43.) Defendants SEIU and SEIU-UHW (collectively, “Defendants”) filed separate

1 motions to dismiss Plaintiff's FAC.<sup>1</sup> (Dkt. Nos. 43, 57.) On July 25, 2013, this  
2 Court granted both motions to dismiss, allowing Plaintiff leave to amend the FAC.  
3 (Dkt. No. 87 at 30.) ("If Prime Healthcare wishes, it **SHALL FILE** an amended  
4 complaint within thirty days of the date this Order is electronically docketed.  
5 Failure to file an amended complaint by this date may result in dismissal with  
6 prejudice.") (emphasis in original). To date, Plaintiff has not filed a second  
7 amended complaint. On November 1, 2013, Defendants filed a motion to dismiss  
8 this action for lack of prosecution under Rule 41(b). (Dkt. No. 88.) Plaintiff filed a  
9 notice of intent to appeal on November 4, 2013. (Dkt. No. 89) Defendants' motion  
10 has been fully briefed. (Dkt. Nos. 93, 94.)

#### 11 LEGAL STANDARD

12 Federal Rule of Civil Procedure 41(b) provides that a defendant may move to  
13 dismiss an action or claim "[i]f the plaintiff fails to prosecute or comply with these  
14 rules or a court order." Dismissal, however, "is a harsh penalty and is to be imposed  
15 only in extreme circumstances." Henderson v. Duncan, 779 F.2d 1421, 1423 (9th  
16 Cir. 1986) (citations omitted). In determining whether to dismiss a case for failure  
17 to comply with a court order, the district court weighs five factors: "(1) the public's  
18 interest in expeditious resolution of the litigation; (2) the court's need to manage its  
19 docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring  
20 disposition of cases on their merits; and (5) the availability of less drastic  
21 alternatives." Ferdik v. Bonzelet, 963 F.2d 1258, 1260-61 (9th Cir. 1992) (citations  
22 and internal quotation marks omitted). In addition, "[a] dismissal for lack of  
23 prosecution must be supported by a showing of unreasonable delay," which creates  
24 a presumption that the defendants have been injured. Henderson, 779 F.2d at 1423.  
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28 <sup>1</sup>A third motion to dismiss was filed by Defendants Kaiser Foundation Health Plan, Inc., Kaiser Foundation Hospitals, and Southern California Permanente Medical Group. (Dkt. No. 59.) These Defendants do not join the present motion.

1 Unlike dismissals under Rule 41(b), a Rule 12(b)(6) dismissal for failure to  
2 state a claim carries no stigma for disobedience of a court order. Edwards v. Marin  
3 Park, Inc., 356 F.3d 1058, 1065 (9th Cir. 2004). Furthermore, the United States  
4 Court of Appeals for the Ninth Circuit (“Ninth Circuit”) reviews Rule 41(b)  
5 dismissals for “abuse of discretion in applying the five factors set forth in Ferdik,  
6 963 F.2d at 1260, which pertain to the propriety of the sanction, not to the merits of  
7 the underlying question (such as whether a complaint states a claim).” Id. (citing  
8 Yourish v. California Amplifier, 191 F.3d 983, 986). On the other hand, the Ninth  
9 Circuit reviews 12(b)(6) dismissals “de novo, reviewing directly the question  
10 whether the plaintiff has stated a claim upon which relief could be granted.” Id.  
11 (citing Stone v. Travelers Corp., 58 F.3d 434, 436-37 (9th Cir. 1995)).

#### 12 ANALYSIS

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14 Defendants file the present motion under Federal Rule of Civil Procedure  
15 41(b), seeking involuntary dismissal of Plaintiff’s FAC with prejudice. (Dkt. No.  
16 88-1.) Defendants argue Plaintiff’s failure to either amend or indicate intent to  
17 appeal prior to the Court’s ordered deadline warrants Rule 41(b) sanctions. (Id. at 1-  
18 2.) In response, Plaintiff claims Rule 41(b) sanctions are appropriate only in “cases  
19 where there is a true failure to prosecute,” and that Plaintiff’s settlement attempts  
20 and notice to opposing counsel of intent to appeal excuse any delay. (Dkt. No. 93 at  
21 1-2.) Plaintiff requests instead that this Court enter a final judgment in this case  
22 without Rule 41(b) sanctions. (Id. at 1, 3.) Defendants reply that neither Plaintiff’s  
23 settlement attempts nor flawed communications with opposing counsel excuse  
24 Plaintiff’s failure to either file a second amended complaint or notify the Court of  
25 intent to stand on the FAC. (Dkt. No. 94.)

26 As an initial matter, the Court notes that Plaintiff must obtain a final  
27 judgment from this Court prior to filing a notice of appeal. WMX Technologies,  
28 Inc. v. Miller, 104 F.3d 1133 (9th Cir. 1997) (en banc) (“We now specifically rule

1 that a plaintiff, who has been given leave to amend, may not file a notice of appeal  
2 simply because he does not choose to file an amended complaint. A further district  
3 court determination must be obtained.”). The United States Court of Appeals for the  
4 Ninth Circuit (“Ninth Circuit”) has expressly rejected the contrary holdings of other  
5 circuits. Id. at 1136 (disapproving of Otis v. City of Chicago, 29 F.3d 1159, 1166-  
6 68 (7th Cir. 1994) (en banc) (“finality springs into existence when the time for leave  
7 to amend expires.”)). Absent notice of a plaintiff’s intent not to amend a complaint  
8 when given leave to by the Court, “resources continue to be consumed by a case  
9 sitting idly on the court’s docket.” Edwards v. Marin Park, Inc., 356 F.3d 1058,  
10 1063-65 (9th Cir. 2004).

11 Weighing the five factors from Ferdik v. Bonzelet, 963 F.2d 1258, the Court  
12 concludes that Plaintiff’s delay and failure to move the Court for final judgment  
13 warrants Rule 41(b) sanction. In particular, the first three Ferdik factors weigh  
14 heavily in favor of Rule 41(b) dismissal. See Yourish, 191 F.3d at 990 (1999)  
15 (approving of the district court’s grant of Rule 41(b) involuntary dismissal where  
16 three out of five Ferdik factors favored dismissal). Involuntary dismissal serves the  
17 public’s interest in expeditious resolution of the litigation as well as the Court’s  
18 need to manage its docket because Plaintiff’s noncompliance with the Court’s  
19 deadline has caused this case to languish on the Court’s docket for over two months.  
20 By failing to timely move the Court for final judgment in this matter, Plaintiff has  
21 effectively tolled the allowed period to prepare an appeal. See Jung v. K. & D. Min.  
22 Co., 356 U.S. 3355 (1958) (Permitting appeal nearly two years after petitioners were  
23 given leave to file an amended complaint because neither the defendants nor the  
24 district court acting sua sponte sought to dismiss the action with prejudice after  
25 petitioners missed the amendment deadline).

26 Furthermore, this delay has prejudiced the Defendant. See Yourish, 191 F.3d  
27 at 991 (“We have indicated that the risk of prejudice to the defendant is related to  
28

1 the plaintiff's reason for defaulting in failing to timely amend.") (citing Malone v.  
2 U.S. Postal Service, 833 F.2d 128, 131 (9th Cir. 1987)). To explain the delay,  
3 Plaintiff offers evidence of ongoing settlement negotiations as well as  
4 communication to opposing counsel of intent to stand on the FAC. (Dkt. No. 93 at  
5 1-2.) Neither reason explains Plaintiff's failure to communicate Plaintiff's intentions  
6 to this Court by formal notice or motion for extension of time. Because  
7 unreasonable plaintiff delay creates a presumption of injury to defendants,  
8 Henderson v. Duncan, 779 F.2d 1421, 1423 (9th Cir. 1986); see also Yourish, 191  
9 F.3d at 991-92, the Court finds that the third Ferdik factor also favors Rule 41(b)  
10 dismissal.

11 The fourth Ferdik factor asks the Court to weigh the public policy favoring  
12 disposition of cases on their merits. Ferdik, 963 F.2d at 1261. Public policy in this  
13 case does not favor dismissal under either Rule 41(b) or Rule 12(b)(6),<sup>2</sup> since both  
14 Plaintiff and Defendant seek dismissal of the FAC with prejudice. (Dkt. Nos. 88,  
15 93.)  
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17 Last under the Ferdik analysis, the Court considers Plaintiff's request that this  
18 Court enter final judgment in this matter, dismissing the FAC with prejudice but  
19 without Rule 41(b) sanction. (Dkt. No. 93 at 1.) Although Plaintiff proposes a "less  
20 drastic alternative," the Court concludes that the other Ferdik factors outweigh the  
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22 <sup>2</sup>The Court notes that the Ninth Circuit in Edwards v. Marin Park, Inc. indicated that a  
23 complaint dismissed under Rule 41(b) would not be reviewed on the merits on appeal. 356 F.3d 1058,  
24 1065 (9th Cir. 2004) ("conversion of a 12(b)(6) dismissal into one under Rule 41(b) . . . would . . .  
25 unjustly deny plaintiffs . . . who exercise the right to stand on a complaint their right to an appeal on  
26 the merits of the question whether the complaint is adequate as a matter of law."). If this is the case,  
27 the public policy favoring adjudication on the merits favors this Court's dismissal of the above-  
28 captioned matter under Rule 12(b)(6) instead of Rule 41(b). However, the Ninth Circuit in other cases  
has reviewed the merits of an underlying dismissal where the dismissal was converted to a Rule 41(b)  
dismissal for failure to timely amend the complaint or notify the Court of intent to appeal. See Yourish  
v. California Amplifier, 191 F.3d 983 (1999) (holding that the district court did not abuse its discretion  
in dismissing Plaintiff's case under Rule 41(b) but nonetheless reviewing the underlying Rule 9(b)  
dismissal on the merits). The Court finds that even if the public policy favoring adjudication on the  
merits weighs in favor of dismissal under Rule 12(b)(6) rather than under Rule 41(b), the first three  
Ferdik factors outweigh this general public policy. See Id.

1 availability of this proposed alternative. See Yourish, 191 F.3d at 990.


2  
3 **CONCLUSION**

4 For the reasons stated above, the Court **GRANTS** Defendants' motion to  
5 dismiss, (Dkt. No. 88), and **DISMISSES WITH PREJUDICE** Plaintiff's action in  
6 its entirety under Federal Rule of Civil Procedure 41(b) as to all Defendants. The  
7 Clerk of Court shall enter judgment accordingly.

8 Having so held, the Court hereby **VACATES** the hearing date set for this  
9 matter on December 13, 2013 at 1:30 p.m.

10 **IT IS SO ORDERED.**

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12 DATED: December 11, 2013

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15 HON. GONZALO P. CURIEL

16 United States District Judge