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

10 MUTHU SUKUMARAN,
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12 Plaintiff,
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14 v.
15 U.S. DHS/ICE-EL CENTRO, *ET*
16 *AL.*,
17 Defendants.

Case No. 14-cv-00967-BAS(JMA)

**ORDER GRANTING
DEFENDANT FREDDY
CARRENO'S MOTION TO
DISMISS FOR LACK OF
PROSECUTION PURSUANT TO
FED. R. CIV. P. 41(b)**

(ECF No. 34)

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19 Plaintiff Muthu Sukumaran ("Plaintiff"), proceeding *pro se* and *in forma*
20 *pauperis*, commenced this civil rights action on April 17, 2014. (See ECF Nos. 1, 6.)
21 Presently before the Court is a motion to dismiss for lack of prosecution pursuant to
22 Federal Rule of Civil Procedure 41(b) filed by Defendant Freddy Carreno. (ECF No.
23 34.) No opposition was filed.

24 The Court finds this motion suitable for determination on the papers submitted
25 and without oral argument. See Civ. L.R. 7.1(d)(1). For the reasons set forth below,
26 the Court **GRANTS** Defendant Carreno's motion to dismiss pursuant to Federal Rule
27 of Civil Procedure 41(b).

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1 **I. BACKGROUND**

2 Plaintiff, previously an immigration detainee at the U.S. Department of
3 Homeland Security’s Immigration and Customs Enforcement’s Processing Center in
4 El Centro, California,¹ commenced this civil rights action on April 17, 2014. (ECF
5 No. 1.) On August 29, 2014, the Court dismissed without prejudice Plaintiff’s claims
6 against all defendants except for Defendants Auhl, Chan, and Carreno. (ECF No. 6.)
7 On October 24, 2014, Defendant Carreno filed an Answer to the Complaint. (ECF
8 No. 8.) On November 12, 2014, Defendant Auhl filed a motion to dismiss for lack
9 of jurisdiction, which was granted with prejudice on May 15, 2015. (ECF Nos. 11,
10 31.) Plaintiff, through the United States Marshal Service, was unable to serve
11 Defendant Chan. (*See* ECF Nos. 28-30.)

12 Plaintiff participated in a Case Management Conference (“CMC”) on
13 December 8, 2014. (ECF No. 13.) After Defendant Auhl was dismissed, a telephonic
14 CMC was set by United States Magistrate Judge Jan M. Adler for June 3, 2015. (ECF
15 No. 32.) The CMC did not go forward due to Plaintiff’s failure to appear. (ECF No.
16 33.) Defendant Carreno represents that no discovery has been conducted and no
17 depositions have been set in this case. (ECF No. 34 at p. 4.) On November 23, 2015,
18 Defendant Carreno filed a motion to dismiss for lack of prosecution pursuant to
19 Federal Rule of Civil Procedure 41(b) with a hearing date of January 19, 2016. (ECF
20 No. 34.) Plaintiff did not file an opposition.

21 **II. LEGAL STANDARD**

22 Federal Rule of Civil Procedure 41(b) provides that “[i]f the plaintiff fails to
23 prosecute or to comply with these rules or a court order, a defendant may move to
24 dismiss the action or any claim against it.” Fed. R. Civ. P. 41(b). “Dismissal under
25 Rule 41(b) is a sanction, to be imposed only in ‘extreme circumstances.’” *Edwards*
26 *v. Marin Park, Inc.*, 356 F.3d 1058, 1063 (9th Cir. 2004) (*citing Dahl v. City of*

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28 ¹ Plaintiff filed a Notice of Change of Address to a location in Maryland
on March 4, 2015. (ECF No. 26.)

1 *Huntington Beach*, 84 F.3d 363, 366 (9th Cir. 1996)). Under Ninth Circuit precedent,
2 a district court must consider the following factors before involuntarily dismissing a
3 case: “(1) the public’s interest in expeditious resolution of litigation; (2) the court’s
4 need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public
5 policy favoring disposition of cases on their merits; and (5) the availability of less
6 drastic alternatives.” *Yourish v. Cal. Amplifier*, 191 F.3d 983, 990 (9th Cir. 1999)
7 (citing *Hernandez v. City of El Monte*, 138 F.3d 393, 399 (9th Cir. 1998)); *see also*
8 *Nealy v. Transportacion Maritima Mexicana, S.A.*, 662 F.2d 1275, 1278-79 (9th Cir.
9 1980). Dismissal will be affirmed where at least four factors support dismissal, or
10 where at least three factors strongly support dismissal. *Id.* Although preferred, it is
11 not necessary for a district court to make explicit findings in order to show that it has
12 considered these factors. *Id.*

13 **III. DISCUSSION**

14 Upon consideration of the factors, the Court finds that all of the factors, with
15 the exception of the public policy favoring disposition of a case on its merits, strongly
16 support dismissal. Plaintiff has not appeared in this case since March 4, 2015, when
17 he filed a Notice of Change of Address. (*See* ECF No. 26.) He failed to appear at
18 the CMC on May 15, 2015. (*See* ECF No. 33.) Defendant Carreno represents that
19 “[P]laintiff has done nothing to prosecute his case” since the CMC on December 8,
20 2014. (ECF No. 34-1 at ¶ 9.) Given Plaintiff’s failure to prosecute his case for over
21 a year, the Court finds the public’s interest in expeditious resolution of litigation and
22 its own need to manage its docket strongly support dismissal.

23 The factors which consider the risk of prejudice to Defendant Carreno and the
24 availability of less drastic alternatives also strongly support dismissal. Plaintiff bears
25 the burden of presenting evidence excusing his delay in prosecuting his case. *See*
26 *Nealy*, 662 F.2d at 1280-81. Plaintiff has not opposed this motion or presented any
27 evidence excusing his delay. “[I]f the plaintiff proffers no pleading or presents no
28 proof on the issue of (reasonableness [of the delay]), the defendant wins.” *Id.* at 1280

1 (citing *Larios v. Victory Carriers, Inc.*, 316 F.2d 63, 67 (2d Cir. 1963)). The burden
2 of production does not shift to the defendant to show at least some actual prejudice
3 unless Plaintiff proffers a non-frivolous excuse for his delay. *See id.* at 1281.
4 Therefore, Defendant Carreno was not required to present evidence of some actual
5 prejudice. However, as Defendant Carreno pointed out, this is a civil rights action in
6 which Plaintiff claims Defendant Carreno violated his constitutional right to adequate
7 medical care while in custody, and in the approximately twenty-two (22) months
8 since the filing of the Complaint, “[w]itnesses have likely relocated . . . ; memories
9 concerning [P]laintiff’s stay at the detention facility have likely faded; and evidence
10 may no longer exist (i.e., [P]laintiff’s medical file) given that [P]laintiff was a
11 temporary detainee, and has since relocated to Maryland.” (ECF Nos. 34-1 at ¶ 10;
12 and 6 at p. 13.) Given Plaintiff’s lengthy and unreasonable delay, which he has failed
13 to excuse, and the high possibility of prejudice to Defendant Carreno, the Court finds
14 these factors strongly weigh in favor of dismissal. *See Alexander v. Pac. Mar. Assoc.*,
15 434 F.2d 281, 283 (9th Cir. 1971) (“Unreasonable delay creates a presumption of
16 injury to [a defendant’s] defenses.”).


17 Lastly, Plaintiff’s failure to appear at the telephonic CMC, pursue discovery,
18 or oppose this motion does not leave the Court with less drastic alternatives. As the
19 Court finds that four of the five factors strongly weigh in favor of dismissal, the Court
20 **GRANTS** Defendant Carreno’s motion to dismiss.

21 **IV. CONCLUSION & ORDER**

22 Based on the foregoing, the Court **GRANTS** Defendant Carreno’s motion to
23 dismiss pursuant to Federal Rule of Civil Procedure 41(b) (ECF No. 34).

24 **IT IS SO ORDERED.**

25
26 **DATED: February 3, 2016**

27 
28 **Hon. Cynthia Bashant**
United States District Judge