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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

JEFFREY R. MCKEE,

Plaintiff,

v.

KATHY BODNAR, et al.,

Defendants.

No. CV-12-5102-JTR

ORDER DENYING PLAINTIFF'S  
MOTION TO WITHDRAW

**BEFORE THE COURT** is Plaintiff's Motion to voluntarily dismiss his case pursuant to FED. R. CIV. P. 41(a)(2). ECF No. 94. Plaintiff, an inmate at the Coyote Ridge Corrections Center (CRCC) at the time of the events alleged in the complaint, appears *pro se*. Defendants are represented by Candie M. Dibble and John C. Dittman, Washington State Assistant Attorneys General. The parties have not consented to proceed before a magistrate judge.

**PROCEDURAL HISTORY**

Plaintiff filed a complaint in Franklin County Superior Court in May 2012, alleging Defendants violated his federal rights under the First Amendment of the United States Constitution. ECF No. 1. Plaintiff filed an amended complaint in July 2012. ECF No. 1. The action was removed to federal court on July 30, 2012, based on federal question jurisdiction, 28 U.S.C. § 1331. ECF No. 1. On August 29, 2012, in advance of the Court's scheduling conference, Defendants filed a

1 Motion for Summary Judgment, supported by a Memorandum and Declarations.  
2 ECF Nos. 7-12. On September 7, 2012, the Court struck the Motion for Summary  
3 Judgment but granted Defendants leave to renew the Motion following the  
4 completion of the scheduling conference. ECF No. 28. On April 29, 2013, Co-  
5 Defendant Matthew G. Silva's claims against Defendants were dismissed, with  
6 prejudice, based on a stipulation of the parties. ECF No. 80. Defendants  
7 subsequently filed another Motion for Summary Judgment with respect to Mr.  
8 McKee's claims. ECF No. 82. In response, Plaintiff filed a "Motion to Withdraw"  
9 his action **without prejudice**. ECF No. 94. Defendants filed a response on  
10 August 26, 2013, requesting that Plaintiff's Complaint be dismissed **with**  
11 **prejudice**. ECF No. 95. On September 5, 2013, Plaintiff filed a reply brief. ECF  
12 No. 99. The matter is now before the Court.

### 13 **BACKGROUND**

14 Plaintiff, a prisoner at the CRCC, brings this civil rights action pursuant to  
15 42 U.S.C. § 1983, alleging Defendants conspired to deprive him of his "legal CDs"  
16 when his CDs were rejected by the CRCC mailroom. Plaintiff argues Defendants'  
17 behavior violated his civil rights under the First Amendment right to free speech,  
18 access the courts, and confidential communications with counsel. ECF No. 1.  
19 Plaintiff additionally alleges that Defendants have retaliated against him for filing  
20 grievances and civil actions. ECF No. 1. The following Defendants are named in  
21 the amended complaint: Kathy P. Bodnar, public records officer employed by the  
22 Washington State Attorney General's Office; Bernard Warner, Department of  
23 Corrections (DOC) secretary; Dan Pacholke, DOC deputy director of prisons;  
24 Israel Gonzalez, DOC correctional manager of prisons; Michael P. Watkins, DOC  
25 security operations manager; Jeffrey Uttecht, superintendent of the CRCC; Richard  
26 Duncan, a CRCC lieutenant; Edward Trowbridge, a CRCC lieutenant; Randal  
27 Smith, a CRCC sergeant assigned to the CRCC mailroom; and Michael True, a  
28 CRCC corrections officer assigned to the CRCC mailroom. ECF No. 1. Plaintiff

1 seeks declaratory and injunctive relief and monetary damages. ECF No. 1.

## 2 **DISCUSSION**

3 Plaintiff has moved the Court to voluntarily dismiss his case, without  
4 prejudice. ECF No. 94. Plaintiff claims he has been segregated, infracted, and  
5 separated from his legal materials since the filing of this action. ECF No. 94 at 2.  
6 As a result, Plaintiff indicates he does not have the legal research capabilities,  
7 discovery and resources “to further litigate this case or answer the pending  
8 summary judgment motion.” ECF No. 94 at 2-3. Plaintiff requests that his  
9 Complaint be dismissed, without prejudice, or, in the alternative, the hearing on  
10 Defendants’ Motion for Summary Judgment be continued to permit him an  
11 opportunity to “amend and supplement his complaint.” ECF No. 94 at 3.

12 Defendants oppose a dismissal without prejudice and oppose a continuance  
13 for further amendment of the Complaint. ECF No. 95. Defendants request that the  
14 court either address the pending summary judgment Motion or dismiss Plaintiff’s  
15 Complaint **with prejudice**. ECF No. 95.

### 16 **A. Voluntary Dismissal**

17 Pursuant to FED. R. CIV. P. 41(a)(2), a plaintiff may dismiss an action after  
18 an opposing party files a summary judgment motion only with the approval of the  
19 Court. A district court should grant a motion for voluntary dismissal unless a  
20 defendant can show it will sustain some plain legal prejudice as a result. *Waller v.*  
21 *Fin. Corp. of Am.*, 828 F.2d 579, 583 (9<sup>th</sup> Cir. 1987). Plain legal prejudice may be  
22 shown where actual legal rights are threatened or where monetary or other burdens  
23 appear to be extreme or unreasonable. *See, Watson v. Clark*, 716 F.Supp. 1354,  
24 1356 (D. Nev. 1989), *aff’d*, 909 F.2d 1490, 1990 WL 111365 (9<sup>th</sup> Cir. 1990).  
25 Factors to consider in determining legal prejudice are:

- 26 (1) The defendant’s effort and expense involved in preparing for trial;  
27  
28 (2) Excessive delay and lack of diligence on the part of the plaintiff in

1 prosecuting the action;

2 (3) Insufficient explanation of the need to take a dismissal; and

3 (4) The fact that summary judgment has been filed by the defendant.

4  
5 *Paulucci v. City of Duluth*, 826 F.2d 780, 783 (8<sup>th</sup> Cir. 1987); *see, also, Grover v.*  
6 *Eli Lilly & Co.*, 33 F.3d 716, 718 (6<sup>th</sup> Cir. 1994); *United States v. Outboard Marine*  
7 *Corp.*, 789 F.2d 497, 502 (7<sup>th</sup> Cir. 1986); *United States v. Berg*, 190 F.R.D. 539,  
8 543 (E.D. Cal. 1999).

9 Under the circumstances of this case, these factors, in total, weigh in favor  
10 of Defendants: the case has been pending for over a year, Defendants have  
11 produced over 1,200 pages in discovery, numerous motions have been filed and  
12 resolved, Plaintiff has failed to offer a sufficient explanation of his need to take a  
13 dismissal, and Defendants have filed a lengthy summary judgment Motion  
14 addressing Plaintiff claims. The Court finds it would result in legal prejudice to  
15 Defendants if this action was dismissed, without prejudice, prior to the resolution  
16 of Defendants' summary judgment Motion. Accordingly, Plaintiff's Motion to  
17 dismiss his Complaint, without prejudice, is denied at this time.

18 **B. Continuance Request**

19 Pursuant to Rule 15(a)(1) of the Federal Rules of Civil Procedure “[a] party  
20 may amend its pleading once as a matter of course” 21 days after serving the  
21 pleading. Otherwise, “a party may amend its pleading only with the opposing  
22 party’s written consent or the court’s leave.” FED. R. CIV. P. 15(a)(2).

23 Plaintiff’s amended complaint was filed over a year ago. Since that time,  
24 discovery has been provided, several motions have been argued and resolved, and  
25 Defendants have filed a dispositive motion, which remains pending. The Court  
26 finds that any second amendment to Plaintiff’s complaint at this juncture would  
27 only cause undue delay in this matter. Plaintiff’s Motion for leave to amend and  
28 supplement his July 2012 Amended Complaint is therefore denied.

1 Defendants' summary judgment Motion was filed on June 3, 2013, ECF No.  
2 82-86; however, this Motion is nearly identical to the summary judgment Motion  
3 Defendants filed at the onset of the case, ECF No. 7-12.<sup>1</sup> Plaintiff has thus been on  
4 notice of Defendants' position and arguments on summary judgment since August  
5 29, 2012. Defendants' pending Motion for Summary Judgment was noted for  
6 hearing without oral argument on September 10, 2013. ECF No. 93. Although  
7 Plaintiff has been on notice of Defendants' summary judgment arguments for over  
8 a year and the hearing date for the Motion has passed, the Court finds, in the  
9 interest of justice, that Plaintiff shall be granted additional time to respond to  
10 Defendants' pending Motion for Summary Judgment. Plaintiff shall provide a  
11 response to Defendants' Motion for Summary Judgment, ECF No. 82, no later than  
12 **45 days from the date of this order**. Should Plaintiff fail to provide a timely  
13 response to Defendants' Motion for Summary Judgment, the Court shall  
14 recommend the case be dismissed **with prejudice**. Accordingly,

15 **IT IS ORDERED:**

16 1. Plaintiff's Motion to voluntarily dismiss his Complaint, without  
17 Prejudice, **ECF No. 94**, is **DENIED**;

18 2. Plaintiff's alternative request for leave to amend and supplement his  
19 Complaint is **DENIED**; and

20 3. Plaintiff is **GRANTED** a continuance of **45 days from the date of**  
21 **this order** to file a response to Defendants' Motion for Summary Judgment. **A**  
22 **failure to file a timely response to Defendants' Motion for Summary**  
23 **Judgment, ECF No. 82, will result in a recommendation of a dismissal of this**  
24 **case WITH PREJUDICE.**

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26 <sup>1</sup>As indicated above, on September 7, 2012, the Court struck Defendants'  
27 initial Motion for Summary Judgment, but granted Defendants leave to renew the  
28 Motion following the completion of the scheduling conference. ECF No. 28.

1           4.     Defendants’ Motion for Summary Judgment, ECF No. 82, will be  
2 heard, without oral argument, **November 27, 2013.**

3           The District Court Executive is directed to file this Order and provide copies  
4 to Plaintiff and counsel for Defendants.

5           DATED September 18, 2013.

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7                                    S/ JOHN T. RODGERS  
8                                    UNITED STATES MAGISTRATE JUDGE  
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