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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON

7 JASON LEE SUTTON,

No. 4:14-CV-5055-EFS

8 Plaintiff,

**ORDER GRANTING PLAINTIFF'S MOTION
FOR VOLUNTARY DISMISSAL**

9 v.

10 BERNARD WARNER, STEVEN
11 SINCLAIR, JUAN PALOMO and
12 CHARLES PEASE,

Defendants.

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14 Plaintiff has moved to dismiss his case pursuant to Federal Rule
15 of Civil Procedure 41(a)(1). ECF No. 58. Defendants filed their
16 Response. ECF No. 62. Defendants do not object to the dismissal but
17 suggest the Court exercise its discretion as to whether the dismissal
18 should be with prejudice, whether conditions should be included, and
19 whether terms should be awarded. The Court has carefully reviewed the
20 Plaintiff's Motion and the Response of the Defendants. For the reasons
21 stated below, the Court GRANTS Plaintiff's Motion to Dismiss.

22 Federal Rule of Civil Procedure 41(a) governs voluntary
23 dismissal and provides in relevant part:

24 "(1) *By the Plaintiff.*

25 (A) *Without a Court Order.* Subject to Rules 23(e),
26 23.1(c), 23.2, and 66 and any applicable federal
statute, the plaintiff may dismiss an action without a
court order by filing:

- 1 (i) a notice of dismissal before the opposing
2 party serves either an answer or a motion
3 for summary judgment; or
4 (ii) a stipulation of dismissal signed by all
5 parties who have appeared.

6 (B) *Effect*. Unless the notice or stipulation states
7 otherwise, the dismissal is without prejudice. But if
8 the plaintiff previously dismissed any federal- or
9 state-court action based on or including the same
10 claim, a notice of dismissal operates as an
11 adjudication on the merits.

12 (2) *By Court Order; Effect*. Except as provided in Rule
13 41(a)(1), an action may be dismissed at the plaintiff's
14 request only by court order, on terms that the court
15 considers proper. . . . Unless the order states otherwise,
16 a dismissal under this paragraph (2) is without prejudice.

17 Fed. R. Civ. P. 41(A).

18 Because Defendants have served a motion for summary judgment,
19 this case can only be dismissed by a stipulation of dismissal signed
20 by all parties or by court order. *Id.*

21 A motion for voluntary dismissal "is addressed to the district
22 court's sound discretion." *Stevedoring Servs. of Am. v. Armilla Int'l*
23 *B.V.*, 889 F.2d 919, 921 (9th Cir. 1989). "When ruling on a motion to
24 dismiss without prejudice, the district court must determine whether
25 the defendant will suffer some plain legal prejudice as a result of
26 the dismissal." *Westlands Water Dist. v. United States*, 100 F.3d 94,
96 (9th Cir. 1996). Legal prejudice is "prejudice to some legal
interest, some legal claim, [or] some legal argument." *Id.* at 97.
Legal prejudice does not arise from the prospect of a second lawsuit,
tactical advantage gained by the plaintiff, or a missed opportunity to
receive a ruling on the merits. *Watson v. Clark*, 716 F. Supp. 1354,
1355 (D. Nev. 1989). The court should "consider such factors as the
defendant's effort and expense of preparation for trial, excessive

1 delay and lack of diligence on the part of the plaintiff in
2 prosecuting the action, insufficient explanation for the need to take
3 a dismissal, and whether a motion for summary judgment has been filed
4 by the defendant." *Grover by Grover v. Eli Lilly and Co.*, 33 F.3d
5 716, 718 (6th Cir. 1994); see also *Pace v. S. Express Co.*, 409 F.2d
6 331, 334 (7th Cir. 1969); see also *Arias v. Cameron*, 776 F.3d 1262,
7 1275 (11th Cir. 2015) (stating that the court should "weigh the
8 equities" when deciding a motion to voluntarily dismiss).

9 Here, this case was served on Defendants one year ago. See ECF
10 Nos. 16-20. Defense counsel appeared on August 22, 2014, ECF No. 21,
11 and the Scheduling Conference was held on December 17, 2014, ECF No.
12 25. Defendants have not yet had to prepare for trial, but they have
13 had to respond to a motion for class certification, a motion for a
14 preliminary injunction, and the currently pending motions. Defendants
15 also prepared and filed their motion for summary judgment. ECF No.
16 46. There is no indication of excessive delay or lack of diligence
17 on the part of the *pro se* plaintiff. Plaintiff filed this motion
18 recognizing the deficiencies in his complaint and has no immediate
19 plans to re-file the same claims unless he is again placed in
20 segregation. In granting the Plaintiff's motion to dismiss, the
21 Defendants will not experience legal prejudice. Additionally, the
22 factors weigh in favor of granting voluntary dismissal.

23 Courts often condition dismissal without prejudice on payment of
24 defendant's costs and attorneys' fees, but this is not required.
25 *Stevedoring Servs.*, 889 F.2d at 921. Here, because Plaintiff has been
26 granted leave to proceed *in forma pauperis*, awarding costs and fees

1 would not be practical. ECF No. 10. However, Rule 41(d) allows the
2 Court to impose costs of a previously dismissed action if the
3 plaintiff re-files:

4 (d) Costs of a Previously Dismissed Action. If a plaintiff
5 who previously dismissed an action in any court files an
6 action based on or including the same claim against the
7 same defendant, the court:

8 (1) may order the plaintiff to pay all or part of the
9 costs of that previous action;

10 and

11 (2) may stay the proceedings until the plaintiff has
12 complied.

13 Fed. R. Civ. P. 41(d).

14 The Court declines to award terms or impose conditions at this
15 time. However, if the Plaintiff refiles a complaint with the same
16 claims or that includes the same claims, the Defendants may bring a
17 motion under Rule 41(d). The Court expresses no position on the merits
18 of such motion.

19 The Court, therefore, grants the Plaintiff's motion to dismiss
20 without prejudice.

21 **IT IS HEREBY ORDERED:**

22 1. The Plaintiff's Motion for Dismissal, **ECF No. 58**, is
23 **GRANTED.**

24 2. All claims are **DISMISSED WITHOUT PREJUDICE**, with all
25 parties to bear their own costs and attorneys' fees.

26 3. All pending motions are **DENIED AS MOOT.**

4. All hearings and other deadlines are **STRICKEN.**

5. The Clerk's Office is directed to **CLOSE** this file.

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