LINK:

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	**CV 12–9012 BRO (FFM)**	Date	April 27, 2015
Title	**DUNCAN ROY ET AL V. COUNTY OF LOS ANGELES ET AL**		

Present: The Honorable	**BEVERLY REID O'CONNELL, United States District Judge**	
Renee A. Fisher	Not Present	N/A
Deputy Clerk	Court Reporter	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: (IN CHAMBERS)

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS AND VACATING PLAINTIFFS' MOTION TO WITHDRAW AS COUNSEL AS MOOT [63, 65]

I. INTRODUCTION

Pending before the Court are two separate motions. First, the attorneys for the named plaintiffs in this putative class action have filed a Motion to Withdraw as counsel for Plaintiff Christian Michel Varela ("Mr. Varela"). (Dkt. No. 63.) Second, Defendants have filed a Motion to Dismiss Mr. Varela under Federal Rule of Civil Procedure 41(b) for lack of prosecution. (Dkt. No. 65.) Both of these motions stem from Mr. Varela's deportation and presently unknown location. After consideration of the papers filed in connection with the instant motions, the Court deems these matters appropriate for decision without oral argument of counsel. *See* Fed. R. Civ. P. 78; C.D. Cal. L.R. 7-15. For the following reasons, Defendants' Motion to Dismiss is **GRANTED**. Accordingly, the Motion to Withdraw is **VACATED as moot**.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background

On October 19, 2012, Plaintiffs Duncan Roy ("Mr. Roy"), Annika Alliksoo ("Ms. Alliksoo"), Clemente De La Cerda ("Mr. De La Cerda"), and Mr. Varela (collectively, "Plaintiffs") filed a putative class action lawsuit against the County of Los Angeles and Los Angeles County Sheriff Leroy D. Baca (collectively, "Defendants"). (Dkt. No. 1.) Collectively, Plaintiffs challenge the legality of two practices of the Los Angeles County Sheriff's Department ("Sheriff's Department"). First, Plaintiffs assert that the Sheriff's

LINK:

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	**CV 12–9012 BRO (FFM)**	Date	April 27, 2015
Title	**DUNCAN ROY ET AL V. COUNTY OF LOS ANGELES ET AL**		

Department has unlawfully denied bail to individuals on the basis of an immigration hold placed by Immigration and Customs Enforcement ("ICE"). (Compl. ¶ 1.) Second, Plaintiffs allege that the Sheriff's Department's practice of denying individuals release from jail for more than forty-eight hours after the charges against them have been dismissed or released violates state and federal law. (*Id.*)

The putative class action involves two classes, including one for equitable relief and one for damages. (*Id.* ¶¶ 87–114.) These classes include various subclasses. (*Id.*) Mr. Varela and Mr. De La Cerda are the named representatives of the Equitable Relief Class. (*Id.* ¶ 87.) Mr. Varela is the sole named plaintiff for the Equitable Relief Sub-class, which seeks relief on behalf of all class members currently in the Sheriff's Department's custody who have been detained for more than forty-eight hours solely on the basis of an immigration hold. (*Id.* ¶ 13.)

Mr. Varela's involvement in this action stems from an encounter with the Sheriff's Department on September 18, 2012 when he was arrested for driving a stolen vehicle. (*Id.* ¶ 84.) According to the Complaint, Mr. Varela in fact borrowed his roommate's car. (*Id.*) The roommate, concerned for Mr. Varela's safety, reported the vehicle and Mr. Varela as missing when Mr. Varela did not return home at the time he had expected. (*Id.*) Upon Mr. Varela's arrest, ICE placed an immigration hold on him. (*Id.* ¶ 85.) Mr. Varela pleaded guilty at his arraignment and was ordered to pay a $200 fine. (*Id.*) When the judge learned about the immigration hold, however, the judge ordered Mr. Varela to serve 120 days instead. (*Id.*)

B. Procedural History

At the time this action commenced, Mr. Varela was incarcerated in the Los Angeles County Jail with an expected release date of November 7, 2012. (*Id.* ¶ 85.) On November 3, 2014, Defendants served interrogatories, requests for admissions, and requests for production on all named plaintiffs. (Decl. of Justin W. Clark in Supp. of Defs.' Mot. to Dismiss ("Clark Decl.") ¶ 3.) When Mr. Varela did not respond, Defendants met with Plaintiffs' counsel to discuss the delay. (*Id.*) During this meeting, Plaintiffs' counsel indicated they were having difficulty contacting Mr. Varela and requested an extension of time to respond to attempt and locate him. (*Id.*)

LINK:

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	**CV 12–9012 BRO (FFM)**	Date	April 27, 2015
Title	**DUNCAN ROY ET AL V. COUNTY OF LOS ANGELES ET AL**		

Plaintiffs' counsel has not been able to locate or communicate with Mr. Varela since he became eligible for release from the Los Angeles County Jail and was transferred to ICE's custody. (Decl. of Jennifer Pasquarella in Supp. of Defs.' Mot. to Dismiss ("Pasquarella Decl.") ¶ 4.) In attempting to locate Mr. Varela, Plaintiffs' counsel contacted Mr. Varela's former roommate and ex-girlfriend. (*Id.*) These individuals report that Mr. Varela has been deported. (*Id.*) Neither has remained in contact with Mr. Varela. (*Id.*)

Based upon the inability to communicate with Mr. Varela, Plaintiffs' counsel filed the instant Motion to Withdraw on April 7, 2015. (Dkt. No. 63.) That same day, Defendants filed a Motion to Dismiss Mr. Varela pursuant to Federal Rule of Civil Procedure 41(b) for failure to prosecute. (Dkt. No. 65.) Plaintiffs' counsel does not oppose this motion. (*See* Dkt. No. 67.)

III. LEGAL STANDARD

A. Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 41(b)

Pursuant to Federal Rule of Civil Procedure 41(b), a defendant may move to dismiss an action or any claims against it for the plaintiff's failure to prosecute. Fed. R. Civ. P. 41(b). A district court should weigh the following five factors in determining whether to dismiss a case or claim for failure to prosecute: "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendant[]; (4) the public policy favoring the disposition of cases on their merits; and (5) the availability of less drastic sanctions." *In re Eisen*, 31 F.3d 1447, 1451 (9th Cir. 1994). A court may presume prejudice to the defendant where the plaintiff's delay is unreasonable. *Citizens Utils. Co. v. Am. Tel. & Tel. Co.*, 595 F.2d 1171, 1174 (9th Cir. 1979) (citing *Alexander v. Pac. Mar. Ass'n*, 434 F.2d 281, 283 (9th Cir. 1970)). On the other hand, whether the defendant has in fact suffered any actual prejudice "may be an important factor in deciding whether a given delay is 'unreasonable.'" *Id.* (citing *Pearson v. Dennison*, 353 F.2d 24, 29 (9th Cir. 1965)). District courts have wide discretion in determining whether to dismiss a case or claims for failure to prosecute. *Anderson v. Air W., Inc.*, 542 F.2d 522, 524 (9th Cir. 1976).

LINK:

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	**CV 12–9012 BRO (FFM)**	Date	April 27, 2015
Title	**DUNCAN ROY ET AL V. COUNTY OF LOS ANGELES ET AL**		

B. Motion to Withdraw as Counsel

"An attorney may not withdraw as counsel except by leave of court." *Darby v. City of Torrance*, 810 F. Supp. 275, 276 (C.D. Cal. 1992); *see also* C.D. Cal. L.R. 83-2.3.2. "The decision to grant or deny counsel's motion to withdraw is committed to the discretion of the trial court." *Irwin v. Mascott*, No. CV 97-04737 JL, 2004 U.S. Dist. LEXIS 28264, at *3–4 (N.D. Cal. Dec. 1, 2004) (citing *Wash. v. Sherwin Real Estate, Inc.*, 694 F.2d 1081, 1087 (7th Cir. 1982)). In ruling on motions to withdraw, courts have considered the following factors:

> (1) the reasons why withdrawal is sought; (2) the prejudice withdrawal may cause to other litigants; (3) the harm withdrawal might cause to the administration of justice; and (4) the degree to which withdrawal will delay the resolution of the case.

Id. at *4 (citing cases). Additionally, the Central District's Local Rules provide that "[a] motion for leave to withdraw must be supported by good cause." C.D. Cal. L.R. 83-2.3.2. Such a motion must give the client and all other parties who have appeared reasonable written notice. *Id.*

IV. DISCUSSION

A. Defendants' Rule 41(b) Motion to Dismiss

Defendants seek to dismiss Mr. Varela from this action based upon his failure to prosecute the action. (*See* Mot. to Dismiss at 1–4.) Defendants also assert that dismissal is appropriate as a sanction under Federal Rule of Civil Procedure 37 based upon Mr. Varela's failure to respond to Defendants' discovery requests. (*Id.* at 4–5.) In this case, the Court finds it most appropriate to consider the motion under Rule 41(b). After applying the factors governing dismissals for failure to prosecute, the Court finds that Mr. Varela should be dismissed from this case.

1. Expeditious Resolution of the Litigation

The public's interest in expeditious resolution favors dismissal under Rule 41(b). *See Yourish v. Cal. Amplifier*, 191 F.3d 983, 990 (9th Cir. 1999) ("[T]he public's interest

LINK:

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	**CV 12–9012 BRO (FFM)**	Date	April 27, 2015
Title	**DUNCAN ROY ET AL V. COUNTY OF LOS ANGELES ET AL**		

in expeditious resolution of litigation always favors dismissal."). A court may therefore dismiss a case for lack of prosecution where the plaintiff has unreasonably delayed. *In re Eisen*, 31 F.3d at 1451.

Mr. Varela was served with discovery requests in November 2014, over five months ago, and he has not yet responded to any of these requests. (*See* Clark Decl. ¶ 3.) Additionally, since he was transferred to ICE's custody,[1] Mr. Varela has not been in contact with his attorneys. (*See* Pasquarella Decl. ¶ 4.) Mr. Varela's absence has delayed discovery and may delay class certification for an entire class of plaintiffs who share an interest this matter's speedy resolution. Given these circumstances, Mr. Varela's dismissal is necessary to expedite the litigation and allow this case to proceed.

2. The Court's Need to Manage its Docket

The second factor—the Court's need to manage its docket—also favors dismissal. "District courts have inherent power to control their dockets. In the exercise of that power they may impose sanctions including, where appropriate, default or dismissal." *Thompson v. Hous. Auth. of City of L.A.*, 782 F.2d 829, 831 (9th Cir. 1986). Dismissing Mr. Varela's individual claims will prevent substantial delay and wasteful pretrial activities. As Mr. Varela has not been in contact with his attorneys, no longer resides at his last known address, and is not in touch with his former associates, issuing an order to show cause or taking other measures short of dismissal are unlikely to reach Mr. Varela or prompt his participation. Instead, such measures would consume further judicial resources and prevent the Court from effectively managing its docket.

3. The Risk of Prejudice to Defendants

The risk of prejudice to Defendants also favors dismissal. The Ninth Circuit has explained that "[t]he law presumes injury from unreasonable delay," and that even in the absence of actual prejudice, "the failure to prosecute diligently is sufficient by itself to justify a dismissal." *In re Eisen*, 31 F.3d at 1453 (quoting *Anderson*, 542 F.2d at 524).

[1] Ms. Pasquarella has not identified Plaintiffs' counsel's last date of contact with Mr. Varela. Based on the allegations in the Complaint, Mr. Varela's 120 days of service in the Los Angeles County Jail expired in November 2012. Assuming he was transferred to ICE's custody sometime reasonably thereafter, Plaintiffs' counsel has not communicated with Mr. Varela for over two years.

LINK:

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	**CV 12–9012 BRO (FFM)**	Date	April 27, 2015
Title	**DUNCAN ROY ET AL V. COUNTY OF LOS ANGELES ET AL**		

Nevertheless, where a plaintiff provides a non-frivolous excuse for delay, the burden shifts to the defendants to demonstrate at least some actual prejudice. *Id.* (internal citation and quotation marks omitted).

In this case, Mr. Varela has not responded to interrogatories, requests for admissions, and requests for production served by Defendants more than five months ago. (Clark Decl. ¶ 3.) Defendants have already agreed to an extension of time to respond to these discovery requests to permit Plaintiffs' counsel to attempt to locate Mr. Varela. (*Id.*) These attempts were wholly unsuccessful. (Pasquarella Decl. ¶ 4.) Assuming Mr. Varela has in fact been deported, the reason for his absence from this case is clearly not "frivolous." Nevertheless, Defendants have satisfied their burden of showing actual prejudice from the delay. Mr. Varela's lack of contact with his attorneys suggests he has abandoned his interest in this case. Indeed, as Mr. Varela seeks only equitable relief that will no longer benefit him because he is not in the Los Angeles County Jail's custody, Mr. Varela's interest appears remote. Yet, if Mr. Varela remains a named plaintiff in this case, Defendants will be prejudiced, as they will be unable to fully conduct discovery or prepare a cohesive litigation strategy. Defendants should not bear the burden of locating Mr. Varela or waiting upon his return, particularly where the only known facts and circumstances regarding his absence suggest he may not return to this litigation. For these reasons, the Court finds that this factor favors dismissal.

4. The Public Policy Favoring Disposition on the Merits

Public policy favors disposition of cases on the merits and generally strongly weighs against involuntary dismissal. "Although there is indeed a policy favoring disposition on the merits, it is the responsibility of the moving party to move towards that disposition at a reasonable pace, and to refrain from dilatory and evasive tactics." *Morris v. Morgan Stanley & Co.*, 942 F.2d 648, 652 (9th Cir. 1991). Here, it appears that Mr. Varela did not necessarily abandon this litigation voluntarily; nevertheless, his absence has impeded the resolution of this case. Further, it is not clear when, or even whether, Mr. Varela may be available to participate in this action. Thus, although public policy typically weighs against dismissal, this consideration does not necessarily predominate here, where it is not clear that a resolution on the merits could in fact be reached. For this reason, the Court finds that this factor is neutral.

LINK:

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	**CV 12–9012 BRO (FFM)**	Date	April 27, 2015
Title	**DUNCAN ROY ET AL V. COUNTY OF LOS ANGELES ET AL**		

5. The Availability of Less Drastic Sanctions

Before dismissing a case or claim, a district court must consider the adequacy of less drastic sanctions. *Malone v. U.S. Postal Serv.*, 833 F.2d 128, 131–32 (9th Cir. 1987). Here, sanctions lesser than dismissal would be ineffective. The Court cannot warn Mr. Varela about the possibility of dismissal, as neither his counsel nor his associates know where he is located. Under the circumstances, Mr. Varela's dismissal is warranted. Nevertheless, given that the likely reason for Mr. Varela's absence remains outside his control, the Court finds dismissal without prejudice to be most appropriate in this case. *See Arellano v. T-Mobile USA, Inc.*, No. CV 10-05663 WHA, 2012 WL 3877668, at *2 (N.D. Cal. Sept. 6, 2012) (noting that Rule 41(b) allows dismissal with or without prejudice and dismissing without prejudice where dismissal with prejudice "would be too harsh of a sanction").

B. Plaintiffs' Motion to Withdraw as Counsel

Counsel representing Plaintiffs in this case seek to withdraw as attorneys of record for Mr. Varela due to his absence and their inability to locate or communicate with him. (*See* Dkt. No. 63.) As indicated above, an attorney may not withdraw absent leave from the Court. Because the Court finds that Mr. Varela should be dismissed from this case, the Motion to Withdraw is moot.

V. CONCLUSION

For the forgoing reasons, Defendants' Motion to Dismiss pursuant to Federal Rule of Civil Procedure 41(b) is **GRANTED**. Mr. Varela is hereby **DISMISSED without prejudice** from this case. Plaintiffs' Motion to Withdraw is accordingly **VACATED as moot**. The hearing on these matters set for May 11, 2015, at 1:30 p.m., is hereby **VACATED**.

IT IS SO ORDERED.

:

Initials of Preparer rf