UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

SAM DRAKE,

Plaintiff,

v.

IBAL, *et al.*,

Defendants.

Case No. 1:22-cv-01149-BAM (PC)

ORDER REGARDING PLAINTIFF'S REQUEST FOR VOLUNTARY DISMISSAL OF CERTAIN CLAIMS AND PARTIES

(ECF No. 9)

Plaintiff Sam Drake ("Plaintiff") is a pretrial detainee proceeding *pro se* and *in forma pauperis* in this civil rights action under 42 U.S.C. § 1983. On November 1, 2022, the Court screened the complaint and found that it failed to comply with Federal Rules of Civil Procedure 8, 18, and 20 and failed to state a cognizable claim for relief. (ECF No. 7.) The Court granted Plaintiff leave to file an amended complaint or notice of voluntary dismissal. (*Id.*)

On December 13, 2022, Plaintiff filed a first amended complaint, (ECF No. 10), together with a request for voluntary dismissal of certain claims and parties pursuant to Federal Rule of Civil Procedure 41, (ECF No. 9). Plaintiff states that his request is made to narrow the claims, parties, and issues involved in this matter, and that he dismisses his conspiracy and harassment claims, as well as Defendants Ibal, Sciacqua, McCoy, R. Duran, and Ibarra. (ECF No. 9, p. 2.) Upon review of the first amended complaint, it appears Plaintiff has already narrowed the allegations and claims therein to exclude the claims and defendants he wishes to dismiss from this

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action. (*See* ECF No. 10.)

"[U]nder Rule 41(a)(1)(i), a plaintiff has an absolute right to voluntarily dismiss his action prior to service by the defendant of an answer or a motion for summary judgment." *Commercial Space Mgmt. Co., Inc. v. Boeing Co., Inc.*, 193 F.3d 1074, 1077 (9th Cir. 1999) (quotation and citation omitted). "[A] dismissal under Rule 41(a)(1) is effective on filing, no court order is required, the parties are left as though no action had been brought, the defendant can't complain, and the district court lacks jurisdiction to do anything about it." *Id.* at 1078. No defendant has been served in this action and no defendant has filed an answer or motion for summary Judgment.

It is unclear to what extent Federal Rule of Civil Procedure 41 applies to the dismissal of only certain claims or parties to an action. However, the Court finds that in light of Plaintiff's choice to exclude these claims and defendants from his first amended complaint, the action will procced only on those claims and parties included in the first amended complaint, which the Court may find cognizable after screening, and the request is granted on that basis.

Accordingly, IT IS HEREBY ORDERED as follows:

1. Plaintiff's request for voluntary dismissal of certain claims and parties, (ECF No. 9), is GRANTED;
2. The Clerk of the Court is directed to terminate Defendants Ibal, Sciacqua, McCoy, R. Duran, and Ibarra from this action; and
3. The first amended complaint will be screened in due course.

IT IS SO ORDERED.

Dated: **December 14, 2022**

/s/ Barbara A. McAuliffe
UNITED STATES MAGISTRATE JUDGE