Case No. 15-55391 and 15-55398

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

R. BAEZA, et al.; C. Corral, et al.
Plaintiffs-Appellants

vs.

LEROY D. BACA,
Defendant-Appellee

Appeal From The United States District Court
For The Central District of California
Honorable Dean D. Pregerson
Lower Court Docket No. CV 07-03109 DDP-SH

DEFENDANT/APPELLEE'S ANSWERING BRIEF

PAUL B. BEACH, State Bar No. 166265
JUSTIN W. CLARK, State Bar No. 235477
LAWRENCE BEACH ALLEN & CHOI, PC
100 West Broadway, Suite 1200
Glendale, California 91210-1219
(818) 545-1925 Telephone / (818) 545-1937 Facsimile

Attorneys for Defendant/Appellee
LEROY D. BACA

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I. INTRODUCTION

Plaintiffs in this consolidated appeal are former inmates who were incarcerated in Los Angeles County jail, who claim they were not provided with a bunk upon which to sleep during their incarcerations. (Excerpts of Record, (hereinafter, "ER") 126-134, 548-556.) Plaintiffs allege that this so-called "floor sleeping" violated their rights under the Eight and Fourteenth Amendments to the United States Constitution. This appeal involves two separate cases – *Baeza v. Baca* and *Corral v. Baca* - which were consolidated on appeal given the similar nature of the relevant issues on appeal. The two cases, however, are not identical, and they were not consolidated by the District Court. Specifically, Plaintiffs in *Baeza* allege floor sleeping occurred at permanent jail housing locations between January 1, 2006 and May 10, 2007. (ER 126-134.) Plaintiffs in *Corral*, on the other hand, allege that they slept on the floor during their initial intake into the jail system at the Inmate Reception Center between May 17, 2005 and December 31, 2005. (ER 548-556.) In addition, certain procedural history from a separate, but related case, *Thomas v. County of Los Angeles*, U.S.D.C. Case No. CV 04-08448 DDP is also relevant to the determination of issues in this appeal.

As set forth in greater detail below, both *Baeza* and *Corral* were dismissed by the District Court pursuant to Federal Rules of Civil Procedure,

Rule 41(b), for failure to prosecute based on Plaintiffs' failure to move these actions forward for nearly three years. The dismissals of both actions should be affirmed.

II. SUMMARY OF ARGUMENT

Despite the appearance created by Plaintiffs' Opening Brief (which is filled with largely irrelevant facts and procedural history), the issues relevant to the resolution of this appeal are simple and straightforward. As set forth herein, the record clearly establishes that the District Court did not abuse its discretion in dismissing the underlying matters for failure to prosecute and similarly did not abuse its discretion in vacating several other motions purely as a matter of docket management.

First, with respect to the dismissal of *Baeza* and *Corral* for failure to prosecute, the record clearly shows that Plaintiffs did virtually nothing to advance these cases toward trial for almost three years. (ER 71-73, 88-89, 455-456, 472-473.) Even accepting Plaintiffs' version of events as true (which it is not), Plaintiffs admit that they failed to diligently pursue their claims for almost two years, which was sufficient, in and of itself, for the Court to have exercised its discretion to dismiss the cases for lack of prosecution. Plaintiffs' efforts to shift the blame for this delay to Defendant and the District Court are both unfounded and unavailing. The District

Court's dismissal for failure to prosecute based on this delay should be affirmed.

Second, with respect to the motions pending at the time of the dismissal for failure to prosecute, it is firmly established by controlling Ninth Circuit authority that a court has discretion to deny motions that are pending if an action is being dismissed. If an action has been dismissed, as a matter of practical docket management, a district court has the discretion and authority to deem any other pending motions as moot. That is what happened in the underlying matters, and it was in no way an abuse of discretion. These decisions too, should be affirmed.

Finally, with respect to several other motions that were vacated by the Court shortly after the underlying matters were filed, there is no evidence in the record to show that the Court abused its discretion to vacate these motions. In fact, the record clearly establishes that the subject motions (including Plaintiffs' Motion for Class Certification, Plaintiffs' Motion for Summary Judgment, and a Motion to Consolidate) were all first continued based on pending law and motion matters in *Thomas,* and later *vacated*[1] because the

[1] Plaintiff incorrectly asserts that these motions were *denied*. They were not and in fact, they were never fully briefed. As the docket in the underlying matter clearly shows, the motions were vacated "on the Court's own motion." (ER 148, Dkt. Nos. 24, 26.)

parties in all three cases were engaged in good faith settlement discussions[2], negating any need for briefing the above-referenced motions.

In granting the initial continuance of these motions, the Court explained:

> the Court notes that it has set a briefing schedule in the related matter of *Thomas v. Baca*, CV 04-08448, on a motion for class decertification, a motion for reconsideration/ clarification of the order granting summary judgment, and a request that the Court certify an interlocutory appeal. Because the resolution of these matters could have a great impact on the disposition of the motions in the instant case, the Court finds it would be in the rest of judicial economy to resolve the *Thomas* issues first. Therefore, after reviewing the papers substituted by the parties and for good cause shown, the Court grants the *ex parte* application. The hearing is continued to December 3, 2007 at 10:00 a.m. (ER 110-111.)

None of the above-referenced decisions by the District Court were an abuse of discretion, and they should be affirmed.

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[2] The parties in *Baeza*, *Corral*, and *Thomas* are all represented by the same counsel.

III. ISSUES PRESENTED

1. Did the District Court abuse its discretion by granting Defendant's motions to dismiss for lack of prosecution under F.R.C.P. Rule 41(b) based on Plaintiffs' multi-year delay in moving the underlying matters forward?

2. Did the District Court abuse its discretion by denying as moot other motions that were pending when the underlying matter was dismissed for lack of prosecution?

3. Did the District Court abuse its discretion in vacating, on its own motion, Plaintiffs' motion to consolidate, the motion for summary adjudication, and motion for class certification based on pending law and motions matters and settlement discussions in a related case?

IV. COMBINED STATEMENT OF THE CASE AND FACTS

The operative complaint in *Baeza* was filed on May 10, 2007, based on alleged floor-sleeping at permanent jail housing facilities between January 1, 2006 and May 10, 2007. (ER 126-134.) The operative complaint in *Corral* was filed on September 4, 2007, based on alleged floor-sleeping at the Inmate Reception Center (the facility that processes inmates into and out of the County jail system) between May 17, 2005 and December 31, 2005. (ER 548-556.)

Shortly after the complaint in *Baeza* was filed, Plaintiffs filed motions for class certification and summary adjudication on June 11, 2007. (ER 155-156, 357-358.) Plaintiffs in *Corral* filed similar motions on October 1, 2007. (ER 504, 524, 541.)

On October 18, 2007, the District Court granted Defendant's *ex parte* applications to either vacate or continue Plaintiffs' motions for summary adjudication and class certification, continuing the hearing date first to October 29, 2007, and later to December 3, 2007. (ER 110-111, 494-495.) These motions were never fully briefed and instead, were first continued because of pending law and motion matters in *Thomas*,[3] and later continued based on efforts to reach a global settlement of *Baeza*, *Corral*, and *Thomas*. Approximately one year later, on December 17, 2008, in ruling on an *ex parte* application filed by Plaintiffs to continue the trial and pretrial deadlines in *Baeza* and *Corral*, the District Court held "there is good cause for *discovery* in this case to be stayed pending settlement discussions" because "all parties

[3] The pending law and motions matters included a motion for class decertification and a motion to certify an interlocutory appeal regarding the District Court's finding, in *Thomas*, that floor-sleeping constituted a *per se* constitutional violation. Because all three cases (*Baeza*, *Corral*, and *Thomas*) involve claims of floor-sleeping, the District Court wisely concluded that it made sense to resolve issues associated with class certification and the constitutionality of floor-sleeping generally before proceeding with briefing on the same subjects in *Baeza* / *Corral*.

indicated an interest in immediate settlement talks before proceeding further with *Thomas v. Baca* and related cases." (ER 98-99, emphasis added.) When this order was issued, *Thomas* was a certified class action, while *Baeza* and *Corral* were proposed class actions. Since all three actions pertain to similar alleged constitutional violations, it made sense to attempt to simultaneously negotiate settlement of all three cases together. (ER 71-72.)

While the District Court recognized good cause existed to stay *discovery* at the time, this case (and *Corral*) was never actually stayed. (ER 72, 98-99, 455.) In fact, various pretrial and trial deadlines were not vacated, but rather continued. (ER 98-99.) Plaintiffs allowed the October 2009 pretrial conference date and the November 2009 trial date to expire without a word. (ER 71, 88, 98-99, 455, 472.)

After 2008, the Plaintiffs did not file anything of substance until March 7, 2014. (ER 72-73, 456.) The only filing by Plaintiffs in either case during this time was a notice of change of attorney information on December 17, 2010. (ER 72, 456.) **The parties did not engage in settlement discussions for either case after March 2, 2011, the date of the parties' last settlement conference in *Thomas*.** (ER 72, 456.)

On March 7, 2014, Plaintiffs filed motions to lift stays on discovery, reactivate the actions and set discovery cutoff, pretrial and trial dates. (ER 91-

92, 475-476.) Defendant swiftly responded on March 17, 2014, filing oppositions to Plaintiffs' motions, as well as motions to dismiss for lack of prosecution. (ER 55, 75, 439, 459.) **Until these motions, Defendant had not had any communication with Plaintiffs since March 2, 2011.** (ER 72-73, 456.)

On February 11, 2015, the District Court granted Defendant's motions to dismiss for lack of prosecution in both *Baeza* and *Corral*, pursuant to F.R.C.P. Rule 41(b). (ER 2, 375.) The Court ruled that "[h]aving considered the relevant factors … Plaintiffs' delays in prosecuting this matter were not reasonable." (ER 2, 375.) The Court's orders also denied Plaintiffs' motions to lift the stay as moot. (ER 2, 375.) Plaintiffs filed notices of appeal on March 11, 2015. (ER 1, 374).

V. STANDARD OF REVIEW

A district court's dismissal of an action under F.R.C.P. Rule 41(b) for failure to prosecute is only reviewable for abuse of discretion. *Lal v. California*, 610 F.3d 518, 523 (9th Cir. 2010)*; Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1065 (9th Cir. 2004); *Von Poppenheim v. Portland Boxing and*

Wrestling Comm'n, 442 F.2d 1047, 1049 (9th Cir. 1971); *Hastings v. Littlefield*, 988 F.2d 1209 (5th Cir. 1993).[4]

An abuse of discretion will be found only if the appellate court is firmly convinced that "the reviewed decision lies beyond the pale of reasonable justification under the circumstances." *Boyd v. City & County of San Francisco*, 576 F3d 938, 943 (9th Cir. 2009); *Harman v. Apfel*, 211 F.3d 1172, 1175 (9th Cir. 2000).

[4] Despite the abuse of discretion standard that applies to this appeal, Plaintiffs' Opening Brief states that when "a district court does not conduct a Rule 41(b) analysis explicitly, then this court 'reviews the record independently to determine whether the district court abused its discretion.'" (AOB at 19 section B.) In support of this proposition, Plaintiffs cite to *Ghazali v. Moran*, 46 F.3d 52, 54 (9th Cir. 1995); however, *Ghazali* says nothing of the kind. In *Ghazali*, this Court ruled that an independent review of the record could be completed, *subject to an abuse of discretion standard*, when a district court fails to explicitly consider factors relevant to a dismissal because of a failure to follow local rules. *Id.* at 53-54. *Ghazali* does not state, as Plaintiffs' suggest, that such a review is required or even appropriate in the context of a dismissal under FRCP Rule 41(b). Regardless, even if such an independent review for abuse of discretion becomes necessary, there is ample evidence in the record to prove that the District Court expressly considered all elements related to a dismissal under Rule 41(b). In fact, the Court's order dismissing the underlying matters expressly states that the District Court "considered the relevant factors." (ER 2, 375.)

VI. ARGUMENT

A. The District Court Did Not Abuse Its Discretion In Dismissing The Underlying Action For Failure To Prosecute.

The District Court dismissed the underlying action due to Plaintiffs' failure to diligently prosecute their claims. Specifically, Plaintiffs failed to take any action whatsoever to move this case forward for almost three years. (ER 60.) Accordingly, the District Court correctly dismissed their claims under FRCP Rule 41(b).

The abuse of discretion standard employs an objective two-part test: First, the appellate court must "determine *de novo* whether the trial court identified the *correct legal rule* to apply to the relief requested." The trial court abuses its discretion if it failed to do so. *United States v. Hinkson*, 585 F.3d 1247, 1251, 1261-1263 (9th Cir. 2009) (en banc) (emphasis added); *see also*, *Ahancihian v. Xenon Pictures, Inc.*, 624 F.3d 1253, 1258 (9th Cir. 2010); *Lemoge v. United States*, 587 F3d 1188, 1192 & n. 2 (9th Cir. 2009). Second, the appellate court must "determine whether the trial court's *application* of the correct legal standard was (1) *illogical*, (2) *implausible*, or (3) *without support* in inferences that may be drawn from the facts in the record." The district court abuses its discretion if it identified the correct legal standard, but then applied an *incorrect analysis* to the underlying facts. *United States v.*

Hinkson, *supra* (emphasis added; internal quotes omitted); *see also*, *Ahancihian v. Xenon Pictures, Inc.*, *supra*; *Lemoge v. United States*, *supra*.

1. Plaintiffs Do Not Challenge Whether The District Court Identified The Correct Legal Standard For Dismissal Under FRCP Rule 41(b).

Defendant sought dismissal of the underlying action under FRCP Rule 41(b) for failure to prosecute. (ER 55-74.) The District Court was briefed by both Plaintiffs and Defendant regarding the applicable standards and elements for dismissal under this Rule. (ER 26-42; 55-74.) Plaintiffs do not challenge whether the District Court identified the correct legal standard. Instead, Plaintiffs challenge the manner in which that standard was applied, arguing that the District Court should have reached a different conclusion. As explained below, there was ample evidence in the record to support the District Court's decision.

2. The District Court's Dismissal Of The Underlying Action Was Not Illogical, Implausible, Or Without Support In The Record.

As set forth above, in determining whether the District Court abused its discretion, the Ninth Circuit must "determine whether the trial court's *application* of the correct legal standard was (1) *illogical*, (2) *implausible*, or (3) *without support* in inferences that may be drawn from the facts in the record." United States v. Hinkson, 585 F.3d 1247, 1251, 1261-1263 (9th Cir.

2009) (en banc) (emphasis added); see also, Ahancihian v. Xenon Pictures, Inc., 624 F.3d 1253, 1258 (9th Cir. 2010); Lemoge v. United States, 587 F3d 1188, 1192 & n. 2 (9th Cir. 2009). A district court abuses its discretion if it identified the correct legal standard, but then applied an *incorrect analysis* to the underlying facts. *(Id.)* Plaintiffs have not demonstrated that the District Court's decision was illogical or implausible (even if they disagree with it) and in fact, there is ample evidence in the record to show that the District Court's decision was correct and should be affirmed.[5]

a. Plaintiffs' Substantial Delay in Prosecuting this Action Warranted Dismissal.

Pursuant to Rule 41(b), "if the plaintiff fails to prosecute . . . a defendant may move to dismiss the action or any claim against it." Fed. R. Civ. P. 41(b). "Every plaintiff in federal court has a responsibility to prosecute his action diligently." *Collins v. Pitchess,* 641 F.2d 740, 742 (9th Cir. 1981); s*ee, West v. City of New York,* 130 F.R.D. 522, 524 (S.D.N.Y. 1990) ("It is plaintiff's obligation to move his case to trial, and should he fail to do so in a reasonable manner, his case may be dismissed with prejudice as a sanction for his unjustified conduct."); *Bendix Aviation Corp. v. Glass,* 32

[5] Plaintiffs have neither cited nor briefed the scope of the Ninth Circuit's review given the applicable abuse of discretion standard.

F.R.D. 375, 379 (E.D. Pa. 1961) (responsibility of taking steps to bring a case to trial falls on plaintiff and his attorney). Accordingly, a plaintiff has the ultimate burden of showing both a non-frivolous explanation for the delay and a lack of prejudice to the defendant. *See, Laurino v. Syringa Gen. Hosp.*, 279 F3d 750, 753 (9th Cir. 2002); *Nealy v. Transportation Maritima Mexicana, S.A.*, 662 F.2d 1275, 1280 (9th Cir. 1980).

In the Ninth Circuit, district courts must examine several factors in determining whether involuntary dismissal is warranted: (1) the court's need to manage its docket; (2) the public interest in expeditious resolution of litigation; (3) the risk of prejudice to defendants from delay; (4) warnings to the plaintiff (or lack thereof)[6]; (5) the policy favoring disposition of cases on their merits; and (6) the availability of lesser sanctions. *See*, *Yourish v. California Amplifier,* 191 F.3d 983, 990 (9th Cir. 1999). In addition to these factors, the a district court should also consider the stage of the proceedings, the length of the delay, and earlier delays attributable to the nonmoving party. *See*, *Laurino v. Syringa Gen. Hosp.,* 279 F.3d 750, 753 (9th Cir. 2002); *Link v. Wabash R.R. Co.,* 370 US 626, 634-635, 82 S.Ct. 1386, 1391 (1962). "Failure

[6] This factor warrants less consideration where involuntary dismissal is sought via a noticed motion. *See, Morris v. Morgan Stanley & Co.*, 942 F.2d 648, 652 (9th Cir. 1991) (finding there is no warning requirement when dismissal follows a noticed motion under FRCP Rule 41(b)).

to prosecute diligently alone justifies dismissal, even where actual prejudice to the defendant is not shown." *Moore v. Telfon Communications Corp.*, 589 F.2d 959, 967 (9th Cir. 1978); *see also, Anderson v. Air West, Inc.*, 542 F.2d 522, 525 (9th Cir. 1976) ("This court has consistently held that the failure to prosecute diligently is sufficient by itself to justify a dismissal, even in the absence of a showing of actual prejudice to the defendant from the failure.").

Plaintiffs contend that the circumstances in the underlying matter did not justify the District Court's decision to dismiss the underlying matters for failure to prosecute. Plaintiffs, however, are mistaken, because even under Plaintiffs' analysis, they failed to diligently prosecute the underlying matters for almost two full years. (ER 72-73, 456.) This delay, in and of itself, was sufficient for the District Court to dismiss the underlying matters and certainly has not illogical or implausible.

From 2009 until their motion to "reactivate" was filed in March 2014, Plaintiffs filed nothing with the District Court in the underlying matters, except a notice of change of attorney information. (ER 72, 456.) Furthermore, no settlement discussions occurred after March 2, 2011. (ER 72, 456.) In fact, there had been absolutely no communication between the parties during this time until Plaintiffs' counsel contacted Defendant to meet and confer regarding the motion to reactivate. (ER 72-73, 456). Dismissals

for failure to prosecute have been upheld based on shorter periods of delay and Plaintiffs can point to no evidence in the record to suggest that the District Court's decision based on this delay was implausible for illogical.

Comparably, no abuse of discretion has been found when courts dismissed cases in which the plaintiff failed to take action for as little as two months. *See, e.g., Alexander v. Pacific Maritime Ass'n*, 434 F.2d 281, 283 (9th Cir. 1970) (holding district court did not abuse its discretion by dismissing for lack of prosecution when plaintiff did not take action regarding an arbitration award for nine months); *Wade v. City of Los Angeles*, 2012 WL 6965074 *2 (C.D. Cal.) (dismissing action for failure to prosecution in which plaintiff "has taken no action for almost two months"); *Bautista v. Concentrated Employment Program of Dept. of Labor*, 459 F.2d 1019 (9th Cir. 1972) (finding no abuse of discretion to dismiss a case for want of prosecution when litigation was halted for eleven months). Given Plaintiffs' delay, it was not an abuse of the District Court's discretion to dismiss the underlying matters and said dismissal should be affirmed.

b. Plaintiffs Efforts To Blame Defendant And The Lower Court For Their Delay Are Unavailing.

In an effort to distract from their own failure to diligently prosecute their claims, Plaintiffs attempt to blame Defendant and the District Court for

the multi-year delay discussed above. It is, however, the duty of the *plaintiff* to move their case toward trial. *See*, *Collins v. Pitchess*, 641 F.2d 740, 742 (9th Cir. 1981) ("Every plaintiff in federal court has a responsibility to prosecute his action diligently."); *Ely Valley Mines, Inc. v. Hartford Acc. And Indem. Co.*, 644 F.2d 1310 (9th Cir. 1981) ("the primary responsibility for furthering a case is upon the plaintiff and his attorney."); *In re Lagmay*, 2015 WL 5970667 *2 (D. Haw.) ("It is plaintiff's obligation to move his case to trial."); *Deams v. Consumer Credit Counseling Services*, 1996 WL 162950 *1 (N.D. Cal.) ("It is plaintiff's duty to prosecute this action.").

In support of their attempt to shift the blame for their own delay, Plaintiffs argue that dismissal is not warranted when multiple parties are responsible for a delay and cite to *Peart v. City of New York*, 992 F.2d 458, 461 (2nd Cir. 1993). Plaintiffs, however, mispresent the holding of *Peart*. Specifically, Plaintiffs inexplicably add the word "[**not**]" to the actual wording in *Peart*, completely changing its meaning. In reality, the court in *Peart* held the district court did not abuse its discretion by dismissing an action due the plaintiff's counsel's delay, despite the fact delays were not solely plaintiff's fault in that case. *Id.* at 461, 463. Thus, *Peart* actually supports Defendant's position and constitutes additional persuasive authority for the affirmance of the District Court's decision below.

c. Plaintiffs' Counsel's Health Issues, While Unfortunate, Do Not Amount To An Extraordinary Circumstance That Warranted Relief.

Plaintiffs argue that Plaintiffs' counsel's health issues, which the District Court expressly considered before issuing its decision, warrant overturning the District Court's sound exercise of discretion. As even Plaintiffs' Opening Brief points out, only an "extraordinary circumstance warrant[s] relief from a judgment dismissing the case for failure to prosecute under Rule 41", citing *Lal*, 610 F.3d at 521. (AOB at 24.) This rule allowing relief is "used sparingly … only where extraordinary circumstances prevented a party from taking timely action." *Latshaw v. Trainer Wortham & Co., Inc*. 452 F.3d 1097, 1103 (9th Cir. 2006); *U.S. v. Alpine Land & Reservoir Co*., 984 F.2d 1047, 1049 (9th Cir. 1993); *Markray v. AT&T-SBC-Pacific Bell Directory*, 2010 WL 3220096 at *3 (C.D. Cal. 2010).

Here, Plaintiffs claim that the District Court abused its discretion in dismissing the underlying actions because the Court failed to consider Plaintiffs' counsel's health issues and failed to rule that such issues created an "extraordinary circumstance." In support of this argument, Plaintiffs cite to *Klapprott v. United States*, 335 U.S. 601 (1949), which is distinguishable. This is a 1949 case in which the Supreme Court set aside a default judgment because *petitioner* was ill, incarcerated, financially poor and without counsel

for over four years. *Id.* at 604, 607, 615. Here, it was allegedly Plaintiffs' counsel who was ailing, not the Plaintiffs themselves.

Delay attributable to counsel for any reason is less likely to prompt relief, because it does not explain the failure to prosecute by plaintiffs themselves. *See*, *In re Osinga*, 91 B.R. 893, 896-97 (Bankr. 9th Cir. 1988) ("plaintiffs should have and could have insisted that their lawyers take some action or that new counsel be substituted."); *U.S. v. 59.88 Acres of Land*, 734 F.Supp. 555, 559 (D. Mass. 1990) ("If they did not know of [attorney's] illness, they neglected to maintain contact with their attorney and protect their interests. If they did learn of Attorney[]'s illness, they did not secure replacement counsel or otherwise seek to protect their interests."); *Link v. Wabash R. Co.*, 370 U.S. 626, 633-34 (1962) ("Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent.").

In addition, while Defendant is sensitive to counsel's health issues, attributing a wholesale lack of prosecution for over a year based on Plaintiffs' counsel's hip condition simply does not qualify as an "extraordinary circumstance". *See*, *59.88 Acres of Land,* 734 F.Supp. at 559 (finding no entitlement to relief on the grounds attorney had "serious illness which eventually led to his death at approximately the same time that final judgment

was entered."); *U.S. v. State of Wash.*, 98 F.3d 1159, 1161-63 (9th Cir. 1996) (holding the fact a judge suffered from Alzheimer's disease when he issued a ruling was "not one of those rare cases where 'extraordinary circumstances' warrant vacating."); *Collins*, 641 F.2d at 742 ("incarceration does not absolve a plaintiff of this responsibility" to prosecute his action diligently); *Jones v. Ryan*, 733 F.3d 825, 840 (9th Cir. 2013) (holding a change in the law is not sufficient to constitute an extraordinary circumstance).

Here, if Plaintiffs' counsel knew she was unable perform her duties for fourteen months because of a medical condition, then she could and should have taken appropriate action to ensure the diligent prosecution of the Plaintiffs' claims in her absence. For example, Plaintiffs have offered no reason why Plaintiffs' co-counsel, former Magistrate Judge Joseph Reichmann, could not have provided assistance due to Plaintiffs' counsel medical condition. Similarly, there is no reason why Plaintiffs could not have secured alternate counsel to either provide assistance or substitute in as counsel of record.

d. The Fact That The District Court's Order Dismissing The Underlying Matters Does Not Explicitly Discuss Alternate Penalties To Dismissal Does Not Warrant Reversal Of The Decision Below.

Plaintiffs further argue that the District Court's orders dismissing the

underlying matters did not explicitly analyze the viability of alternative penalties for Plaintiffs' multi-year delay in prosecuting their claims. However, a district court's failure to expressly describe its consideration of other sanctions is not an abuse of discretion. *See*, *Malone v. U.S. Postal Service*, 833 F.2d 128, 132 (9th Cir. 1987) (noting Ninth Circuit has "never held that explicit discussion of alternatives is *necessary* for an order of dismissal to be upheld."); *Moneymaker v. CoBEN (In re Eisen)*, 31 F.3d 1447, 1455 (9th Cir. 1994) ("it is unnecessary (although helpful) for a trial court to discuss why alternatives to dismissal are infeasible."); *Morris v. Morgan Stanley & Co*., 942 F.2d 648, 652 (9th Cir. 1991) ("there is no requirement that the court make findings regarding alternatives."); *Yufa v. Lighthouse Worldwide Solutions*, 2014 WL 5106331 *7 (N.D. Cal.) ("district court need not explicitly consider alternative sanctions.").

The Ninth Circuit has similarly disavowed the need for district courts to discuss their contemplation of other factors. *See, Al-Torki v. Kaempen*, 78 F.3d 1381, 1384 (9th Cir. 1996) ("district court is not required to make explicit findings on the essential factors."); *Mohtadi v. Terayon Communications Systems, Inc*., 100 Fed.Appx. 691, 694 (9th Cir. 2004) ("While the District Court did not make any explicit findings regarding the manageability of its docket, the District Court did make clear that the delay

was grounds for dismissal."); *Morris,* 942 F.2d at 652 ("there is no warning requirement when dismissal follows a noticed motion.").

Simultaneously, the District Court had overwhelming justification to conclude that softer penalties would be inadequate. Dismissal is appropriate when "sanctions less severe than dismissal would not have been effective in assuring the prompt disposition of this case or in discouraging similar conduct in the future." *U.S. v. Merrill*, 258 F.R.D. 302, 310 (E.D.N.C. 2009); *see also, Gholizadeh v. Wells Fargo Bank, N.A.*, 2015 WL 9272810 *3 (C.D. Cal. Dec. 17, 2015) ("Plaintiffs seem to have lost interest in this case, meaning … lesser sanctions would be ineffective and inadequate."). Plaintiffs present no recommendation or even suggestion of what would serve as a satisfactory alternative remedy, because dismissal was the only remedy that could guarantee just results.

Alternatives to dismissal are only a viable option if they serve to undo the prejudice caused by plaintiffs' past failure to prosecute. *See*, *Mann v. Lewis*, 108 F.3d 145, 147 (8th Cir. 1997) (district courts should only refuse dismissal where "less-severe sanction could adequately remedy the effect of the delay on the court and the prejudice to the opposing party."); *Merrill*, 258 F.R.D. at 310 (Lesser sanctions are not the most appropriate response if they would not "have cured the prejudice to defendants resulting from … delay.").

The harm suffered by Defendant as a result of Plaintiffs' multi-year failure to prosecute is irreparable. Both *Baeza* and *Corral* involve allegations of events that occurred almost a decade ago. (ER 126-134, 548-556). No alternative sanctions would enable Defendant to refresh the memories of Los Angeles County Sheriff's Department employees regarding the details Plaintiffs' claims of floor sleeping that allegedly occurred that long ago. It is impossible to accurately surmise the amount of additional evidence regarding Plaintiffs' claims that may have been irrecoverably lost due to Plaintiffs' dilatory conduct. Hence, the only appropriate remedy available to the District Court was dismissal.

e. The District Court's Dismissal Of The Underlying Matters Was Not An Abuse Of Discretion In Light Of The Prejudice Suffered By Defendant.

The District Court's dismissal of the underlying matters was neither illogical nor implausible based on the prejudice suffered by Defendant due to Plaintiffs' delay in prosecuting their claims. Specifically, Plaintiffs failed to take any action to move their cases forward for at least two years. This Court has consistently held that such unreasonable delay alone gives rise to a presumption of prejudice and injury to a defendant's ability to effectively defend against a lawsuit. *Hernandez v. City of El Monte*, 138 F.3d 393, 400 (9th Cir. 1998); *Anderson*, 542 F.2d at 524; *In re Eisen*, 31 F.3d at 1453; *In re*

Phenylpropanolamine (PPA) Products Liability Litigation, 460 F.3d 1217, 1227 (9th Cir. 2006); *see also*, *Morris*, 942 F.2d at 652 ("we may presume from the length of time that has elapsed … that Appellees ability to present its case has been prejudiced."). Therefore, the prejudice suffered by Defendant "need not be 'irremediable harm that could not be alleviated by [the] court's reopening discovery and postponing trial.'" *Adams v. Trustees of the New Jersey Brewery Employees' Pension Trust Fund*, 29 F.3d 863, 874 (3rd Cir. 1994); *Doe v. City of Los Angeles*, 2013 WL 6019121 *11 (C.D. Cal. Nov. 13, 2013).

Here, Plaintiffs' failure to prosecute unreasonably lasted for three years, and, even under Plaintiffs' version of events, at least two years. (ER 72, 456.) Numerous cases have found a presumption of prejudice in similar circumstances. *See, e.g.*, *Quansah v. City of San Jose*, 902 F.2d 40, (9th Cir. 1990) (finding plaintiff's approximately two year "delay creates a presumption of prejudice to the defendants."); *In re Batson*, 993 F.2d at 881 (after three year delay in prosecution, court found "[i]n view of the length of delay in the instance case … court properly presumed prejudice."); *In re Eisen*, 31 F.3d at 1453-54 (affirming district court's holding that defendant was prejudiced by four-year delay based on the presumption that witnesses' memory had faded over time); *Wade v. Ratella*, 407 F.Supp.2d 1196, 1207-08

(S.D. Cal. 2005) (prejudice presumed from the fact the case had "languished on the court's docket without activity from [the] [p]laintiff for nearly two years.").

These delays regularly lead to a finding of prejudice because it is reasonably presumed that witnesses' memories will fade overtime. *See, In re Osinga*, 91 B.R. at 895 ("In light of the fact that witnesses move away and their memories fade, injury to defendants is rightfully presumed."); *Pagtalunan v. Galaza*, 291 F.3d 639, 643 (9th Cir. 2002) ("Unnecessary delay inherently increases the risk that witness' memories will fade and evidence will become stale."); *Nealey v. Transportation Maritima Mexicana, S.A.,* 662 F.2d 1275, 1281 (9th Cir. 1980) (prejudice resulting from delay in prosecuting action manifests itself in loss of evidence and loss of memory by a witness).

Although Plaintiffs assert that Defendant has suffered no prejudice, they presented no evidence to combat this presumption to the District Court and can point to no such evidence in the record. As such, Defendant is under no obligation to make a showing of actual prejudice. The alleged events in *Corral* took place in 2005, while those in *Baeza* took place (allegedly) in May 2007. (ER 126-134, 548-556). Since then, witnesses have retired and moved away, while the memories of those remaining have undoubtedly faded. (ER 73, 90, 457, 474.) Records potentially containing highly relevant information

will now be difficult, if not impossible, to recover. Considering approximately 17,000 inmates move through the Los Angeles County Jail system each year, it is extremely unlikely any witnesses who would have had valuable information will still be able to recollect the relevant events that occurred a decade ago. (ER 73, 90, 457, 474.)

The significant prejudice Defendant would endure in defending these actions as a consequence of Plaintiffs' lengthy and unreasonable failure to prosecute is yet further verification that the District Court did not abuse its discretion in dismissing the underlying matters.

f. Other Factors Demonstrating That The District Court Did Not Abuse Its Discretion In Dismissing The Underlying Matters.

A variety of additional considerations support the conclusion that it was not an abuse of discretion for the District Court to dismiss the underlying matters. To begin, the Ninth Circuit has held "the public's interest in the expeditious resolution of litigation always favors dismissal." *Yourish v. California Amplifier*, 191 F.3d 983, 990 (9th Cir. 1999); *Wystrach v. Ciachurski*, 267 Fed.Appx. 606, 608 (9th Cir. 2008). Therefore, "this factor strongly favors dismissal." *Yourish*, 191 F.3d at 991.

Plaintiffs argue *Baeza* and *Corral* "could have concluded eight months before they were dismissed on February 11, 2015, had the district court

entertained the *Thomas* plaintiffs' motion for consolidation." This is a very weak argument for multiple reasons. First, the Plaintiffs blindly assume that had the lower Court entertained the *Thomas* plaintiffs' motion for consolidation, the motion would have been granted and the consolidated trial would have been completed without any noteworthy extension of time before or during trial. Next, this ignores the fact that the proposed trial would still have concluded months after Defendant's motions to dismiss were filed. (ER 55, 439). Entertainment of the motion for consolidation by the district court would not have changed the three years of complete inactivity by Plaintiffs, which was the basis for the court's dismissal. (ER 72, 456).

Moreover, courts must be able to manage their own docket and are "in the best position to determine whether the delay in a particular case interferes with docket management." *Pagtalunan*, 291 F.3d at 642; *see also*, *In re Eisen*, 31 F.3d at 1452. Hence, it has been consistently determined that the need for courts to avoid unnecessary delays as a means to manage their dockets supports dismissals. *See*, *Ratella*, 407 F.Supp.2d at 1207-08 (where case had "languished on the court's docket without activity from Plaintiff for nearly two years," the court's need to manage its docket favors dismissal); *Yourish*, 191 F.3d at 990 (lower court's interest in managing its own docket "strongly favors dismissal" where the plaintiff's conduct had caused the action to come

to a halt, "[b]ecause the district judge was in a superior position to evaluate the effects of delay on her docket").

B. The District Court's Denial Of Motions That Were Pending When The Underlying Action Was Dismissed Was Not An Abuse Of Discretion.

When the District Court dismissed the underlying matter for lack of prosecution, it simultaneously dismissed a motion to set new trial and pretrial dates as moot. (ER 2, 375.) Plaintiffs contend that the dismissal of this motion was also an abuse of the District Court's discretion. Plaintiffs are mistaken and they have offered no reason why this decision of the District Court was illogical or implausible. When a court grants wholesale dismissal for lack of prosecution, dismissal of other pending motions is a matter of common sense and certainly not an abuse of discretion.

When an action is dismissed, the Ninth Circuit has held it is appropriate that "[a]ll pending motions are denied as moot." *Brenden v. Carlson*, 586 Fed.Appx. 354, 355 (9th Cir. 2014); *Vaksman v. Eisenberg,* 286 Fed.Appx. 426, 427 (9th Cir. 2008); *Ellington v. California Dept. of Corrections & Rehabilitation*, 2013 WL 3242949 *2 (C.D. Cal.). The Ninth Circuit has specifically applied this rule to the type of motion that the District Court dismissed. *In re Eisen*, 31 F.3d at 1450, 1456 (9th Cir. 1994) (the Ninth Circuit affirmed a decision denying a plaintiff's motion to set trial dates where

all actions were dismissed for failure to prosecute); *Pete v. Olsen*, 2011 WL 833345, *2 (E.D. Wash. March 3, 2011) (after a plaintiff's action was dismissed for failure to prosecute under Rule 41(b), the court denied plaintiff's motion to extend discovery cutoff as moot).

Despite Plaintiffs' arguments to the contrary, a court need not address an issue that has been determined to be moot. *U.S. v. Evanson*, 12 F.3d 1109 (9th Cir. 1993). Beyond this, when an issue is moot, the Ninth Circuit similarly "need not address whether the district court abused its discretion in denying [the] motions." *Burns v. Callahan*, 869 F.2d 1496, (9th Cir. 1989).

C. The Lower Court's Vacation Of Several Motions Because Of Pending Law And Motion Matters And Settlement Discussions In A Related Case Was Also Not An Abuse Of The Lower Court's Discretion.

Only days after this action was filed, Plaintiffs filed motions for summary adjudication, a motion for class certification, and a motion to consolidate. (ER 146, Dkt Nos 9, 10.) Given the early stage of the proceedings and for a variety of other reasons, Defendant sought relief from the District Court, requesting a continuance of the hearing date (and associated briefing schedule) or, in the alternative, vacation of the motions altogether. (ER 147, Dkt No.13.) The basis for Defendant's request was that pending law and motion matters in a related matter, *Thomas v. COLA*,

U.S.D.C. Case No CV 04-08448 DDP, had the potential to significantly impact both the procedural and substantive outcome of the underlying matters.[7] The District Court agreed, and granted a continuance. Then, several months later, because of on-going settlement discussions between the parties, vacated the motions altogether. (ER 109-111, 154, 493-495.) Neither of these decisions were illogical or implausible and in fact, as explained below, they make perfect sense and were a sound and reasonable exercise of the District Court's discretion.

Most importantly, the motions were never fully briefed (Defendant did not file opposition papers and Plaintiffs did not file replies), and furthermore, they were not denied as Plaintiffs' claim. Instead, they were vacated by the District Court's own motion. (ER 148, Dkt. No. 26.) Accordingly, the merits of each of these motions are completely irrelevant to the resolution of this appeal. Instead, the only relevant issue is whether, based on on-going settlement discussions, the District Court abused its discretion by vacating

[7] The pending law and motions matters included a motion for class decertification and a motion to certify an interlocutory appeal regarding the District Court's finding, in Thomas, that floor-sleeping constituted a *per se* constitutional violation. Because all three cases (*Baeza*, *Corral*, and *Thomas*) involve claims of floor-sleeping, the District Court wisely concluded that it made sense to resolve issues associated with class certification and the constitutionality of floor-sleeping generally before proceeding with briefing on the same subjects in *Baeza* / *Corral*.

these motions. The answer is simply "no". At the time, the parties in *Baeza*, *Corral*, and *Thomas* were engaged in good faith settlement discussions with the assistance of Magistrate Judge Carla Woehrle and later, District Judge Dean D. Pregerson. (ER 71-72; 593-597.) Accordingly, there was no need for the parties to brief the motions discussed above, and doing so would have been counter-productive given the parties' efforts to reach a global settlement of all three matters.

VIII. CONCLUSION

The District Court correctly concluded there was a lack of prosecution by Plaintiffs in both *Baeza* and *Corral*. (ER 2, 375). As such, it was proper to dismiss the actions under F.R.C.P. Rule 41(b) and not an abuse of discretion. Moreover, Plaintiffs have not shown how this decision was illogical or implausible and in fact, the soundness of these decisions is supported by ample evidence in the record. Considering previously upheld dismissals due to shorter delays and Plaintiffs' unexcused failure to responsibly move the case to trial, Plaintiffs cannot meet their burden of proving that the District Court abused its discretion by dismissing the underlying actions.

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Accordingly, the dismissal of the underlying matters should be affirmed, as should the other orders discussed above.

Dated: April 13, 2016 LAWRENCE BEACH ALLEN & CHOI, P.C.

By /s/ Justin W. Clark
Justin W. Clark
Attorneys for Defendant/Appellee
LEROY D. BACA

STATEMENT OF RELATED CASES

In accordance with Ninth Circuit Local Rule 28-2.6, Defendant/Appellees hereby advise the Court that they are aware of the related cases, *S. A. Thomas v. Leroy D. Baca, et al*, Case No. Case No. 15-55399 and *S. A. Thomas, et al. v. County of Los Angeles*, Cross Appeals Case Nos. 14-56183.

Dated: April 13, 2016 LAWRENCE BEACH ALLEN & CHOI, P.C.

By /s/ Justin W. Clark
Justin W. Clark
Attorneys for Defendant/Appellee
LEROY D. BACA

CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 32(a)(7)(c), I certify that the Answering Brief is double spaced, proportionately spaced (Times New Roman), has a typeface of 14 points and contains approximately 6,758 words.

Dated: April 13, 2016 LAWRENCE BEACH ALLEN & CHOI, P.C.

By /s/ Justin W. Clark
Justin W. Clark
Attorneys for Defendant/Appellee
LEROY D. BACA

CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2016, I electronically filed the foregoing **DEFENDANT/APPELLEE'S ANSWERING BRIEF** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Marion R. Yagman
Yagman & Reichmann
475 Washington Boulevard
Venice Beach, CA 90292-5287

/s/ Justin W. Clark
Justin W. Clark