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Appeal No. 07-56210

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Antonio Geluz, Marilyn Geluz, Estela Hernandez,

Appellants,

vs.

THC - Orange County, Inc., dba Kindred Hospital - Ontario,

Appellee.

On Appeal From the United States District Court
for the Central District of California
Hon. Stephen G. Larson
Case No. EDCV 06 1250 SGL (JCRx)

APPELLEE'S OPENING BRIEF

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I. CORPORATE DISCLOSURE STATEMENT

Pursuant to F.R.App. Pro. 26.1, Appellee THC- ORANGE COUNTY, INC. dba KINDRED HOSPITAL ONTARIO; (erroneously sued as KINDRED HOSPITAL); identifies its corporate ownership as follows: Kindred Healthcare Operating, Inc. is the parent corporation of THC – Orange County, Inc.; Kindred Healthcare Operating, Inc. is a wholly-owned subsidiary of Kindred Healthcare, Inc., a publicly traded company.

II. STATEMENT OF JURISDICTION

Appellee THC – Orange County, Inc. ("THC") agrees this Court has jurisdiction of this appeal from final judgment under 28 U.S.C. § 1291.[1] THC also agrees the district court had original subject matter jurisdiction under 28 U.S.C. § 1331 (among other statutes), and supplemental jurisdiction over the state law claims under 28 U.S.C. § 1367.

III. ISSUE ON APPEAL

Whether the district court properly exercised its discretion in dismissing the Geluzes' case under Fed. R. Civ. Pro. Rule 41(b) because of their repeated violations of the Federal Rules of Civil Procedure, the Local Rules of the U.S. District Court for the Central District of California, and the district court's orders?

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[1] Except where context demands otherwise, Appellee will refer to itself as THC, and will refer to Appellants as the "Geluzes."

IV. SUMMARY OF ARGUMENT

This Court should affirm the judgment below. The district court properly dismissed the case under Fed. R. Civ. Pro. 41(b).

The district court properly weighed the five factors this Court requires a district court to consider before ordering a Rule 41(b) dismissal. See Malone v. U.S. Postal Service, 833 F.2d 128, 130 (9th Cir. 1987) (listing relevant factors). The district court justifiably decided the Geluzes engaged in a pattern of disregard for the Federal Rules of Civil Procedure, the district court's local rules and standing orders, and the district court's orders in the case below.

The Geluzes repeatedly filed pleadings untimely, and without serving them, despite warnings and requests. They disregarded the district court's orders by filing pleadings on behalf of a pro se plaintiff who was engaging in the unlicensed practice of law. They attempted to include within an amended complaint individual defendants who had been dismissed with prejudice by prior orders.

The district court provided the Geluzes with several opportunities to comply with the rules and its orders, but they obstinately would not do so. As a result, the district court correctly concluded that dismissal was warranted.

The Geluzes appear to contend dismissal under Rule 41(b) is somehow precluded by the district court's earlier disposition of a motion to dismiss brought

under Rule 12. The argument is unintelligible and is unsupported by relevant authority.

The Geluzes also argue that the district court improperly dismissed Appellant Antonio Geluz from the action because he lacked standing. This argument appears to be directed to the district court's order granting Appellees' motion to dismiss pursuant to Fed. R. Civ. Pro. 12(b). Appellants did not oppose below the motion to dismiss under Rule 12. They do not appeal from that order in the notice of appeal here. They do not include the relevant papers in the record, nor do they support the argument with proper citations to the record or relevant authorities. Therefore, Appellants waived any such argument. But the Geluzes' arguments with respect to Mr. Geluz also lack merit.

In sum, this Court should affirm the judgment.

V. STATEMENT OF THE CASE

Marilyn and Antonio Geluz filed a Complaint in the United States District Court for the Central District of California on November 15, 2006 (Supp. ER 105).[2] They initially named 12 defendants[3] and alleged approximately 19

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[2] Pages of the Supplemental Excerpts of Record are cited as "Supp. ER ___."

[3] The named defendants in the original Complaint were Kindred Hospital, Kindred Pharmacy Services Inc., Peter Adamo, Carol Petty, Machel Gilmore, Lorna Anastacio, Cecilia De La Pena, Lolito Fajardo, CT Corporate Systems, Amanda Baeza, Donna Gonzalez, and Curtis Powell.

purported causes of action.[4] Mr. and Mrs. Geluz filed a First Amended Complaint on December 16, 2006, adding Plaintiff Estela Hernandez (Supp. ER 90).

Defendants THC - Orange County, Inc., Kindred Pharmacy Services, Inc., Peter Adamo, Carol Petty, Curtis Powell, Machel Gilmore, Donna Gonzalez, Amanda Baeza, Lorna Anastacio, Cecilia De La Pena, and Lolita Fajardo filed a Motion to Dismiss the First Amended Complaint under Fed. R. Civ. Pro. 8 and 12(b)(1) and (6) on January 26, 2007 (the "12(b)(6) Motion"). (Supp. ER 83, 85). The Geluzes did not oppose the motion. (Supp. ER 83). The district court granted the 12(b)(6) Motion on March 12, 2007. (Id.)

The Geluzes then filed a request to set aside the court's order granting the 12(b)(6) Motion. (Supp. ER 79-80). The district court reconsidered the 12(b)(6) Motion on March 15, 2007, and affirmed its original decision. (See id.) The district court gave Plaintiffs Estela Hernandez and Marilyn Geluz leave to amend

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[4] The causes of action purportedly alleged in the original and First Amended Complaint were for Retaliatory Discharge Under Title VII of the Civil Rights Acts [sic] of 1964, "HIPAA," "NLRA," "ERISA," "FMLA," "Fed. RICO Act," "Calif. Work. Comp. Lab. Code 132(a)" [sic], "Unpaid Cancellation Breach Wages," "Unfair Business Practice Violations," "Wrongful Termination," "Fraud/Deceit, Conversion/Loss of Funds & Benefits Via False Pretense," "Larceny by Trick," "Organized Racketeering," "Extortion," "Coercion," "Wilful Breach of Employment Contract," "Implied Covenant of Good Faith and Fair Dealing," "Intentional Infliction of Emotional Distress," "Gross Negligence & False Light/Private Facts Invasion of Privacy," Defamation, and for Injunctive and Declaratory Relief. (Supp. ER 90-91).

three claims for relief by April 16, 2007. (Supp. ER 82). The district court also denied the Geluzes' request for an interlocutory appeal. (Supp. ER 80).

Hernandez and Marilyn Geluz did not file a Second Amended Complaint by April 16, as ordered. On April 26, 2007, as there was no operative complaint on file, Defendants moved to dismiss the case pursuant to Rule 41(b). (Supp. ER 75-78).

On May 15, 2007, the district court granted Plaintiffs Hernandez and Marilyn Geluz an extension until May 30, 2007 to file their Second Amended Complaint. (Supp. ER 71).

On May 16, 2007, plaintiffs filed a Second Amended Complaint, that the district court struck, sua sponte, on May 17, 2007, on the grounds that it violated the court's May 15 Order. (Supp. ER 9:4-7, 113).

The plaintiffs below filed another Second Amended Complaint on May 30, 2007. (Supp. ER 9:12-14, 50-57). This Second Amended Complaint, added two new plaintiffs: Erlinda Aquino and the United Filipino Association of the Inland Empire.[5] They also added three new defendants: Shelley Wilson, Olophius Perry, and the U.S. Equal Employment Opportunity Commission. (Supp. ER 51, 56-57).[6]

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[5] Aquino and the UFAIE are not parties to this appeal, as they have not joined in the Notice of Appeal or signed the Appellants' opening brief.

[6] These defendants, along with CT Corporation, apparently were not served in the district court.

The defendants moved to dismiss the Second Amended Complaint under Rule 41(b). (Supp. ER 14:22-23). The district court granted the Motion on July 24, 2007. (Id.)

Plaintiffs Antonio Geluz, Marilyn Geluz, and Estela Hernandez filed a Notice of Appeal on July 27, 2007.[7] (Supp. ER 116). Plaintiffs also filed a Motion to Disqualify Judge Larson and for reconsideration of the district court's order. (Id.) The district court (Virginia A. Phillips, J.) denied the Motion to Disqualify on August 16, 2007 and returned the case to Judge Larson. (Id.) Judge Larson denied the Motion for Reconsideration on September 24, 2007. (Supp. ER 117).

VI. STATEMENT OF FACTS

A. BACKGROUND INFORMATION

Plaintiffs-Appellants Marilyn Geluz and Estela Hernandez were employees in Defendant THC - Orange County, Inc.'s hospital (which does business as Kindred Hospital – Ontario). Marilyn Geluz was terminated for excessive absences on July 19, 2006. (Supp. ER 98:20-99:6). Estela Hernandez was terminated for taking patient information out of the hospital for unauthorized purposes around November 21, 2006, after hospital management concluded that she violated patient confidentiality policies and the Health Insurance Portability

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[7] The Geluzes submitted a copy of the Notice of Appeal with the opening brief.

and Accountability Act ("HIPAA")(42 U.S.C. § 201 et seq.). (Supp. ER 100:12-20, 101:2-3).

Plaintiff-Appellant Antonio Geluz was never employed by any defendant. He claims standing to sue through his wife, Marilyn's, employment. Appellant "UFAIE"[8] is the United Filipino Nurses Association of the Inland Empire (according to the Second Amended Complaint). UFAIE first was added to the case in the Second Amended Complaint. Its corporate status is "suspended" and it is unrepresented by counsel. (Supp. ER 38). Its relationship to the plaintiffs or defendants is unclear.

B. THE FIRST AMENDED COMPLAINT AND THE MOTION TO DISMISS

The First Amended Complaint was 103 pages, asserting up to 23 claims for relief against 12 defendants, including nine individual supervisors and co-workers.[9]

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[8] UFAIE is listed as an appellant in the Notice of Appeal.

[9] Individual Defendants Peter Adamo (Supp. ER 52:25-26), Carol Petty (Supp. ER 53:8-11), Curtis Powell (Supp. ER 53:16-18), Machel Gilmore (Supp. ER 53:25-54:2), Donna Gonzalez (Supp. 54:8-11), Amanda Baeza (Supp. 54:18-20), Lorna Anastacio (Supp. ER 54:26-55:2), and Celia De La Pena (Supp. ER 55:8-12), are all supervisory or management employees at Kindred Hospital - Ontario. Lolita Fajardo is a Licensed Vocational Nurse at Kindred Hospital - Ontario (Supp. ER 55:19-26). The Complaint also named as defendant CT Corporation, but apparently Plaintiffs never served that entity. (Supp. ER 56:1-5).

For a variety of reasons, the FAC did not state a proper claim against any defendant, and it frankly was too verbose and convoluted for Defendants to fully understand the claims. Therefore, Defendants filed a Motion to Dismiss pursuant to Fed. R. Civ. P. 8 and 12(b)(6) (the "12(b)(6) Motion").

1. Plaintiffs Did Not File an Opposition to the 12(b)(6) Motion.

The Plaintiffs below did not serve or file an opposition to the 12(b)(6) Motion by March 12, 2007, which was forty-five days after the motion was filed and seven days before the hearing date.[10] Under U.S.D.C. C.D. Cal. Local Rule 7-12, the failure to oppose a motion is deemed consent to granting the motion. (Supp. ER 5:27-6:3, 83).[11] Therefore, on March 12, the district court granted the Motion to Dismiss, adopting Defendants' Proposed Order with some modifications. (Supp. ER 83-84). The district court gave Plaintiffs Marilyn Geluz and Estela Hernandez until April 16, 2007 to file an amended complaint against the only remaining served defendant – THC – based on three claims for relief. (Id.)

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[10] Although they had already received the 12(b)(6) Motion filed on behalf of all the Kindred-affiliated defendants, the Geluzes requested default judgments against several individual defendants. (Supp. ER 5:1-14). The Clerk mistakenly entered defaults, which were promptly vacated by the district court. (Id.)

[11] U.S.D.C. C.D. Cal. L.R. 7-12 states: "Failure to File Required Papers. The Court may decline to consider any memorandum or other paper not filed within the deadline set by order or local rule. The failure to file any required paper, or the failure to file it within the deadline, may be deemed consent to the granting or denial of the motion."

2. Plaintiffs' Motion to Set Aside the March 12 Order

Plaintiffs filed a Motion to Set Aside the March 12 Order granting the 12(b)(6) Motion. (Supp. ER 79). In that Motion, they claimed their opposition to the 12(b)(6) Motion had been "inadvertently misdirected." (Id.)

Of note, Plaintiffs did not serve any defendant with the motion to set aside. (Supp. ER 33:3-8). Nor did they serve the allegedly "misdirected" opposition to the 12(b)(6) Motion. (Id.) Defendants only learned of Plaintiffs' request via the Court's March 15, 2007 Order denying Plaintiffs' request. [12]

Defense counsel then wrote Plaintiffs a clearly-worded letter stating that they must serve all pleadings, and that Defendants would request sanctions if Plaintiffs continued to file pleadings in court without service to counsel. (Supp. ER 7:1-12, 40).

C. THE SECOND AMENDED COMPLAINT

1. Plaintiffs Request an Extension

Rather than file a Second Amended Complaint on April 16, Plaintiffs requested an extension. (Supp. ER 7:12-20). The district court denied the request. (Id.)

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[12] The district court considered Plaintiffs' arguments in the opposition, but still granted Defendants 12(b)(6) Motion, "for the reasons well stated in defendants' motion to dismiss." (Supp. ER 84).

2. Plaintiffs Fail to Timely File Second Amended Complaint; Defendants Move to Dismiss

By April 26, 2007, Plaintiffs still had not filed a Second Amended Complaint, which was due on April 16, because the district court denied the request for an extension. Defendants then filed their first Motion to Dismiss the case under Rule 41(b), set for hearing on May 21, 2007. (Supp. ER 75).

As of May 10, Plaintiffs still had neither filed their Second Amended Complaint nor opposed the Rule 41(b) Motion. (Supp. ER 73, 111). By operation of Local Rule 7-12, Plaintiffs again consented to granting the Motion to Dismiss. Defendants filed a notice of non-opposition. (Supp. ER 73).

3. Plaintiffs Filed -- But Did Not Serve -- a Late Opposition to Defendants' First Rule 41(b) Motion.

After Defendants filed the notice of non-opposition, Plaintiffs, on May 14, filed a document, in which they claimed to have a "gentlemen's agreement" with defense counsel not to oppose requests for extension of time to file pleadings. (Supp. ER 7:21-8:27, 13:4-12). Plaintiffs did not serve that document on Defendants until May 17, despite defense counsel's warning to Plaintiffs regarding non-service of pleadings.

The district court, however, issued an Order on May 15, accepting Plaintiffs (unrebutted) explanation of a "gentleman's agreement."[13] In the May 15 Order, the district court denied Defendants' first Motion to Dismiss Under Rule 41(b) "without prejudice as premature," and granted Plaintiffs a final extension of time (until May 30, 2007) to file the Second Amended Complaint. (Supp. ER 71). The district court's decision to grant Plaintiffs yet another extension to file the Second Amended Complaint amounted to a 44-day extension from April 16, the date it originally was due.

4. The District Court Warned Plaintiffs Regarding Further Extensions and Antonio Geluz's Involvement in the Case

In its May 15 Order granting Plaintiffs extension, the district court warned Plaintiffs "that failure to file the second amended complaint within the time specified may result in dismissal of the case." (Supp. ER 71). The district court also reminded Plaintiffs that Antonio Geluz was dismissed without leave to amend and stated that it would not accept any further pleadings that included Antonio Geluz as a plaintiff: "Antonio Geluz's continued appearance in this case, and his

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[13] There was no such "gentleman's agreement." Indeed, Plaintiffs' "gentlemen's agreement" claim was belied by Plaintiffs' own attempts to obtain defaults against three of the individual defendants after Defendants filed their 12(b)(6) Motion. As explained more fully herein, Plaintiffs did not serve their opposition timely, thereby depriving Defendants of the opportunity to address Plaintiffs' explanation.

continued submission of pleadings on behalf of the remaining pro se plaintiffs, amounts to the unauthorized practice of law." (Supp. ER 72)

5. Plaintiffs Filed, But Did Not Serve on Defendants, a Second Amended Complaint that Included Antonio Geluz as a Plaintiff.

On May 16, 2007, Plaintiffs attempted to file a Second Amended Complaint. Plaintiffs never served this pleading on Defendants.

Plaintiffs apparently included Antonio Geluz on the caption and signature lines. (Supp. ER 9:4-6). The court therefore struck the first version of the Second Amended Complaint. (Id.)

6. Plaintiffs File Another Second Amended Complaint

On May 30, Plaintiffs' filed another Second Amended Complaint. The Second Amended Complaint was delivered to Defendants without a postmark. However, it did not arrive until June 11, 2007, nearly two weeks after it was filed. (Supp. ER 49).[14]

The second version of the Second Amended Complaint removed Antonio Geluz from the caption, but asserted claims on his behalf in the body of the pleading.(Supp. ER 9:15-26; 11:13-12:14). In addition, the Second Amended Complaint added as a Plaintiff the United Filipino Association of the Inland

[14] The district court found that Plaintiffs "never served their second amended complaint on defendants contemporaneously with the filing of the complaint. . . . Instead, it appears that plaintiffs mailed a copy of the second amended complaint to defendants almost two weeks after it was filed." (Supp. ER 9:8-14).

Empire ("UFAIE"), in what the district court found to be an undisguised attempt by Antonio Geluz to subvert its prior orders and represent the other plaintiffs indirectly. (Supp. ER 11:26-12:1). The UFAIE's attempt to proceed pro se as an organization was also a violation of court rules, barring associations from appearing without counsel. (Supp. ER 12:2-5 citing U.S.D.C. C.D.Cal. Local Rule 83-2.10.1).

The Second Amended Complaint included the same claims against the same individual defendants whom the district court previously had dismissed in its March 12 Order. (Supp. ER 9:26-10:5; 11:2-12).

D. DEFENDANTS MOVED UNDER RULE 41(B) TO DISMISS THE CASE

On June 12, 2007, Defendants moved to dismiss the case for Plaintiffs' failure to comply with the court's previous orders and applicable rules. (Supp. ER 2:1-5). The district court granted the motion, finding that Plaintiffs violated several court orders and the Federal Rules of Civil Procedure.

The district court determined that Plaintiffs violated the March 12 Order dismissing the individual defendants. (Supp. ER 11:5-12). The district court next concluded Plaintiffs violated its March 12 and May 15 Orders prohibiting Antonio Geluz from appearing as a Plaintiff. (Supp. ER 11:13-25). The district court also found Plaintiffs unjustifiably and repeatedly failed to comply with Rule 5, requiring service on opposing parties (Supp. ER 10:13-17). In addition, the district

court noted Plaintiffs had violated other rules, such as the time limits for filing oppositions and the procedure for waiving oral argument. (Supp. ER 12:17-22).

The district court expressly considered each of the factors courts must weigh before dismissing a case under Rule 41(b) (Supp. ER 3:3-9). The court concluded Plaintiffs' conduct interfered with its docket, negatively affected expeditious resolution of the matter , prejudiced defendants, and that lesser sanctions already had been attempted and would not be effective. (Supp. ER 13:20-14:2) Therefore, the district court dismissed the case. (Supp. ER 14:22-23).

VII. LEGAL DISCUSSION

A. STANDARD OF REVIEW

This Court "review[s] the district court's dismissal of a complaint pursuant to Rule 41(b) for abuse of discretion." Yourish v. California Amplifier, 191 F. 3d 983, 986 (9th Cir. 1999). "The trial court's dismissal should not be disturbed unless there is 'a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.'" Ferdik v. Bonzelet, 963 F.2d 1258, 1260 (9th Cir. 1992) (quoting Malone, 833 F.2d at 130).

B. STANDARD FOR GRANTING MOTION TO DISMISS UNDER RULE 41(B)

Fed. R. Civ. Pro. 41(b) provides: "If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the

action or any claim against it. . . ." Thus, the district court may rely on Rule 41(b) when a plaintiff (1) fails to comply with the Federal Rules of Civil Procedure or (2) court orders. The Geluzes did both in the instant case. They violated several court orders, and they did not follow the Federal Rules of Civil Procedure.

In addition to finding predicate violations of rules or orders, the trial court must consider five factors before dismissing a case under Rule 41(b): "(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 defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic alternatives.'" Yourish, 191 F.3d at 990 (citing Malone, 833 F.2d at 130; Hernandez v. City of El Monte, 138 F.3d 393, 399 (9th Cir. 1998); Henderson v. Duncan, 779 F.2d 1421, 1423 (9th Cir. 1986)). This Court affirms the district court's exercise of discretion "where at least four factors support dismissal . . . or where at least three factors 'strongly' support dismissal." Yourish, 191 F.3d at 990 (quoting Ferdik, 963 F.2d at 1263).

Plaintiffs here violated both court orders and applicable rules. The district court applied the above factors and concluded dismissal of the action was warranted. Therefore, the district court acted within its discretion and the judgment should be affirmed.

C. THE DISTRICT COURT CORRECTLY DETERMINED PLAINTIFFS INTENTIONALLY VIOLATED ITS ORDERS

> A determination that an order was disobeyed is entitled to considerable weight because a district judge is best equipped to assess the circumstances of the non-compliance. The question is not whether this court would have, as an original matter, imposed the sanctions chosen by the trial court, but whether the trial court exceeded the limits of its discretion.

Halaco Engineering Co. v. Costle, 843 F.2d 376, 379 (9th Cir. 1988) (citations omitted) (analyzing Rule 37(b)(2)(C) dismissal sanction).

1. Plaintiffs' Violations of the Court's Orders

In its March 12, 2007 Order, the district court ordered Plaintiffs to file a Second Amended Complaint on or before April 16, 2007. Although the court denied Plaintiffs' request for an extension, they did not file that pleading until May 16, 2007, after the defendants filed their first Rule 41(b) Motion to Dismiss.

In its May 15, 2007 Order, the district court specifically ordered Antonio Geluz not to appear as a party in the Second Amended Complaint, warning that any such pleading would be "stricken" (Supp. ER 72). Yet, on May 16, Antonio Geluz included himself in the Second Amended Complaint, both in the caption as well as on the signature line. (Supp. ER 9:4-7). The district court struck the first version of the Second Amended Complaint sua sponte. (Id.)

The Geluzes filed their second version of the Second Amended Complaint on May 30, 2007. The district court noted Plaintiffs continued to violate its May

15 order. First, Plaintiffs continued to include Antonio Geluz in the pleading. Second, the district court found the Second Amended Complaint violated the court's March 12 order because the dismissed individual defendants were still included (Supp. ER 9:26-10:5, 11:11-12).

2. The District Court Found Plaintiffs' Violations Were Willful

The Geluzes' violations of the district court's orders were not merely inadvertent. As the district court found, they were intentional and contemptuous. In particular, as the district court noted, Plaintiffs' insistence on including Antonio Geluz in the Second Amended Complaint, both directly and via the new "UFAIE" plaintiff, was nothing short of an attempted "end run" around its Order:

> The second amended complaint makes no secret that adding the UFAIE as a party to this case was not just so Antonio Geluz could represent that entities' interest in this case but was meant to allow Antonio Geluz to represent all the other pro se individual plaintiffs' interest as well . . . . That plaintiffs' ploy was ineffective, however, does not take away from the contemptuous nature of the action itself. Plaintiffs deliberately tried to subvert the order of this Court so as to have Antonio Geluz represent the interests of all the plaintiffs in this case . . . .

(Supp. ER 11:26-12:10). The court also determined that "Plaintiffs knew full well that the Court would not brook such conduct as the Court had previously struck an effort on their part to lodge the second amended complaint that contained Antonio Geluz in the case caption and his name on the signature line for the pleading's filing." (Supp. ER 12:11-14).

D. THE DISTRICT COURT CORRECTLY FOUND PLAINTIFF WILFULLY VIOLATED RULE 5 OF THE FEDERAL RULES OF CIVIL PROCEDURE AND LOCAL RULE 5-3.1

The district court also based its dismissal Order on the Geluzes' failure to serve Defendants with several different pleadings.

Fed. R. Civ. Pro. 5 provides that "every pleading subsequent to the original complaint . . . [and] every written motion . . . shall be served upon each of the parties." U.S.D.C. C.D. Cal. Local Rule 5-3.1 require parties to file a declaration in support of the certificate of service required by Rule 5.

The district court correctly found the Geluzes failed to serve Defendants with several papers including their "Motion to Set Aside" the court's March 12, 2007 Order, their belated Opposition to Defendants Rule 12(b) Motion, and the Geluzes' first version of their Second Amended Complaint. The Geluzes also untimely served their Opposition to Defendants' first Rule 41(b) Motion, and their second version of the Second Amended Complaint.

The Geluzes' repeated failure to comply with Rule 5 and Local Rule 5-3.1 was intentional. They never claimed ignorance or confusion regarding the requirement of service. In fact, sometimes they did serve their papers albeit late. Rather, they argued below, as they argue here, that Defendants' counsel's letter to Plaintiffs, reminding Plaintiffs of Rule 5 and their obligations to serve Defendants' counsel, somehow excused them. As the district court observed, "Plaintiffs'

reading of defense counsel's letter is absurd." (Supp. ER 10:21-22).[15] Plaintiffs had fair warning regarding their obligations to serve papers. Their abject refusal to acknowledge their wrongdoing further proves their conduct was intentional.

E. THE DISTRICT COURT EXPRESSLY WEIGHED RELEVANT FACTORS IN DECIDING TO DISMISS THE ACTION

As discussed above, the district court was required to consider five factors before dismissing the instant case under Rule 41(b). Here, all five factors strongly support dismissal.

1. The Dismissal Served the Public Interest in Expeditious Resolution.

"The public's interest in expeditious resolution of litigation always favors dismissal." Pagtalunan v. Galaza, 291 F.3d 639, 642 (9th Cir. 2002) (quoting Yourish, 199 F.3d at 990). Plaintiffs' pattern of conduct demonstrates this factor strongly militated in favor of the court's decision to dismiss the action.

"Experience teaches that, unless cases are pled clearly and precisely, issues are not joined, discovery is not controlled, the trial court's docket becomes unmanageable, the litigants suffer, and society loses confidence in the court's ability to administer justice." Bautista v. Los Angeles County, 216 F.3d 837, 840-

[15] The Geluzes's recalcitrance and disobedience continue in this Court. They failed to serve their Motion for an Extension of Time to file their opening brief in this Court (Supp. ER 16). THC learned of the Motion only through PACER and filed an opposition (See id.). But by the time THC objected to the request, this Court already had granted it. The Geluzes in this Court also disregarded an Order to Show Cause issued by this Court regarding their failure to prosecute the appeal, responding only after this Court issued a second OSC (Supp. ER 26-27).

841 (9th Cir. 2000). The Geluzes' voluminous pleadings, delivered untimely to the court below and the defendants, and rearguing issues that had already been determined, threatened to undermine the public's confidence in the court's ability to administer justice. The Geluzes not only brought a host of irrelevant and sometimes unintelligible claims, but also improperly attempted to include defendants against whom no claims would lie. When the district court dismissed these defendants, the Geluzes refused to accept their dismissal and "re-alleged the same claims against the same individual defendants as they had done in the first amended complaint" (Supp. ER 11:11-12). The Geluzes' attempt to include individual defendants in this case made their defiance of the district court's orders unusually public.

The Geluzes repeatedly filed their pleadings late and "riddled . . . with opaque passages and ipse dixit" that wasted the court's time. (Supp. ER 79). The Geluzes' failure to comply with the district court's time limits for filing their Second Amended Complaint as well as their opposition papers provides further strong support of this factor. It is beyond cavil that Plaintiffs' complaint was frivolous in most respects.

The public has a strong interest in ensuring that lawsuits are clearly stated. "In order to give fair consideration to those who call upon us for justice, [this Court] must insist that parties not clog the system by presenting [courts] with a

slubby mass of words. . ." Sekiya v. Gates, 508 F.3d 1198, 1200 (9th Cir. 2007) (quoting N/S Corp. v. Liberty Mut. Ins. Co., 127 F.3d 1145, 1146 (9th Cir. 1997)). The Geluzes' conduct repeatedly thwarted the district court's attempt to efficiently terminate claims utterly lacking merit and dismiss defendants who were haled into court with no justification.

2. The Court's Need to Manage Its Docket Strongly Supports Dismissal.

"The trial judge is in the best position to determine whether the delay in a particular case interferes with docket management and the public interest." Pagtalunan, 291 F.3d at 642. The district court here specifically determined that Plaintiffs' "conduct has interfered with [its] ability to expeditiously manage its docket . . ." (Supp. ER 13:22-23). As explained by the district court, the Geluzes' "failure to file oppositions in a timely manner or to file complaints that have complied with the Court's prior orders has led to the Court having to entertain repeated requests for either extensions of time, to set aside orders it has entered in the case, or to entertain motions to dismiss for failure to prosecute, all of which has further delayed resolution of this case." (Supp. ER 12:17-22).

"It is incumbent upon [this Court] to preserve the district courts' power to manage their dockets without being subject to the endless vexatious noncompliance of litigants like" Plaintiffs here. Ferdik, 963 F.2d at 1261. Therefore, this factor, too, strongly supports dismissal.

3. Plaintiffs' Disobedience and Frivolous Explanations Prejudiced Defendants.

"To prove prejudice, a defendant must establish that plaintiff's actions impaired defendant's ability to proceed to trial or threatened to interfere with the rightful decision of the case." Pagtalunan, 291 F.3d at 642.

The district court specifically determined that Plaintiffs' failure to follow court rules and orders prejudiced defendants. (Supp. ER 13:23). In particular, the district court found that Plaintiffs' repeated failure to serve Defendants with papers filed in court precluded Defendants from timely responding to Plaintiffs' submissions:

> plaintiffs' repeated failure to serve on defendants pleadings . . . they have filed in this case has impaired the defendants' ability to respond to the documents plaintiffs have filed with the Court. The most notable example being the Court's May 15 Order denying defendants' motion to dismiss. That order was predicated upon plaintiffs' representation that there existed a gentleman's agreement amongst the parties allowing extensions of time to file pleadings. Plaintiffs' opposition to that motion was served so late on defendants that by the time they received it the Court had already ruled on the motion. If the opposition had been not only filed, but served, promptly as is called for in the Court's Standing Order and the local rules, defendants would have convinced the Court that no such agreement existed thereby leading to the Court granting defendants' motion to dismiss.

(Supp. ER 13:1-12).

Plaintiffs' failure to timely waive oral argument or submit oppositions also prejudiced Defendants, as they made unnecessary trips to Court for hearings that did not occur. (See, e.g., Supp. ER 2). Thus, Plaintiffs' conduct prejudiced Defendants by driving up litigation costs for no justifiable reason, and by manipulating the district court into issuing rulings that it would not have rendered if Plaintiffs had complied with the rules. Had the Geluzes continued to prosecute the case without serving papers and without adhering to the district court's orders or the rules governing all litigants, they would have continued to interfere with the defendants' ability to prepare for trial, and the rightful decision of the case.

Moreover, in considering the prejudice factor, this Court may "place particular reliance on the district court's determination that [plaintiff's] excuse for [his or] her conduct was groundless. Whether prejudice is sufficient to support an order of dismissal is in part judged with reference to the strength of the plaintiff's excuse for the default." Malone, 833 F.2d at 131. This Court has also upheld dismissal pursuant to Rule 41(b) when the plaintiffs made false statements to the district court in an attempt to explain their failure to prosecute. See Pearson v. Dennison, 353 F.2d 24, 29 (9th Cir. 1965).

Here, the district court expressly found the Geluzes' explanations for their conduct to be "absurd," "mystifying" and "not credible" (Supp. ER 10:22; 13:13, 13:21-22) ("Moreover, the implausibility of plaintiffs' excuse for failing to

comply with both Rule 5's requirements [and the Court's Standing Order and the local rules] also bolsters the finding of prejudice in this case.") (Supp ER. 13:15-19).

The district court rejected the Geluzes' explanation of a "gentleman's agreement" to refrain from objecting to late-filed documents. The court also did not accept the Geluzes' ironic attempt to justify their failure to serve papers based on defense counsel's express, written demand for proper service (Supp. ER 10:24).

Plaintiffs' conduct not only prejudiced Defendants, but also was inexcusable based on Plaintiffs' utterly implausible excuses. This factor therefore strongly supports dismissal. But even without a specific showing of prejudice, when a litigant "continues to disregard deadlines, warnings, and schedules set by the district court, [this Court] cannot find that a lack of prejudice to defendants is determinative" in supporting dismissal. Henderson v. Duncan, 779 F.2d 1421, 1425 (9th Cir. 1986).

4. The Public Policy Favoring Disposition of Cases on Their Merits.

While public policy favors disposition of cases on their merits, that factor does not preclude dismissal of this action. First, as explained, the remaining factors strongly support dismissal. Second, this factor does not weigh heavily against the district court's decision.

Defendants' 12(b)(6) Motion offered substantive defenses to each of the Geluzes' claims for relief. Although they initially failed to respond, the Geluzes eventually filed their opposition with a request to set aside the order granting the 12(b)(6). The district court considered the substance of the Geluzes' untimely opposition and found it inadequate to overcome the defects in the First Amended Complaint. (Supp. ER 71,79).

Any "plaintiff has the right simply to allow the complaint to be dismissed" by choosing not to amend. Yourish, 191 F. 3d at 987 n. 4. But the Geluzes obstinately filed and then re-filed a Second Amended Complaint. They included claims, defendants and a plaintiff that the district court already had determined should be dismissed. Since the district court had already decided those claims and dismissed most of them with prejudice, Plaintiffs' claims were determined on the merits.

Plaintiffs Hernandez and Marilyn Geluz had only to file a short and plain statement of their purported employment discrimination claims. When they failed to amend in the time provided by the March 15 order, the district court granted an extension until May 30. (Supp. ER 70). In doing so, the court explained: "complying with the Rule 8 requirement for a short and plain statement of their claims – which is all the March 12 Order was predicated upon – was not a particularly onerous burden for the pro se litigants to meet in the time allotted in

the March 12 Order." (Id.) However, the court warned Plaintiffs: "no further extensions will be granted absent extraordinary circumstances. Plaintiffs are warned that failure to file the second amended complaint within the time specified may result in dismissal of the case." (Id.) And: "Any further pleading submitted in this case by Antonio Geluz shall be immediately stricken." (Id.)

Evidently, Plaintiffs could not amend their complaint to state a viable claim for relief. Plaintiffs submitted a Second Amended Complaint that included Antonio Geluz on the caption and signature line. (Supp. ER 12:11-14). It was rejected by the court. (Id.) Plaintiffs came back two weeks later with a Second Amended Complaint that removed Antonio Geluz from the caption, but still asserted claims on his behalf. (Supp. ER 12:9-11). Moreover, the Second Amended Complaint re-alleged the dismissed claims against the dismissed individual defendants, added another co-worker as plaintiff (Supp. ER 56:14-21), and, added as defendants another co-worker, the US. Equal Employment Opportunity Commission, and its District Director (Supp. ER 57:14-16).

Most of the lawsuit was dismissed on the merits before the Court disposed of the rest of it via its Rule 41(b) Order. Plaintiffs were unwilling to submit a narrowly drafted, compliant amended complaint for resolution on the merits. "A complaint which fails to comply with rules 8(a) and 8(e) may be dismissed with prejudice pursuant to rule 41(b)." Nevijel v. North Coast Life Ins. Co., 651 F.2d

671, 673 (9th Cir. 1981) Therefore, this factor does not preclude or even militate against dismissal.

5. The District Court Made Express Findings that Less Drastic Remedies Failed to Correct Plaintiffs' Disobedience.

The district judge specifically determined that he had exhausted his options for controlling the Plaintiffs below. "Given the litigation history in this case, the Court finds that no lesser sanctions (be it monetary, a further warning, or the preclusion of claims) are available for the simple fact that the Court has utilized such alternative sanctions in this case before arriving at this point." (Supp. ER 13:27-14:2).

The district court warned Plaintiffs in its May 15 Order that failure to file an amended complaint by May 30 could result in dismissal of the case (Supp. ER 71). The court also told Plaintiffs it would strike any complaint that included Antonio Geluz. When Plaintiffs filed a non-compliant Second Amended Complaint on May 16, the district court struck it (Supp. ER 9:5-7). Thus, the district court imposed lesser sanctions before dismissing the case.

The district court, mindful of the Geluzes' status as in pro per, gave them the benefit of the doubt at every turn. "Nonetheless, plaintiffs remain undeterred and proceeded to file yet another Second Amended Complaint that did not comply with the May 15 order or with the March 12 Order. Plaintiffs have been repeatedly given the chance to bring themselves into conformity with the Court's order and

rules of procedure and despite this opportunity have persisted in their contemptuous behavior." (Supp. ER 14:14-18).

"[P]roviding plaintiff with a second or third chance following a procedural default is a 'lenient sanction,' which, when met with further default, may justify imposition of the ultimate sanction of dismissal with prejudice." Malone, 833 F.2d at 132 (quoting Callip v. Harris County Child Welfare Department, 757 F.2d 1513, 1521 (5th Cir. 1985)). Plaintiffs had at least three chances to amend their complaint.

F. THE DISTRICT COURT ADEQUATELY CONSIDERED PLAINTIFFS' IN PRO PER STATUS

The district court expressly recognized Plaintiffs' status as in pro per throughout its Rule 41(b) Order. The court carefully considered their status in reaching its conclusion that dismissal was warranted. This Court will uphold dismissals of actions filed by plaintiffs in pro per where, as here, there is a repeated violation of orders and rules, particularly where, as here, the plaintiff fails to provide sufficient excuses for their failure. See Pagtalunan, 291 F.3d at 643 (upholding dismissal of pro per plaintiff's case where plaintiff did not adequately explain disobedience of filing deadline); Ferdik, 963 F.2d 1258 (upholding dismissal of pro per plaintiff's case where plaintiff failed to correct pleading after warning by district court).

G. THE DISTRICT COURT PROPERLY RULED ANTONIO GELUZ LACKED STANDING

The Geluzes appear to argue that the district court erred by dismissing the action against Antonio Geluz and excluding his participation. The Geluzes do not appeal the district court's Rule 12(b) Order, as they do not attach the Order, nor do they refer to it in the Notice of Appeal.

Assuming arguendo Geluz appealed the Rule 12(b) Order, his only argument in the opening brief is that the district court improperly dismissed Antonio Geluz. This Court reviews that decision de novo. Werft v. Desert Southwest Annual Conf., 377 F.3d 1099, 1100 (9th Cir. 2004) (affirming dismissal of Title VII discrimination claim where "ministerial exception" barred claim as a matter of law).

There is no authority for Antonio Geluz's claim of standing. Only an employer can be liable for employment discrimination. 42 U.S.C. § 2000e-3(a) ("It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment. . ." (emphasis added).) Thus, "because Title VII prohibits employers from discriminating against their employees, however. . . [spouses] who were not employees of [the defendant] have no standing to assert a claim for discrimination under Title VII." Mauldin v. Wal-Mart Stores, Inc., 89 FEP Cases 1600, 1612-1613 2002 U.S. Dist. LEXIS 21024, 2002 WL 2022334(N.D. Ga. 2002) (citing Nicol v. Imagematrix, Inc. 773

F. Supp. 802, 806 (E.D. Va. 1991) for the premise that third parties do not have standing to bring Title VII actions, even when beneficiaries of employee health plans.)

To THC's knowledge, no court has found a right to bring a discrimination action against a plaintiff's spouse's employer where the plaintiff was not employed by the defendant. See Flamand v. American Int'l Group, 876 F. Supp. 356, 372 (D.P.R. 1994) (applying ADEA and local anti-discrimination law); Asklar v. Honeywell, Inc., 29 FEP Cases 1596, 1599 (D. Conn. 1982)(ADEA).

The cases the Geluzes cite do not allow a non-employee to sue the employer of a relative for discrimination or contract claims. The district court in E.E.O.C. v. Nalbandian Sales, Inc., 36 F.Supp.2d 1206, 1211 (N.D.Cal. 1998) considered whether a former employee, and applicant for re-employment, could base a retaliation claim on his co-employee sister's protected activity. Antonio Geluz does not allege that he ever applied for or was employed by any defendant.

Neither does the other case the Geluzes cite, United Teachers – Los Angeles v. Board of Education, 1982 U.S. Dist. LEXIS 13140, 31 Fair Empl. Prac. Cas. (BNA) 943 (C.D. Cal. 1982), stand for the proposition the Geluzes attempt to advance. The court there held that an employer's policy of providing full coverage for health care costs related to pregnancy for female employees, but not male

employees whose dependent spouses gave birth, was discriminatory. The employees, not the spouses, brought the claim for relief.

In sum, Antonio Geluz was properly dismissed from the case via the Rule 12(b) Motion. Even if Antonio Geluz's arguments were correct, the district court's Rule 41(b) decision should be affirmed. Antonio Geluz was not privileged to disobey the district court's orders merely because he disagreed with them. And the district court's disposition of the Rule 12(b) Motion did not excuse Geluz's failure to serve Defendants' attorneys. Therefore, regardless of Antonio Geluz's standing, this Court should affirm the judgment.

H. THE GELUZES' REMAINING ARGUMENTS LACK MERIT

The Geluzes argue that Local Rule 7-12, which considers non-opposition to a motion consent to granting it, is unconstitutional. This Court previously upheld essentially the same local rule in Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995) (noting "Although we construe pleadings liberally in their favor, pro se litigants are bound by the rules of procedure."). In any event, the district court did consider the Geluzes' arguments against the 12(b)(6) motion, but found them unconvincing (Supp. ER 71, 79). Therefore, the Geluzes' argument is moot.

The Geluzes' reliance on Semtek, Inc. v. Lockheed-Martin Corp., 531 U.S. 497 (2001), is misplaced. Semtek did not change the standards applicable to Rule 41(b). Rather, Semtek held that a federal court, sitting in diversity jurisdiction,

holding that a California statute of limitations had run, did not preclude a Maryland court from hearing the same claim under a Maryland statute of limitations. See id. at 500. The Supreme Court merely held that the meaning of "adjudication on the merits" in Rule 41 means the case may not be heard again in the same court. Id. at 505. Because the federal courts apply state procedural law in diversity cases, Rule 41 could not operate to change the interpretation of Maryland's statute of limitations. See id. at 503-04.

Here, the district court was not sitting in diversity jurisdiction and the court was not obligated to apply state procedural law. The Geluzes asserted their principal claims under federal law. In addition, their claims were not dismissed under any statute of limitations. Semtek has no application here.

VIII. CONCLUSION

For the foregoing reasons, Appellee THC-Orange County, Inc. respectfully requests that this Court affirm the judgment.

Dated: April 23, 2008

Respectfully submitted,

SHAW VALENZA LLP

By: _____

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached answering brief is proportionately spaced, has a typeface of 14 points or more and contains 7166 words as measured by the word processing program used to prepare the brief.

Dated: April 23, 2008

Respectfully submitted,

SHAW VALENZA LLP

By: _____
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Kindred Hospital Ontario

CERTIFICATE OF SERVICE

United States Court of Appeals
For the Ninth Circuit

I, Carolyn Angel, certify that I am employed with the law firm of Shaw Valenza LLP, whose address is 300 Montgomery Street, Ste. 788, San Francisco, California 94104; I am over the age of eighteen (18) years and am not a party to this action. On April 23, 2008, I caused the attached: APPELLEE'S OPENING BRIEF to be delivered to the below addresses within 24 hours by overnight delivery service via OnTrac Delivery.

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I declare under penalty of perjury under the laws of the United State of America that the above is true and correct; executed on April 23, 2008, at San Francisco, California.

Carolyn Angel

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Volume 1

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