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9 *Attorneys for Plaintiff*

10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
12 SAN JOSE DIVISION

13 CHRIS WERDEBAUGH, individually and on
14 behalf of all others similarly situated,

15 Plaintiff,

16 v.

17 BLUE DIAMOND GROWERS,

18 Defendant.

Case No. 5:12-CV-02724 LHK

**NOTICE OF MOTION AND MOTION;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR VOLUNTARY
DISMISSAL OF ACTION**

Hearing Date: May 14, 2015

Time: 1:30 PM

Judge: Hon. Lucy H. Koh

21 **TO DEFENDANT AND ITS ATTORNEY OF RECORD:**

22 **PLEASE TAKE NOTICE THAT** on May 14, 2015 at 1:30 PM, or as soon thereafter as
23 the parties may be heard, in Courtroom 8 on the 4th floor of the United States District Court,
24 Northern District of California, San Jose Division, located at 280 South 1st Street, San Jose,
25 California, before the Honorable Lucy H. Koh, Plaintiff Chris Werdebaugh (“Plaintiff”) will, and
26 hereby does, move for voluntary dismissal of this case with prejudice pursuant to Fed. R. Civ. P.
27 41(a)(2).
28

MEMORANDUM OF POINTS AND AUTHORITIES

1
2 Plaintiff Chris Werdebaugh (“Plaintiff”) hereby files his Motion for Voluntary Dismissal
3 pursuant to Federal Rule of Civil Procedure 41(a)(2). As grounds, Plaintiff states as follows:

I. FACTUAL STATEMENT

4
5 This action was filed on May 29, 2012. (Dkt. 1) Since that time, the parties have been
6 litigating the claims presented in this case according to the Court’s scheduling orders. On May 23,
7 2014, this Court certified this matter as a class action under Rule 23(b)(3). (Dkt. 131) On
8 October 30, 2014, Defendant filed its Motion for Decertification of the 23(b)(3) class. (Dkt. 166)
9 On December 15, 2014, the Court decertified the Rule 23(b)(3) class. (Dkt. 190) On October
10 30, 2014, Defendant filed its Motion for Summary Judgment (Dkt. 166). Plaintiff filed his
11 Opposition to Motion for Summary Judgment on December 8, 2014 (Dkt. 187), and Defendant
12 filed its Reply on January 12, 2015 (Dkt. 196).

13
14 On January 27, 2015, counsel for Plaintiff, Pierce Gore, emailed counsel for Defendant,
15 Larry Cirelli, and offered to stipulate to voluntarily dismiss this case with prejudice, with the
16 parties to bear their own fees and costs. (*See* Declaration of Pierce Gore, attached as Exhibit A)
17 On January 28, 2015, Plaintiff had not yet received an email from Defendant, and subsequently,
18 Plaintiff prepared a motion for voluntary dismissal of this action with prejudice, and reserved a
19 hearing date on May 14, 2015. *Id.*

20
21 On January 29, 2015, defense counsel notified Plaintiff’s counsel via email that he
22 received the notice of hearing date reservation and intended to “review your motion when it is
23 filed.” *Id.* On January 29, 2015, Plaintiff’s counsel again contacted defense counsel, offering to
24 stipulate to a dismissal of this action with prejudice. *Id.* As of the filing of Plaintiff’s Motion,
25 Plaintiff’s counsel has received no further response from defense counsel. *Id.* Accordingly,
26
27
28

1 Plaintiff now moves for voluntary dismissal of his case with prejudice pursuant to Federal Rule of
2 Civil Procedure 41(a)(2).

3 4 **II. ARGUMENT**

5 **A. Standard for Voluntary Dismissal**

6 Federal Rule of Civil Procedure 41(a)(2) provides that "an action may be dismissed at the
7 plaintiff's request only by court order, on terms that the court considers proper." *See* Fed. R. Civ.
8 P. 41(a)(2). Unless the order of dismissal provides otherwise, a dismissal pursuant to Rule
9 41(a)(2) is without prejudice. *Id.* District courts are granted discretion to dismiss claims with or
10 without prejudice. *See Diamond State Ins. Co. v. Genesis Ins. Co.*, 379 F. App'x 671, 673 (9th
11 Cir. 2010); *Romoland Sch. Dist. v. Inland Empire Energy Ctr. LLC*, 548 F.3d 738, 747-51 (9th
12 Cir. 2008); *Smith v. Lenches*, 263 F.3d 972, 974 (9th Cir. 2001).

13 A motion for voluntary dismissal under Rule 41(a)(2) is addressed to the district court's
14 sound discretion. *Stevedoring Services of America v Armilla Intl BV*, 889 F.2d 919, 921 (9th Cir
15 1989). "A district court should grant a motion for voluntary dismissal under Rule 41(a)(2) unless
16 a defendant can show that it will suffer some plain legal prejudice as a result." *Smith v. Lenches*,
17 263 F.3d 972, 975 (9th Cir. 2001). "Plain legal prejudice may be shown where actual legal rights
18 are threatened or where monetary or other burdens appear to be extreme or unreasonable."
19 *Watson v Clark*, 716 F. Supp. 1354, 1356 (D. Nev. 1989), *aff'd*, 909 F.2d 1490 (9th Cir 1990),
20 *United States v. Two Parcels of Real Prop. Located in Mendocino County*, 2001 U.S. Dist.
21 LEXIS 16082, 3-4 (N.D. Cal. Sept. 27, 2001)

22 Under the standard for Rule 41 dismissal set forth in the Rule and cases applying the
23 Rule, Plaintiff is entitled to dismissal of this case with prejudice.

24 **B. Dismissal With Prejudice is Proper**

25 **1. Defendant Will Not Be Prejudiced if the Court Dismisses Plaintiff's 26 Case with Prejudice**

27 The Ninth Circuit has concluded that "legal prejudice is just that-prejudice to some legal
28 interest, some legal claim, some legal argument." *Westlands Water Dist. v. United States*, 100

1 F.3d 94, 97 (9th Cir. 1996). Plain legal prejudice does not result simply because a suit remains
2 unresolved, the defendant faces the prospect of a second lawsuit, or the plaintiff stands to gain
3 some tactical advantage. *Id.* In addition, the Ninth Circuit has specified that neither the fact that a
4 defendant has incurred substantial expense, nor the fact that a defendant has begun trial
5 preparations establishes legal prejudice warranting the denial of a motion under Rule 41(a)(2).
6 *Hamilton v. Firestone Tire & Rubber Co.*, 679 F.2d 143, 145 (9th Cir. 1982). *See also In re*
7 *Lowenschuss*, 67 F.3d 1394, 1400-01 (9th Cir. 1995) ("[T]he inconvenience of defending another
8 lawsuit or the fact that the defendant has already begun trial preparations does not constitute
9 prejudice."); *Hyde & Drath v. Baker*, 24 F.3d 1162, 1169 (9th Cir. 1994); *Hamilton*, 679 F.2d at
10 146 ("Appellant's contention that appellee should have been estopped from requesting a voluntary
11 dismissal, because appellant was put to significant expense in preparing and filing its pleadings, is
12 without merit."); *Am. Nat'l Bank & Trust Co. of Sapulpa v. Bic Corp.*, 931 F.2d 1411, 1412 (10th
13 Cir. 1991) ("The possibility that plaintiffs may gain a tactical advantage by refileing in state court
14 is insufficient to deny a voluntary motion to dismiss without prejudice especially when state law
15 is involved.") (cited by the Ninth Circuit in *Westlands*, 100 F.3d at 97.)

16
17
18 The standard to establish legal prejudice is stringent. Defendant cannot meet the standard
19 in this case. The 23(b)(3) class has been decertified and Defendant refuses to attend a settlement
20 negotiation; the settlement discussion has reached an impasse and Plaintiff no longer desires to
21 pursue the action . Although discovery has occurred and both parties have incurred necessary
22 litigation expense, Plaintiff has not begun trial preparation.

23
24 **2. Plaintiff Requests Voluntary Dismissal of His Case With Prejudice so**
25 **Attorneys' Fees and Costs Should Not Be Awarded to Defendant**

26 Defendant will argue that its litigation expenditures constitute legal prejudice if this case
27 is dismissed with prejudice and that it should be entitled to fees and costs. However, applicable
28

1 law in the Ninth Circuit undercuts nearly all arguments that may be asserted in opposition to
2 Plaintiff's motion to dismiss with prejudice.

3 "As other federal courts in California have concluded, however, the analysis of whether to
4 award fees and costs as a condition of dismissal is different when the voluntary dismissal is *with*
5 prejudice." *Mull v. Motion Picture Indus. Health Plan*, 2013 U.S. Dist. LEXIS 188943 (C.D.
6 Cal. July 29, 2013).

8 "Although courts often award defendants costs and attorney
9 fees when granting a plaintiff's motion to dismiss *without*
10 prejudice under 41(a)(2), such an award is improper when the
11 dismissal is *with* prejudice." *United States v. Two Parcels*,
12 2001 U.S. Dist. LEXIS 16082, 2001 WL 1180698, *4-*5
13 (N.D. Cal. Sept. 27, 2001). * * * As courts have explained,
14 attorneys fees are unjustified in such cases because there is no
15 risk of Plaintiff refiling the same suit and imposing
16 duplicative expenses upon Defendant. *Id.*

17 If the Court decides to impose conditions, including the
18 payment of attorneys fees and costs, the Ninth Circuit has
19 construed the language of Rule 41(a)(2) to effectively provide
20 the plaintiff with a safe-harbor [sic, inappropriate hyphen in
21 original]. Specifically, a court granting a motion of voluntary
22 dismissal with conditions must give the plaintiff "a reasonable
23 period of time within which [either] to refuse the conditional
24 voluntary dismissal by withdrawing [the] motion for dismissal
25 or to accept the dismissal despite the imposition of
26 conditions." *Beard v. Sheet Metal Workers Union*, 908 F.2d
27 474, 476 (9th Cir. 1990). *See also Lau v. Glendora Unified*
28 *School Dist.*, 792 F.2d 929, 931 (9th Cir. 1986).

21 *Id.* citing *Addventure Prods., Inc. v. SmoothReads, Inc.*, 2009 U.S. Dist. LEXIS 94060, 2009 WL
22 3248097, *2 (S.D. Cal. Oct. 8, 2009) (Michael Anello, J.). *See also Co-Investor, AG v. Fonjax,*
23 *Inc.*, 2010 U.S. Dist. LEXIS 42492, 2010 WL 1292767, *3 (N.D. Cal. Mar. 31, 2010) (Saundra
24 Brown Armstrong, J.) ("Since the . . . cause of action has been dismissed with prejudice, costs and
25 attorneys fees cannot be awarded to Defendants because there is no future risk of litigation [on the
26 dismissed claims].") (quoting *Burnette*, 828 F. Supp. at 1443); *Gonzalez v. Proctor & Gamble*
27 *Co.*, 2008 U.S. Dist. LEXIS 16872, 2008 WL 612746, *3 (S.D. Cal. Mar. 4, 2008) (Hayes, J.) ("A

1 plaintiff faced with the imposition of attorneys fees and costs as a condition of voluntary
2 dismissal may request that the action be dismissed *with* prejudice to avoid payment.") (emphasis
3 added); *Rodriguez v. Service Employees Int'l*, 2011 U.S. Dist. LEXIS 117793, 2011 WL 4831201,
4 *3 (N.D. Cal. Oct. 12, 2011) (Spero, M.J.) (determining that there were no exceptional
5 circumstances justifying the award of fees and costs as a condition for court order granting
6 plaintiff's Rule 41(a)(2) motion for voluntary dismissal *with* prejudice); *Chang v. Pomeroy*, 2011
7 U.S. Dist. LEXIS 13806, 2011 WL 618192 (*E.D. Cal.* Feb. 10, 2011) (Drozd, M.J.) (declining to
8 require fees and costs as condition of 41(a)(2) order granting plaintiff's motion to voluntarily
9 dismiss complaint *with* prejudice); *cf. Steinert v. Winn Group, Inc.*, 440 F.3d 1214, 1222 (10th
10 Cir. 2006) ("If the dismissal is with prejudice, attorneys fees may be imposed under Rule 41(a)(2)
11 only in 'exceptional circumstances.'").
12

13
14 **C. Plaintiff Acted In Good Faith and an Award of Attorneys Fees under the**
15 **CLRA is Not Warranted**

16 Because Rule 41(a)(2) does not provide an independent basis for an award of attorney fees
17 and costs, the Court is likely to examine Defendant's request for attorney fees under the CLRA
18 standard. Under the CLRA, a trial court may award reasonable attorneys' fees "to a prevailing
19 defendant upon a finding by the court that the plaintiff's prosecution of the action was not in good
20 faith." Cal. Civ. Code § 1780(e). "Courts have uniformly constructed this language as requiring a
21 subjective test." *Corbett v. Hayward Dodge, Inc.*, 119 Cal. App. 4th 915, 924, 14 Cal. Rptr. 3d
22 741 (2004). "[G]ood faith, or its absence, involves a factual inquiry into the plaintiff's subjective
23 state of mind." *Id.* at 923. Thus, the CLRA fee-shifting "statutory provision requires the trial court
24 to find that the plaintiff proceeded in subjective bad faith before it may award fees to a prevailing
25 defendant." *Shisler v. Sanfer Sports Cars, Inc.*, 167 Cal. App. 4th 1, 9, 83 Cal. Rptr. 3d 771
26 (2008)). The party moving for attorneys' fees has the burden of proving that the plaintiff
27 proceeded in subjective bad faith. *Corbett*, 119 Cal. App. 4th at 926.

28 Plaintiff's subjective good faith is demonstrated by the record of his case. Plaintiff Chris

1 Werdebaugh fulfilled all of his duties as a potential class representative. He reviewed drafts of
2 pleadings, stayed up-to-date on all of the proceedings, communicated with counsel throughout
3 this litigation, prepared written discovery responses, served his own written discovery upon
4 Defendant, preserved and produced documents requested by Defendant in discovery and appeared
5 for a deposition by counsel for Defendant.

6 Moreover, Plaintiff has pursued meritorious claims, as demonstrated by this Court's Order
7 following Plaintiff's Motion for Class Certification (Dkt. 131) and the Order Denying in Part and
8 Granting in Part Defendant's Motion to Dismiss (Dkt. 65). In its Order on the Motion for
9 Decertification, the 23(b)(3) damages class is not allowed to proceed, however, the Court will
10 allow Plaintiff's claims based upon the UCL, FAL, and CLRA to proceed. An implicit corollary
11 to those finding are that Plaintiff's claims were brought in good faith and are not frivolous. Based
12 on these facts, Plaintiff submits that his claims were not frivolous and were pursued in good faith.

13 **1. Defendant Is Not The Prevailing Party for Purposes Of The CLRA**

14 The CLRA does not define the term "prevailing party." *See* Cal. Civ. Code § 1750 *et seq.*
15 However, "[c]ourts construing statutes that contain attorney fees provisions that do not define the
16 term 'prevailing party' . . . have adopted [a] practical approach to determine the recoverability of
17 attorney fees in pretrial voluntary dismissal cases." *Castro v. The Superior Court of Los Angeles*
18 *County*, 116 Cal. App. 4th 1010, 1020 (Cal. App. 2004) (applying a pragmatic approach to
19 determine prevailing party status under California Code of Civil Procedure section 405.38,
20 relying on courts adopting the same approach under California Code of Civil Procedure sections
21 1942.4, 1354, 3344). Under this approach, "the court exercises its discretion to determine the
22 prevailing party by analyzing which party realized its litigation objectives." *Id.* at 1019; *see also*
23 *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983) ("plaintiffs may
24 be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant
25 issue in litigation which achieves some of the benefit the parties sought in bringing suit" (internal
26 quotations and citation omitted)). In assessing litigation success, "courts should respect substance
27 rather than form, and to this extent should be guided by 'equitable considerations.'" *Hsu v.*
28 *Abbara*, 9 Cal. 4th 863, 877, 39 Cal. Rptr. 2d 824, 891 P.2d 804 (1995)).

1 Applying these standards, Defendant cannot establish itself as the prevailing party in this
2 case. Even after the Court's Order to Decertify the 23(b)(3) damages class, Plaintiff's core claims
3 pursuant to the UCL, FAL, and CLRA are allowed to go forward. Thus, Defendant was not the
4 "prevailing party" after the damages class was decertified. Had Plaintiff chosen to do so, he
5 could have continued to trial on his claims under the UCL, FAL, and CLRA.

6 Because Plaintiff acted in subjective good faith in bringing his claims and Defendant is
7 not the prevailing party for purposes of the CLRA, attorney fees should not be awarded in this
8 case.

9 **III. CONCLUSION**

10 Wherefore, premises considered, Plaintiff moves the Court to dismiss his claims against
11 Defendant with prejudice pursuant to Fed. R. Civ. P. 41(a)(2).

12 Dated: January 29, 2015.

13
14 Respectfully submitted,

15 /s/ Dewitt M. Lovelace
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23 *Attorney for Plaintiff*

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25 **PROOF OF SERVICE**

26 I further certify that this document filed through the ECF system will be sent
27 electronically to the registered participants as identified on the Notice of Electronic Filing (NEF)
28 on January 29, 2015.

/s/ Dewitt M. Lovelace

Dewitt M. Lovelace

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7 IN THE UNITED STATES DISTRICT COURT
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10 CHRIS WERDEBAUGH, individually and on
11 behalf of all others similarly situated,

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14 BLUE DIAMOND GROWERS,

15 Defendant.

Case No. CV 12-02724 LHK

**DECLARATION OF PIERCE GORE
IN SUPPORT OF PLAINTIFF’S
MOTION FOR VOLUNTARY
DISMISSAL OF ACTION WITH
PREJUDICE**

16
17 I, Pierce Gore, declare as follows:

18 1. I am co-counsel to Plaintiff Chris Werdebaugh. I submit this declaration in support
19 of Plaintiff’s Motion for Voluntary Dismissal of Action with Prejudice. I have personal knowledge
20 of the facts stated herein, and if sworn as a witness, could and would testify competently to the truth
21 thereof.

22 2. On January 27, 2015, I emailed Defendant’s counsel, offering to stipulate to
23 Plaintiff’s voluntary dismissal of this action, with the parties to bear their own fees and costs.

24 3. On January 28, 2015, having received no response to my email to Defendant’s
25 counsel, Plaintiff’s counsel prepared a motion for voluntary dismissal of this action with prejudice,
26 and reserved a hearing date on May 14, 2015.
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Attorneys for Plaintiff

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**[PROPOSED] ORDER GRANTING
PLAINTIFF'S MOTION FOR
VOLUNTARY DISMISSAL**

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PROOF OF SERVICE

I further certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) on January 29, 2015.

/s/ Dewitt M. Lovelace

Dewitt M. Lovelace