HASSAN A. ZAVAREEI (CA 181547)
JEFFREY KALIEL (CA 238293)
SOPHIA GOREN (CA 307971)
TYCKO & ZAVAREEI LLP
1828 L Street, NW, Suite 1000
Washington, DC 20036
(202) 973-0900
(202) 973-0950 (FAX)
jkaliel@tzlegal.com
hzavareei@tzlegal.com
sgoren@tzlegal.com

STUART E. SCOTT (0064834) (pro hac vice)
DANIEL FRECH (0082737) (pro hac vice)
SPANGENBERG SHIBLEY & LIBER LLP
1001 Lakeside Avenue East, Suite 1700
Cleveland, OH 44114
(216) 696-3232
(216) 696-3924 (FAX)
sscott@spanglaw.com
dfrech@spanglaw.com

Counsel for Plaintiff and the Putative Class

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DAVID M. LUCAS, On Behalf of Himself and Those Similarly Situated Plaintiff, vs. JOS. A. BANK CLOTHIERS, INC., Defendant.	Case No. 14-cv-01631-LAB-JLB **PLAINTIFF'S NOTICE OF MOTION AND MOTION TO VOLUNTARILY DISMISS WITH PREJUDICE** Date: August 15, 2016 Time: 11:30am Courtroom: 14A Judge: Hon. Larry Alan Burns Action Filed: July 9, 2014

NOTICE OF MOTION AND MOTION

TO DEFENDANT AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT on August 15, 2016, at 11:30 a.m., in Courtroom 14A of the above-entitled Court, located at 221 West Broadway, San

Diego, California, 92101, before the Honorable Larry Alan Burns, Plaintiff will, and hereby does, respectfully move the Court, pursuant to Federal Rules of Civil Procedure 41(a)(2), to voluntarily dismiss Plaintiff David Lucas's pending claims against Defendant with prejudice.

This motion is based on this notice of motion and motion; Plaintiff's supporting memorandum; the pleadings, records, and papers on file in this action; and all other matters properly before this Court.

Plaintiff met-and-conferred with Defendant's Counsel regarding this motion. Defendant opposes this motion.

Dated: July 14, 2016

Respectfully submitted,

/s/ Hassan A. Zavareei
HASSAN A. ZAVAREEI (CA 181547)
JEFFREY KALIEL (CA 238293)
SOPHIA GOREN (CA 307971)
TYCKO & ZAVAREEI LLP
1828 L Street, NW, Suite 1000
Washington, DC 20036
(202) 973-0900
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SPANGENBERG SHIBLEY & LIBER LLP
1001 Lakeside Avenue East, Suite 1700
Cleveland, OH 44114
(216) 696-3232
(216) 696-3924 (FAX)
sscott@spanglaw.com
dfrech@spanglaw.com

Counsel for Plaintiff and the Putative Class

CERTIFICATE OF SERVICE

I, Hassan Zavareei, on this 14th day of July 2016, hereby certify that foregoing document was filed via the Court's CM ECF system, thereby causing a true and correct copy to be sent to all ECF-registered counsel of record.

s/ Hassan Zavareei
HASSAN A. ZAVAREEI (CA 181547)
JEFFREY KALIEL (CA 238293)
TYCKO & ZAVAREEI LLP
1828 L Street, NW, Suite 1000
Washington, DC 20036
Telephone: (202) 973-0900
Facsimile: (202) 973-0950
jkaliel@tzlegal.com
hzavareei@tzlegal.com

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Washington, DC 20036
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DANIEL FRECH (0082737) (pro hac vice)
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Cleveland, OH 44114
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dfrech@spanglaw.com

Counsel for Plaintiff and the Putative Class

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DAVID M. LUCAS,
On Behalf of Himself and Those Similarly Situated

Plaintiff,

vs.

JOS. A. BANK CLOTHIERS, INC.,

Defendant.

Case No. 14-cv-01631-LAB-JLB

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION TO VOLUNTARILY DISMISS WITH PREJUDICE

Date: August 15, 2016
Time: 11:30am
Courtroom: 14A
Judge: Hon. Larry Alan Burns
Action Filed: July 9, 2014

I. Introduction and Factual Background

Pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure, plaintiff David Lucas moves this Court to dismiss his pending claims against Defendant Jos. A. Bank Clothiers, Inc. ("JAB") with prejudice.

Plaintiff filed this case on July 9, 2014. David Lucas was one of two named Plaintiffs who alleged that they purchased suits at Jos. A. Bank in reliance on a false "regular" price. The other Plaintiff, Eric Salerno, voluntarily removed himself from the litigation earlier this year, leaving Mr. Lucas as the sole named Plaintiff and class representative. Mr. Lucas responded to written interrogatories and was deposed—flying to California from Japan specifically for that purpose. His deposition was but one of a dozen depositions in this case.

During the pendency of this case, Defendant filed a Motion to Dismiss and a subsequent Motion for Summary Judgment that made no mention of the purported inadequacy of Mr. Lucas as a class representative but instead focused solely on class issues related to restitution/damages. Even in Defendant's Opposition to Plaintiff's Motion for Class Certification, Defendant alleged (in less than a page) that Mr. Lucas was inadequate to serve as a class representative merely because he should have returned his suits and mitigated his damages. ECF No. 79, at 25. Despite having exhaustive transaction data at its disposal, JAB never questioned the validity of Mr. Lucas's purchases. It was not until briefing filed in the last month that the Defendant for the first time attacked the veracity of Mr. Lucas's deposition testimony and the documentation he provided, which it now calls "fraudulent."

Counsel for Mr. Lucas now believes it is ethically required to withdraw from its representation of Mr. Lucas, but cannot ethically state the reasons for that withdrawal. Mr. Lucas has already withdrawn his Motion for Class Certification. Now, with the putative class removed from the litigation, Mr. Lucas moves to dismiss his individual claim, with prejudice, each party to bear their own costs.

Plaintiff's Counsel have expended thousands of hours and a great deal of money pursuing this case. Plaintiff himself has traveled halfway around the world. Neither Plaintiff nor his Counsel take the proposition of dismissing this case lightly. However, Plaintiff and Counsel believe it is the only appropriate course of action under the circumstances and ask this Court to grant Lucas's request to voluntarily dismiss his claims with prejudice.

II. Legal Standard

Under Rule 41(a)(2), an action may be dismissed at the plaintiff's request by court order. Fed. R. Civ. P. 41(a)(2). "A motion for voluntary dismissal pursuant to Federal Rule of Civil Procedure 41(a)(2) should be granted unless a defendant can show that it will suffer some plain legal prejudice as a result of the dismissal." *Chavez v. Northland Grp.*, No. CV-09-2521-PHX-LOA, 2011 WL 317482, at *3 (D. Ariz. Feb. 1, 2011) (citing *Smith v. Lenches*, 263 F.3d 972, 975 (9th Cir. 2001); *Stevedoring Servs. Of Am. v. Armilla Int'l B.V.*, 889 F.2d 919, 921 (9th Cir. 1989)). To establish legal prejudice, the defendant must show "prejudice to some legal interest, some legal claim, some legal argument." *Westlands Water Dist. v. U.S.*, 100 F.3d 94, 97 (9th Cir. 1996). "Uncertainty because a dispute remains unresolved is not legal prejudice." *Id.* Likewise, "legal prejudice does not result merely because the defendant will be inconvenienced by having to defend in another forum or where a plaintiff would gain a tactical advantage by that dismissal." *Tur v. YouTube, Inc.*, No. CV06-4436 FMC (AJWX), 2007 WL 4947615, at *3 (C.D. Cal. Oct. 19, 2007), *aff'd*, 323 F. App'x 532 (9th Cir. 2009). Further, "the expense incurred in defending against a lawsuit does not amount to legal prejudice." *Westlands Water*, 100 F.3d at 97.

Federal Rule of Civil Procedure Rule 23(e) requires the court to review and approve a proposed voluntary dismissal of a *certified* class' claims. Fed. R. Civ. P. 23(e). In analyzing a previous version of Rule 23—which did not contain the word "certified"—the Ninth Circuit held that Rule 23(e) applies, in lighter form, prior to class certification. *See Diaz v. Trust Territory of Pac. Islands*, 876 F.2d 1401, 1408

(9th Cir. 1989). Whether *Diaz* is still good law in light of Rule 23's amendments is uncertain. *See, e.g., Lyons v. Bank of America, NA*, No. C 11–1232 CW, 2012 W L 5940846, at *1 n.1 (N.D. Cal. Nov. 27, 2012); *Tombline v. Wells Fargo Bank, N.A.*, No. 13-CV-04567-JD, 2014 WL 5140048, at *2 (N.D. Cal. Oct. 10, 2014). Nonetheless, courts continue to evaluate voluntary dismissals on the assumption that *Diaz* does apply. *See id*. If *Diaz* applies, the court evaluates potential prejudice to the putative class from: "(1) 'possible reliance on the filing of the action if they are likely to know of it either because of publicity or other circumstances' (2) 'lack of adequate time for class members to file other actions, because of a rapidly approaching statute of limitations' (3) 'any settlement or concession of class interests made by the class representative or counsel in order to further their own interests.'" *Tombline*, 2014 WL 5140048, at *2 (quoting *Diaz*, 876 F.2d at 1408). "The central purpose of this inquiry is to 'determine whether the proposed settlement and dismissal are tainted by collusion or will prejudice absent putative members.'" *Id.*, quoting *Lyons*, 2012 W L 5940846, at * 1.

III. Argument

A. The Defendant Will Not Suffer Legal Prejudice From Dismissal

Mr. Lucas should be allowed to dismiss his case with prejudice as voluntary dismissal will always be granted unless a defendant can show it will suffer some plain legal prejudice. *Lenches*, 263 F.3d at 975. JAB will suffer no cognizable legal prejudice from dismissal of this action. The Ninth Circuit has already made clear the expense incurred in defending a lawsuit does not amount to legal prejudice. *Westlands Water*, 100 F.3d at 97. Likewise, a lost opportunity to resolve a dispute is not legal prejudice. *Veina v. Sutter Hotel Assocs.*, No. C 98–0980 SI, 1998 WL 822773, at *3 (N.D. Cal. Nov. 9, 1998). Moreover, the fact that Plaintiff requests dismissal with prejudice only strengthens the conclusion that the dismissal will not cause legal prejudice. *Lenches*, 263 F.3d at 976 ("That the district court here dismissed, with prejudice, the federal claims so they cannot be reasserted in another

federal suit only strengthens our conclusion that the dismissal caused no legal prejudice and was not an abuse of discretion.").

B. The Dismissal Is Not Tainted By Collusion and Will Not Prejudice Absent Putative Members

Assuming, arguendo, that *Diaz* applies despite the subsequent modification of Rule 23(e), the *Diaz* factors support dismissal of this action. The *Diaz* factors are: (1) potential class members' "possible reliance on the filing of the action if they are likely to know of it either because of publicity or other circumstances" (2) "lack of adequate time for class members to file other actions, because of a rapidly approaching statute of limitations" (3) "any settlement or concession of class interests made by the class representative or counsel in order to further their own interests." *Diaz*, 876 F.2d at 1408. Here, each factor supports dismissal.

In regards to the first factor, potential class members were unlikely to rely on the filing of this action because they likely were not aware of it. "The danger of reliance is . . . generally limited to actions that would be considered of sufficient public interest to warrant news coverage of either the public or trade-oriented variety [, and such reliance] can occur only on the part of those persons learning of the action who are sophisticated enough in the ways of the law to understand the significance of the class action allegation." *Mahan v. Trex Co.*, No. 5:09-CV-00670 JF PVT, 2010 WL 4916417, at *3 (N.D. Cal. Nov. 22, 2010). Here, there is no evidence putative class members have relied to their detriment on the existence of this action. This case has received very little (if any) publicity outside of a few articles published on www.Law360.com—a subscription-only news service available only to legal professionals. As such, this factor weighs towards granting dismissal.

Second, the statute of limitations is not rapidly approaching such that class members may lose their opportunity to file another case. The statute of limitations on UCL claims in California is four years. Additionally, the claims of putative class members in this case are tolled pursuant *Am. Pipe & Const. Co. v. Utah*, 414 U.S.

538, 561 (1974).

Finally, the last *Diaz* factor is intended to guard against collusion. The last factor counsels that dismissal is improper if used by the class representative or counsel in order to further their own interests. Here, neither Plaintiff nor Counsel seeks to dismiss the case for personal gain. The dismissal is not tainted by collusion as neither Plaintiff nor Counsel will receive any benefit from dismissal. Indeed, they will literally each receive nothing as no settlement is involved. As such, this factor also counsels towards dismissal of the action. *See Mahan*, 2010 WL 4916417, at *3. (granting dismissal when neither the plaintiffs nor counsel received compensation from the defendant in return for the dismissal of the claims at issue, and there was no evidence that the parties compromises class claims to the pecuniary advantage of plaintiffs or their attorneys).

C. Notice Is Not Required To The Putative Class

"Under the current version of Rule 23(d)(1), the Court may require notice of 'any step in the action' 'to protect class members and fairly conduct the action.'" *Mahan*, 2010 WL 4916417, at *3. Accordingly, courts only require notice under Rule 23(e) "if there is evidence of collusion or prejudice." *See id.*; *see also Tombline*, 2014 WL 5140048, at *2 ("notice should be given in any circumstance where putative class members might be subject to prejudicial or unfair impacts."). The Ninth Circuit in *Diaz* outlined three potential justifications for requiring notice: (1) it protects the defendant "by preventing a plaintiff from appending class allegations to her complaint in order to extract a more favorable settlement" (2) "notice protects the class from objectionable structural relief, trade-offs between compensatory and structural relief, or depletion of limited funds available to pay the class claims" (3) "notice of dismissal protects the class from prejudice it would otherwise suffer if class members have refrained from filing suit because of knowledge of the pending class action" *Diaz*, 876 F.2d at 1408-09.

None of the stated justifications require notice to be sent in this case. First, this

is not a case where Plaintiff merely added a class allegation to his individual claim in order to increase his bargaining power. If brought on an individual basis, Plaintiff's claim would be worth very little and has required tremendous resources to litigate. Plaintiff's claim only made sense to bring in the context of a putative class action.

Second, the class need not worry about "objectionable structural relief, trade-offs between compensatory and structural relief, or depletion of limited class funds." As stated above, this is a dismissal, not a settlement, and Plaintiff is not being compensated to dismiss his case. A different class member is free to bring the class case again.

Finally, as discussed above, there is no evidence any individual refrained from filing a suit because of knowledge of the pending class action. Moreover, even on the slim chance there was an individual in such a position, notice would not solve the problem. The class is currently without an adequate class representative. Summary judgment briefing is due on July 18, 2016. The Court has denied Plaintiff's request for a continuance of summary judgment briefing in the hopes of giving another class member the opportunity to substitute in for Mr. Lucas. As it stands, Plaintiff cannot brief his Opposition to Defendant's Motion for Summary Judgment without violating the duty of candor to the court. Intervention is impossible prior to the due date for Plaintiff's brief. Given this unenviable procedural posture, notice would accomplish very little. It would merely be a waste of money. *See Diaz*, 876 F.2d at 1411 (noting that when there was no possibility of prejudice, "notice would have merely wasted money").

D. The Parties Should Bear Their Own Costs

This case has and does raise issues of significance to California consumers. The issue of false reference prices has been the subject of at least three different articles in the *New York Times* this year alone and they recently reported the sudden influx of false reference price lawsuits like this one, noting that "twenty-four cases

were filed in the first six months of 2016, nearly as many as the 25 in all of 2015."[1] Several retailers have settled just such claims. *See* Steitfeld, *supra* note 1. ("There have been at least 10 settlements. In April, a Los Angeles judge gave preliminary approval to a $6 million offer by Kohl's Department Stores. That deal came on the heels of a $50 million preliminary settlement by J. C. Penney.")

This case has raised valid claims—claims being asserted against defendants across the retail industry—and being asserted here against JAB, who has been described in the press as among the worst offenders.[2] Indeed, during the pendency of this lawsuit JAB has, for reasons related to this litigation or otherwise, changed certain of their pricing practices.[3] This was not and is not a frivolous lawsuit. It is a

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[1] "Amazon is quietly eliminating list prices" David Steitfeld, *New York Times*, July 3, 2016. Available at: http://www.nytimes.com/2016/07/04/business/amazon-is-quietly-eliminating-list-prices.html?_r=0

> "Bargains online and offline that are not real bargains are breeding legal action, much of it using a tough California law against deceptive advertising. New cases have been filed in the last few months against Macy's, J. Crew, Gymboree, Ann Taylor, Ralph Lauren and the website Wines 'Til Sold Out, according to TruthInAdvertising.org. Twenty-four cases were filed in the first six months of 2016, nearly as many as the 25 in all of 2015."

[2] "Jos. A Bank Swears This Is The Last 'Buy 1, Get 3' Sale Ever", Brad Tuttle, Money, October 22, 2015. Available at: http://time.com/money/4083645/jos-a-bank-buy-1-get-3-free-sale/

> Over the years, Jos. A. Bank has been one of the worst offenders in terms of listing items at extraordinarily inflated prices just so that the inevitable discounts will seem impressive and tempt shoppers to bite.
> […]
> For a long time in the bargain-hungry post-recession era, the eye-popping sales at Jos. A. Bank did the trick, luring in shoppers who simply couldn't pass up the seemingly amazing deals and wound up filling their closets with more clothes than they wanted.

[3] "Why Jos. A Bank is finally ending its infamous 'Buy 1, Get 3' Free Sales" Sarah Halzack, Washington Post, October 22, 2015. Available at:

meritorious lawsuit ultimately undone by the unforeseeable inability of the class representatives to serve the class well in that capacity. Under such circumstances, and where Mr. Lucas is dismissing the case with prejudice, the shifting of fees and cost is not appropriate.

It is extremely important that Plaintiff now moves to voluntarily dismiss the case *with prejudice*. "Attorneys' fees and costs will not be imposed as a condition for voluntary dismissal with prejudice because there is no risk of future litigation." *Larsen v. King Arthur Flour Co.*, No. C 11-05495 CRB, 2012 WL 2590386, at *1 (N.D. Cal. July 3, 2012) (allowing dismissal with prejudice and with no imposition of costs as to putative class representative only in class action (citing *Burnette v. Godshall*, 828 F. Supp. 1439, 1443 (N.D. Cal. 1993)); *see also Rodriguez v. Serv. Emp. Int'l*, No. 10–1377, 2011 WL 4831201, at *3 (N.D. Cal. Oct. 12, 2011) (denying defendants' request for costs as a condition of dismissal pursuant to Rule 41(a)(2) because plaintiffs stipulated to dismissal with prejudice and the case was "not exceptional").

While the issue has not been fully resolved in the Ninth Circuit, "district courts

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https://www.washingtonpost.com/news/business/wp/2015/10/22/why-jos-a-bank-is-finally-ending-its-infamous-buy-1-get-3-free-sales/

> [T]he company is taking bold steps to try to reinvigorate the brand. On Thursday, Jos. A. Bank will kick off its final "buy one, get three free" sale, putting a nail in the coffin on these eye-popping sales that they'd been running since 2012. (Their "buy one, get two free" offering had been around since September 2008, when the economy imploded, and their more traditional "buy one, get one free" sales have been around much longer.)
>
> Jos. A. Bank won't completely abandon promotional pricing, but its new approach will be to give guys good deals on just one or perhaps two suits. Ewert said you can expect to see promotions such as "one suit for $299, two for $500."
>
> "We're going to flip the promotional messaging to talk about what they're going to pay instead of what they're going to save," Ewert said.

have concluded that payment of fees and costs should not ordinarily be imposed as a condition for voluntary dismissal with prejudice." *Internmatch, Inc. v. Nxtbigthing, LLC*, No. 14-CV-05438-JST, 2016 WL 540812, at *2 (N.D. Cal. Feb. 11, 2016) (citing *Rodriguez*, 2011 WL 4831201, at *3; *Burnette*, 828 F. Supp. at 1443).

For a case to be "extraordinary," the case must be "*either* groundless, unreasonable, vexatious, or pursued in bad faith." *Internmatch*, WL 540812, at *2 (emphasis in original) citing *Cairns v. Franklin Mint Co.*, 292 F.3d 1139, 1156 (9th Cir. 2002). As above, this is not that case. There is significant reason to believe that JAB violated California law with respect to its pricing policies.

That said, Plaintiff's counsel must ethically withdraw from their representation of Mr. Lucas. That does not make this case "groundless, unreasonable, vexatious or pursued in bad faith." That creates no occasion for the imposition of costs or fees.[4]

Federal courts across California have repeatedly held that payment of fees and costs should not be imposed as a condition for voluntary dismissal with prejudice. *See, e.g., Rodriguez*, 2011 WL 4831201, at *3 (denying defendants' request for costs as a condition of dismissal pursuant to Rule 41(a)(2) because plaintiffs stipulated to dismissal with prejudice and the case was "not exceptional"); *see also Bynum*, 2014 WL 771116, at *3 (citing *Chang v. Pomeroy*, No. CIV S–08–0657 FCD DAD PS, 2011 WL 618192, at *1 (E.D. Cal. Feb. 10, 2011); *see also Chavez*, 2011 WL 317482, at *4 (granting plaintiff's motion to dismiss with prejudice and denying defendant's request for attorney fees and costs); *Burnette*, 828 F. Supp. at 1443 (declining to award costs and attorney fees where dismissal was with prejudice); *Cf. Steinert v. Winn Group, Inc.*, 440 F.3d 1214, 1222 (10th Cir. 2006) (holding that

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[4] Rule 41(a)(2) simply does not provide a basis for attorneys' fees. *Bynum v. Cty. of Kauai*, No. CIV. 12-00523 JMS, 2014 WL 771116, at *3 (D. Haw. Feb. 24, 2014); see also *Bruce v. Teleflora, LLC*, No. CV13-3279 ODW CWX, 2014 WL 2710974, at *3 (C.D. Cal. June 16, 2014) (As Plaintiffs have pointed out, "when a lawsuit is voluntarily dismissed with prejudice under Fed. R. Civ. P. 41(a)(2)[sic], attorneys' fees have almost never been awarded.").

attorney's fees may be imposed under Rule 41(a)(2) only in exceptional circumstances where dismissal is with prejudice).

In fact, courts have held that a dismissal with prejudice by the named representative in a class action case affirmatively protects that litigant from the imposition of costs and fees. As one California district court has put it, "[a] plaintiff faced with the imposition of attorneys' fees and costs as a condition of voluntary dismissal may request that the action be dismissed with prejudice to avoid payment." *Gonzalez v. Proctor and Gamble Co.*, No. 06cv869 WQH (WMc), 2008 WL 612746, at *3 (S.D. Cal. Mar. 4, 2008) ("An award of costs and attorneys' fees should generally be denied if the voluntary dismissal is granted with prejudice."); *Larsen*, 2012 WL 2590386, at *1 (refusing to assess costs to class action litigant who dismissed his individual case with prejudice prior to class certification).

The issues in this case are important and relevant to California consumers but the case is certainly not "extraordinary." Indeed, cases against retailers making these same claims are being filed here in California on a near weekly basis. While Mr. Lucas ultimately cannot pursue this case, a vast majority of the work done in this case will be generally applicable to any defense of JAB's sales and marketing practices. History suggests they may be forced to defend them again. *See Camasta v. Jos. A Bank Clothiers, Inc.*, No. 12 C 7782, 2013 WL 474509 (N.D. Ill. Feb. 7, 2013) (case against JAB for use of false reference prices); *Waldron v. Jos. A Bank Clothiers, Inc.*, No.12-CV-02060 (N.J. Jan. 28, 2013) (same); *Johnson v. Jos. A. Bank Clothiers, Inc.*, No. 2:13-CV-756, 2015 WL 1476451 (S.D. Ohio Mar. 31, 2015) (same).

Because Plaintiff is dismissing with prejudice and because this case is not an "extraordinary" one within the meaning of the law, the dismissal of Plaintiff Lucas should be final with each party to bear their own costs.

IV. Conclusion

For the foregoing reasons, this Court should grant Plaintiff's Motion to Voluntarily Dismiss with Prejudice.

Dated: July 14, 2016

Respectfully submitted,

/s/ Hassan A. Zavareei
HASSAN A. ZAVAREEI (CA 181547)
JEFFREY KALIEL (CA 238293)
SOPHIA GOREN (CA 307971)
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Counsel for Plaintiff and the Putative Class

CERTIFICATE OF SERVICE

I, Hassan Zavareei, on this 14th day of July 2016, hereby certify that foregoing document was filed via the Court's CM ECF system, thereby causing a true and correct copy to be sent to all ECF-registered counsel of record.

s/ Hassan Zavareei
HASSAN A. ZAVAREEI (CA 181547)