

ARNOLD & PORTER LLP  
 JAMES F. SPEYER (SBN 133114)  
 james.speyer@aporter.com  
 E. ALEX BEROUKHIM (SBN 220722)  
 alex.beroukhim@aporter.com  
 777 South Figueroa Street, Forty-Fourth Floor  
 Los Angeles, California 90017-5844  
 Telephone: 213.243.4000  
 Facsimile: 213.243.4199

Attorneys for Defendant  
 Jos. A. Bank Clothiers, Inc.

UNITED STATES DISTRICT COURT  
 SOUTHERN DISTRICT OF CALIFORNIA

DAVID M. LUCAS  
 10528 Pinion Trail  
 Escondido, CA 92026

and

ERIC L. SALERNO  
 7467 Redhill Way  
 Browns Valley, CA 95918

*On Behalf of Themselves and Those  
 Similarly Situated,*

Plaintiffs,

vs.

JOS. A. BANK CLOTHIERS, INC., a  
 Delaware Corporation,  
 c/o C T Corporation System  
 818 West Seventh Street  
 Los Angeles, CA 90017,

Defendant.

Case No.: 3:14-cv-01631-LAB (JLB)

**JOS. A. BANK CLOTHIERS, INC.'S  
 OPPOSITION TO PLAINTIFF'S  
 MOTION TO VOLUNTARILY  
 DISMISS WITH PREJUDICE**

Date: August 15, 2016  
 Time: 11:30 a.m.  
 Crtrm: 14A  
 Judge: Hon. Larry Alan Burns

Action Filed: July 9, 2014

***Oral Argument Requested***

## TABLE OF CONTENTS

	<b>Page</b>
Introduction.....	1
Background.....	2
A.    Plaintiff’s Counsel Never Should Have Filed This Lawsuit.....	2
1.    Warning Sign Number One: Plaintiff’s Story .....	3
2.    Warning Sign Number Two: Plaintiff’s “Proof” Of Purchase .....	5
3.    Plaintiff’s Proof of Purchase Is Fraudulent .....	6
B.    Plaintiff’s Counsel Never Should Have Continued To Prosecute This Lawsuit .....	8
Argument .....	9
I.    THE COURT SHOULD DECIDE THE PENDING SUMMARY JUDGMENT MOTION AND DENY THIS MOTION AS MOOT.....	9
II.   IF THE COURT GRANTS THE MOTION, IT SHOULD IMPOSE TWO CONDITIONS.....	11
A.   If The Court Grants The Motion, It Should Award Fees And Costs To JAB .....	12
B.   If The Court Grants The Motion, It Should Require Plaintiff’s Counsel To File Any Similar Lawsuit Against JAB In This Court.....	15
Conclusion .....	15

**TABLE OF AUTHORITIES****Page(s)****Federal Cases**

<i>Ballan v. Upjohn Company</i> , 159 F.R.D. (W.D. Mich. 1994).....	13, 14, 15
<i>Coliseum Square Ass’n, Inc. v. Dep’t of Hous. &amp; Urban Dev.</i> , 2002 WL 31886808 (E.D. La. Dec. 18, 2002) .....	12
<i>In re Girardi</i> , 611 F.3d 1027 (9th Cir. 2010) .....	10
<i>Hudson Eng’g Co. v. Bingham Pump Co.</i> , 298 F. Supp. 387 (S.D.N.Y. 1969) .....	9
<i>Pascual v. Wells Fargo Bank, N.A.</i> , 2014 WL 582264 (N.D. Cal. Feb. 13, 2014).....	10
<i>Phillips v. P.F. Chang’s China Bistro, Inc.</i> , 2016 WL 3136925 (N.D. Cal. June 6, 2016).....	15
<i>Simon v. E. Ky. Welfare Rights Org.</i> , 426 U.S. 26 (1976).....	14
<i>U.S. v. Eaglin</i> , 571 F.2d 1069 (9th Cir. 1977) .....	13
<i>U.S. v. Kaufman</i> , 2014 WL 2048198 (S.D.N.Y. May 19, 2014).....	13
<i>Upjohn Co. v. U.S.</i> , 449 U.S. 383 (1981).....	15
<i>Westlands Water Dist. v. U.S.</i> , 100 F.3d 94 (9th Cir. 1996) .....	9
<i>Williams v. Balcort Pension Investors</i> , 150 F.R.D. 109 (N.D. Ill. 1993) .....	13, 14

**Federal Statutes**

28 U.S.C. § 1927 .....	10
------------------------	----

**Other Authorities**

Fed. R. Civ.P. Rule 11 .....	12
Fed. R. Civ.P. Rule 41(a).....	2, 9, 11, 12
Fed. R. Civ.P. Rule 54(d).....	15
Local Rule 7.1.f.3.c.....	11

1 Defendant Jos. A. Bank Clothiers, Inc. (“JAB”) respectfully submits this  
2 memorandum in opposition to plaintiff’s motion to voluntarily dismiss his lawsuit.  
3 Given the extraordinary circumstances underlying this motion and JAB’s opposition,  
4 JAB believes oral argument would be helpful to the Court.

### 5 Introduction

6 We are now two years into this case, and on the cusp of a decision on JAB’s  
7 summary judgment motion. Just as plaintiff’s counsel “have expended thousands of  
8 hours and a great deal of money pursuing this case” (Pl.’s Mot. to Dismiss at 2), JAB  
9 has spent thousands of hours and a great deal of money to defend it and get to the  
10 summary judgment stage. As the Court has recognized, JAB’s “primary argument for  
11 summary judgment is that Lucas’ restitution model is fatally flawed.” Order Denying  
12 *Ex Parte* Mot. to Cont. Hrg. on Mot. for Sum. J. (Dkt. 113), at 1 (July 11, 2016). A  
13 decision in JAB’s favor on plaintiff’s restitution model will dampen the enthusiasm  
14 of plaintiff’s counsel for the future lawsuit against JAB that they have, in not-so-  
15 subtle terms, threatened to bring. Pl.’s Mot. to Dismiss at 10 (“History suggests  
16 [JAB] may be forced to defend [similar lawsuits] again.”).

17 Just a few weeks ago, plaintiff’s counsel vehemently defended their client and  
18 accused JAB of improperly mounting “an attack on his character” when it showed  
19 that plaintiff never bought the products that form the basis of his lawsuit against JAB,  
20 and created fraudulent bank statements to support his perjurious testimony to the  
21 contrary. Dec. of E. Alex Beroukhim (“Beroukhim Dec.”), Ex. 1, at 5; *see* Pl.’s Mot.  
22 for Leave (Dkt. 108-1), at 6 (“Counsel continues to believe that Mr. Lucas testified  
23 honestly to the best of his recollection at his deposition and that the document  
24 produced reflecting his purchases is demonstrative of actual purchases that qualify  
25 him as a class member.”). Now, however, without any new evidentiary  
26 developments, they have abandoned any pretense that their client ever had a claim  
27 against JAB. They now say they cannot proceed with this lawsuit “without violating  
28 the duty of candor to the court” and that they are “ethically required to withdraw from

1 [their] representation of Mr. Lucas.” Pl. Mot. to Dismiss at 6, 1. In an effort to avoid  
2 a summary judgment ruling, they seek an order under Rule 41(a)(2) dismissing this  
3 action with prejudice, with each party to bear its own fees and costs.

4 The Court should rule in JAB’s favor on its summary judgment motion and  
5 deny plaintiff’s motion as moot. Without a summary judgment decision exposing the  
6 fatal flaws in their restitution model, plaintiff’s counsel will simply find another  
7 plaintiff and sue JAB all over again. JAB has been put to enough unnecessary burden  
8 and expense already.

9 If the Court grants the Rule 41(a)(2) motion, it should do so only on two  
10 conditions. First, plaintiff and/or his counsel should pay JAB’s fees and costs. As  
11 plaintiff acknowledges, the Court has discretion to do this in “extraordinary” cases,  
12 which plaintiff describes as cases that are either “groundless, unreasonable,  
13 vexatious, or pursued in bad faith.” *Id.* at 9. This is just such a case. Plaintiff’s  
14 counsel had no good faith basis for filing this lawsuit. Yet they did so anyway,  
15 needlessly forcing JAB to rack up hundreds of thousands of dollars in attorney’s fees  
16 and costs. It is just and appropriate to require them to pay JAB’s legal expenses.

17 Second, any subsequent lawsuit filed by plaintiff’s counsel against JAB  
18 regarding JAB’s price comparison advertising should be filed in this Court. This  
19 Court has devoted a substantial amount of attention to this case. Plaintiff’s counsel  
20 should not be allowed to shop around for another court and judge.

### 21 **Background**

#### 22 **A. Plaintiff’s Counsel Never Should Have Filed This Lawsuit**

23 The undisputed record shows that plaintiff’s counsel filed suit only after  
24 ignoring glaring warning signs. These warning signs were plaintiff’s preposterous  
25 story of his purchase of suits from JAB, and his crude forgery of a bank statement  
26 that served as his only corroboration of that story. Had they conducted any due  
27 diligence whatsoever on these warning signs, they never would have sued JAB.  
28 Instead, they consciously turned a blind eye.

1                   **1.     Warning Sign Number One: Plaintiff’s Story**

2                   Plaintiff claims he bought twelve suits from JAB over the course of four  
3 shopping trips.<sup>1</sup> His story is as follows:

4                   On July 1, 2012, plaintiff bought three suits for \$895 (\$973.31 including sales  
5 tax) from a JAB store in San Diego (he could not recall the precise location) pursuant  
6 to a “Buy one, get two free” promotion.<sup>2</sup> He had the suits altered by JAB.<sup>3</sup> After a  
7 single wearing, each suit started “coming apart” and “fraying.”<sup>4</sup> Rather than return  
8 the suits to JAB and obtain a full refund, he donated the suits to Goodwill and  
9 claimed a charitable donation deduction on his tax returns.<sup>5</sup>

10                  On December 4, 2012, plaintiff bought three more suits for \$950 (\$1,033.13  
11 including sales tax) from a JAB store in San Diego (he again could not recall the  
12 location) pursuant to a “Buy one, get two free” sale.<sup>6</sup> He had the suits altered by JAB.<sup>7</sup>  
13 Once again, each suit started “coming apart” and “fraying” after he wore it once.<sup>8</sup> He  
14 did not lodge any complaint with JAB or seek a refund.<sup>9</sup> He donated these suits as well  
15 to Goodwill.<sup>10</sup>

16                  On June 22, 2013, plaintiff bought another three suits from an unidentified JAB  
17 store in San Diego.<sup>11</sup> This time, he paid \$2,150 (\$2,387.06 including sales tax) pursuant  
18 to a “Buy one, get two free” sale.<sup>12</sup> His rationale for buying three more suits from JAB

19                  <sup>1</sup> FAC ¶¶ 20, 40.

20                  <sup>2</sup> MSJ Beroukhim Dec. (Dkt. 106-2), Ex. 6, at 50:8–51:17; *id.* Ex. 3, at 18 (Int. No.  
21 1); FAC ¶¶ 20, 40.

22                  <sup>3</sup> MSJ Beroukhim Dec. (Dkt. 106-2), Ex. 6, at 82:11–19.

23                  <sup>4</sup> *Id.* Ex. 6, at 52:5–53:15, 54:2–4, 55:24–57:6, 58:10–59:17.

24                  <sup>5</sup> *Id.* at 55:24–57:6, 58:10–59:17.

25                  <sup>6</sup> *Id.* 50:8–51:17; *id.* Ex. 3, at 18 (Int. No. 1); FAC ¶¶ 20, 40.

26                  <sup>7</sup> MSJ Beroukhim Dec. (Dkt. 106-2), Ex. 6, at 82:20–83:1.

27                  <sup>8</sup> *Id.* at 59:24–61:5; 62:9–64:14.

28                  <sup>9</sup> *Id.* at 63:19–22.

<sup>10</sup> *Id.* at 62:9–64:14.

<sup>11</sup> *Id.* at 50:8–51:17; FAC ¶¶ 20, 40.

<sup>12</sup> MSJ Beroukhim Dec. (Dkt. 106-2), Ex. 3, at 18 (Int. No. 1); FAC ¶¶ 20, 40.

1 even though all six of his previous suits allegedly fell apart after a single wearing was  
 2 that he “couldn’t pass up a good sale.”<sup>13</sup> He had these suits altered by JAB as well.<sup>14</sup>  
 3 These suits also fell apart after the first or second wearing.<sup>15</sup> Again, rather than try to  
 4 get his money back, Lucas says he sold these suits for \$50 to \$150 each.<sup>16</sup>

5 On December 11, 2013, plaintiff bought his tenth, eleventh and twelfth suits for  
 6 \$895 (\$973.31 including sales tax) pursuant to a “Buy one, get two free” deal from a  
 7 JAB store in San Diego whose location he could not identify.<sup>17</sup> JAB also altered these  
 8 suits.<sup>18</sup> Once more, these suits supposedly fell apart after one or two wearings.<sup>19</sup> And  
 9 once again, he lodged no complaint and sought no refund.<sup>20</sup> Instead, he simply gave  
 10 these suits away to someone on Craigslist because he “didn’t want to deal with the  
 11 hassle of taking it to a donation center.”<sup>21</sup>

12 Virtually every facet of this story is preposterous:

- 13 • What are the odds that *every one of twelve suits* bought by a single  
 14 customer would “fall apart” after one or two wearings?
- 15 • What customer would *continue (and continue, and continue) to buy suits*  
 16 that “fall apart” after one or two wearings?
- 17 • What customer, having bought such suits, would *fail to lodge any*  
 18 *complaint with the retailer?*
- 19 • What customer, having spent over \$5,000 on such suits, would *not seek*  
 20 *any refund?*

22 <sup>13</sup> MSJ Beroukhim Dec. (Dkt. 106-2), Ex. 6, at 74:20–75:17.

23 <sup>14</sup> *Id.* at 82:11–83:5.

24 <sup>15</sup> *Id.* at 65:14–67:4.

25 <sup>16</sup> *Id.* at 68:25–69:13.

26 <sup>17</sup> *Id.* at 50:8–51:17; *id.* Ex. 3, at 18 (Int. No. 1); FAC ¶¶ 20, 40.

27 <sup>18</sup> MSJ Beroukhim Dec. (Dkt. 106-2), Ex. 6, at 82:11–83:9.

28 <sup>19</sup> *Id.* at 71:9–72:13.

<sup>20</sup> *Id.* at 72:14–73:9.

<sup>21</sup> *Id.*



1 This story should have been a giant, red, flashing “STOP” sign. No  
 2 responsible lawyer would proceed in the face of such a story. At the barest  
 3 minimum, any conscientious lawyer, before proceeding, would have required  
 4 unimpeachable documentation supporting the story. But that did not happen here --  
 5 instead, the opposite occurred.

## 6 **2. Warning Sign Number Two: Plaintiff’s “Proof” Of Purchase**

7 Plaintiff’s counsel did not receive any receipts from their client showing he  
 8 bought a single suit from JAB. They did not receive any record of the alterations he  
 9 claims JAB’s tailors did. They did not receive any record of his supposed donations  
 10 to Goodwill or resales of the suits. The only document they received prior to filing  
 11 concerning his supposed purchases was a document that purported to be four pages  
 12 from plaintiff’s Navy Federal Credit Union account.<sup>22</sup> Each page was a blank white  
 13 sheet but for a single line entry (plaintiff testified he redacted all other information  
 14 “with a black marker” before giving it to his lawyers).<sup>23</sup> The entries looked like this:

7/1/2012	JOS. A BANK	DEBIT CARD PURCHASE	-973.31
12/4/2012	JOS. A BANK	DEBIT CARD PURCHASE	-1033.13
6/22/2013	JOS. A BANK	DEBIT CARD PURCHASE	-2387.06
12/11/2013	JOS. A BANK	DEBIT CARD PURCHASE	-973.31

20 This document should have been a second giant, red, flashing “STOP” sign.  
 21 With its different fonts and incorrect spelling of Jos. A. Bank (it omits the period  
 22 after the middle initial), it resembles a ransom note more than a bank statement.  
 23 Moreover, if plaintiff actually had redacted the pages with a black marker as he said

24  
 25  
 26 <sup>22</sup> *Id.* Ex. 20; *see also id.*, Ex. 6, at 76:15–79:7, 80:2–17 (plaintiff testified that he  
 27 made all his purchases with his Navy Federal Credit Union debit card); Pl.’s Mot for  
 Leave (Dkt. 108-1), at 5 (plaintiff provided purported bank statement to his counsel  
 before filing the Complaint).

28 <sup>23</sup> MSJ Beroukhim Dec. (Dkt. 106-2), Ex. 20; *see also id.*, Ex. 6, at 76:15–79:7.



1 he had, they would have been all *black* except for the single line entry -- but these  
2 pages are all *white*, except for splotches of black surrounding the line entry.

3 Plaintiff's wildly implausible story, coupled with this facially suspect  
4 document that was his only corroboration of that story, should have been more than  
5 enough to cause counsel to walk away. At the very least, further investigation was  
6 called for. Counsel should have, for example, insisted on seeing his actual,  
7 unredacted bank statements, and ensured their preservation. Instead, they made no  
8 further inquiry and forced JAB to defend a case that failed at the most fundamental  
9 level.

### 10 **3. Plaintiff's Proof of Purchase Is Fraudulent**

11 The evidence shows that plaintiff's alleged "bank statement" is indeed  
12 fraudulent. Six different facts prove it:

13 *First*, plaintiff's actual Navy Federal Credit Union ("NFCU") statements for  
14 2012 and 2013, produced by NFCU pursuant to subpoena do not reflect any  
15 purchases from JAB.<sup>24</sup>

16 *Second*, tailoring alterations at JAB cost extra, but the amounts listed in the  
17 "bank statement" do not include any charge for alterations.<sup>25</sup>

18 *Third*, the amounts listed in the "bank statement" reflect a sales tax of 8.75%  
19 for each purchase.<sup>26</sup> Plaintiff claims the first two purchases were made in Virginia  
20 and the second two were made in San Diego.<sup>27</sup> But the sales tax in Virginia and San  
21 Diego during the period in question was never the same, and was never 8.75%.<sup>28, 29</sup>

22 <sup>24</sup> *Id.* Ex. 7.

23 <sup>25</sup> Dec. of Joe M. Carter in Support of JAB's Mot. for Sum J. (Dkt. 106-6) ¶ 2; MSJ  
24 Beroukhim Dec. (Dkt. 106-2), Ex. 6, at 83:10–84:21.

25 <sup>26</sup> *Id.*

26 <sup>27</sup> *Id.* Ex. 6, at 50:8–51:17; *id.* Ex. 8.

27 <sup>28</sup> Req. for Judicial Not. in Support of JAB's Mot. for Sum. J. ("RJN") (Dkt. 106-8),  
28 Exs. 1, 2.

29 <sup>29</sup> Plaintiff alleged in his complaint and testified at deposition that he purchased all the  
suits in San Diego. FAC ¶¶ 20, 40; MSJ Beroukhim Dec. (Dkt. 106-2), Ex. 6, at  
50:8–22. When JAB confronted Lucas's counsel with his actual bank statements

(Footnote Cont'd on Following Page)

*Fourth*, JAB promotions follow a specified cadence, or schedule.<sup>30</sup> These promotions change quite often.<sup>31</sup> On June 22, 2013 and December 11, 2013 -- the dates reflected in the “bank statement” and in plaintiff’s testimony as the dates of the San Diego purchases -- JAB did not offer a “Buy one, get two free” promotion.<sup>32</sup>

*Fifth*, plaintiff claims that he paid \$2,387 for his June 22, 2013 San Diego purchase.<sup>33</sup> The only line of suits that expensive at JAB are part of JAB’s “Platinum Collection.”<sup>34</sup> But on June 22, 2013, JAB did not sell any “Platinum Collection” suits at any of its stores in the San Diego area.<sup>35</sup>

*Finally*, here again is the line entry from the “bank statement”:<sup>36</sup>

12/11/2013	JOS. A BANK	DEBIT CARD PURCHASE	-973.31
------------	-------------	---------------------	---------

And here is how easy it is to recreate this entry, with a couple minutes’ work using *Microsoft Word*:

12/11/2013	JOS. A BANK	DEBIT CARD PURCHASE	-973.31
------------	-------------	---------------------	---------

And here is an actual line entry from plaintiff’s genuine NFCU bank statement:<sup>37</sup>

07-26 POS Debit Visa Check Card 2678 07-25-13 Janieandjack.Com 9 419-278-7172 CA	150.00-	114.60
---	---------	--------

(Footnote Cont’d From Previous Page)

showing that he was living in Virginia and making purchases from brick and mortar stores in Virginia at the time he claimed to have made his first two purchases from JAB, they changed his story and said that they are now claiming that only his last two purchases were made in San Diego. MSJ Beroukhim Dec. (Dkt. 106-2), Ex. 8.

<sup>30</sup> Beroukhim Dec. in Support of Opp. to Pl.’s *Ex Parte* App. To Cont. Hearing & Stay Briefing of JAB’s Mot. for Sum. J. (Dkt. 112-1) (“*Ex Parte* Opp. Beroukhim Dec.”) ¶ 7, Ex. B.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* Ex. B.

<sup>33</sup> MSJ Beroukhim Dec. (Dkt. 106-2), Ex. 20, at 937.

<sup>34</sup> *Ex Parte* Opp. Beroukhim Dec. (Dkt. 112-1) ¶ 8.

<sup>35</sup> *Id.* ¶ 9, Ex. C.

<sup>36</sup> MSJ Beroukhim Dec. (Dkt. 106-2), Ex. 20.

<sup>37</sup> *Id.* Ex. 7.

**B. Plaintiff's Counsel Never Should Have  
Continued To Prosecute This Lawsuit**

Plaintiff filed suit in July 2014. The suit was also filed by co-plaintiff Eric Salerno. Mr. Salerno voluntarily dismissed his claims, on the eve of his deposition and without explanation, on February 8, 2016.<sup>38</sup>

At any point in the last two years, plaintiff's counsel could have easily determined that the "bank statement" was a forgery and their client had no basis to sue. For example, it would have taken minimal effort to determine that the amounts listed on the "bank statement" were inconsistent with the actual sales tax charged in San Diego and Virginia and the fact that JAB charges for alterations. Moreover, in August 2015, JAB produced its promotional calendar records and its sales records to plaintiff, which would have also allowed his counsel to quickly determine that no "Buy one, get two free" sales occurred on the dates in question and no "Platinum Collection" suits were sold at any San Diego-area store on the date in question.<sup>39</sup>

Also, at any point, plaintiff's counsel could have obtained plaintiff's actual Navy Federal Credit Union statements. But they did not do this until May 2016 -- almost two years into the case -- and that was only because JAB demanded to see them.<sup>40</sup> The day JAB received the real bank statements, it notified plaintiff's counsel that no JAB purchases appeared in them.<sup>41</sup>

As of May 2016, therefore, the story shifts from one of willful blindness (at best) to one of actual knowledge that there was no basis for continuing to prosecute this lawsuit. Yet even at this point, plaintiff's counsel plowed ahead vigorously, requiring JAB to expend substantial sums taking expert depositions, preparing expert

<sup>38</sup> Order Granting Stip. of Voluntary Dismissal of Eric Salerno's Claims With Prejudice (Dkt. 76) (Feb. 8, 2016).

<sup>39</sup> *Exp Parte Opp. Beroukhim Dec.* (Dkt. 112-1), ¶¶ 7-9, Exs. B, C.

<sup>40</sup> MSJ Beroukhim Dec. (Dkt. 106-2), Ex. 7 & Ex. 2.

<sup>41</sup> *See* MSJ Beroukhim Dec. (Dkt. 106-2), Ex. 9.

reports, and drafting its summary judgment motion.<sup>42</sup> And on June 22 plaintiff filed his *own* summary judgment motion, based on the fraudulent bank statement.<sup>43</sup> Not until July 14, when plaintiff's counsel moved to dismiss and to withdraw as counsel, did they take the steps they should have taken far earlier, and in no event later than May 2016.

### Argument

#### **I. THE COURT SHOULD DECIDE THE PENDING SUMMARY JUDGMENT MOTION AND DENY THIS MOTION AS MOOT**

“A motion for voluntary dismissal under Rule 41(a)(2) is addressed to the district court's sound discretion and the court's order will not be disturbed unless the court has abused that discretion.” *Westlands Water Dist. v. U.S.*, 100 F.3d 94, 96 (9th Cir. 1996) (internal quotation marks and citation omitted). “It must be remembered that the purpose of Rule 41(a) ‘was to eliminate the evils resulting from the unqualified right of a plaintiff to take a voluntary nonsuit at any stage of the proceeding before pronouncement of judgment and after the defendant had incurred substantial expense or acquired substantial rights.’” *Hudson Eng'g Co. v. Bingham Pump Co.*, 298 F. Supp. 387, 388 (S.D.N.Y. 1969) (citation omitted). In the unique circumstances of this case, the Court should exercise its discretion to deny the motion.

As plaintiff has acknowledged, “class and merits discovery have been completed, experts employed and class certification fully briefed -- at a significant cost in time and resources for both sides.” Pl.'s Mot. for Leave (Dkt. 108-1), at 7. JAB filed its summary judgment motion on June 22, 2016, an undertaking that added significantly to the time and money already invested in this case. JAB's “primary argument” for summary judgment is that plaintiff's restitution model is “fatally

<sup>42</sup> *Ex Parte* Opp. Beroukhim Dec. (Dkt. 112-1), ¶¶ 5–6; Mot. for Sum. J. (Dkt. 106).

<sup>43</sup> Mem. P's & A's in Support of Pl.'s Not. of Mot. & Mot. for Partial Sum. J. (Dkt. 102) (“Pl.'s Mot. for Sum. J.”), at 1.

1 flawed.” Order Denying *Ex Parte* Mot. to Cont. Hrg. on Mot. for Sum. J. (Dkt. 113),  
2 at 1 (July 11, 2016). A favorable ruling on that issue for JAB will discourage similar  
3 lawsuits in the future -- including the lawsuit that plaintiff’s counsel has threatened to  
4 bring. Pl.’s Mot. to Dismiss at 10 (“History suggests” that JAB “may be forced to  
5 defend” similar suits in the future).

6 As JAB has shown, plaintiff’s counsel should never have filed this lawsuit. At  
7 a minimum, they should have dropped it months or years ago. *Pascual v. Wells*  
8 *Fargo Bank, N.A.*, 2014 WL 582264, at \*7 (N.D. Cal. Feb. 13, 2014) (attorney has  
9 “professional duty to dismiss a baseless law suit . . . and to do it promptly when he  
10 learned that his client had no case” (internal quotation marks and citation omitted));  
11 *In re Girardi*, 611 F.3d 1027, 1064 (9th Cir. 2010) (28 U.S.C. § 1927 imposes a  
12 “duty to correct or withdraw litigation positions after it becomes obvious that they are  
13 meritless” (citation omitted)). By instead waiting until mid-July 2016 to do so, they  
14 forced JAB to expend hundreds of thousands of dollars on, among many other things,  
15 its summary judgment motion.

16 Now, having forced JAB to expend time and money to file its summary  
17 judgment motion by ignoring their ethical obligations, plaintiff’s counsel are trying to  
18 avoid a ruling on the summary judgment motion by instead seeking voluntary  
19 dismissal. That would add insult to injury for JAB. JAB filed its summary judgment  
20 motion before plaintiff filed his motion to voluntarily dismiss. Especially given the  
21 circumstances of this case, there is no reason plaintiff’s motion should be allowed to  
22 leapfrog over JAB’s. If JAB wins its motion, as it expects, that will moot plaintiff’s  
23 motion, as well as ensure that JAB’s work and the Court’s work on this case will not  
24 be for naught.

25 Moreover, plaintiff’s counsel has no standing to complain that the Court should  
26 not decide the summary judgment motion because their ethical obligations preclude  
27 them from submitting an opposition. Pl.’s Mot. to Dismiss at 10. Had counsel  
28 complied with their ethical obligations in the first place, JAB would never have filed

1 its summary judgment motion. Plaintiff's counsel cannot invoke their ethical  
 2 obligations only when it suits them. They have made their bed and should now be  
 3 required to lie in it.<sup>44</sup>

4 The Court has two other options that would result in a summary judgment  
 5 ruling. One is for the Court to give plaintiff (who does not admit that he has no case)  
 6 a reasonable time period (perhaps thirty days) to procure new counsel and submit an  
 7 opposition to JAB's summary judgment motion. *See* Frech Dec. (Dkt. 117-1) ¶ 3  
 8 (plaintiff's counsel "advised [plaintiff] of his ability to obtain additional counsel.").  
 9 If no opposition is filed in that period, the Court may grant JAB's motion under Local  
 10 Rule 7.1.f.3.c ("Waiver"). Another is for the Court to require plaintiff's counsel to  
 11 file an amicus brief in opposition to JAB's motion. Such a brief would raise no  
 12 ethical issues for counsel and, given their conduct, would hardly be an unwarranted  
 13 imposition on them.

14 On July 11, this Court denied plaintiff's *ex parte* application to continue the  
 15 hearing on JAB's summary judgment motion. In doing so, the Court rejected  
 16 plaintiff's argument that a continuance was necessary because plaintiff wished to  
 17 replace himself with another plaintiff, and noted that "there is no reason to postpone  
 18 resolution of the summary judgment motion." Order Denying *Ex Parte* Mot. to Cont.  
 19 Hrg. on Mot. for Sum. J. (Dkt. 113), at 1. Granting plaintiff's current motion will in  
 20 essence result in exactly what plaintiff unsuccessfully sought earlier -- a new plaintiff  
 21 and a lengthy continuance of JAB's summary judgment motion.

22 **II. IF THE COURT GRANTS THE MOTION,**  
 23 **IT SHOULD IMPOSE TWO CONDITIONS**

24 Under Rule 41(a)(2), the Court has the authority to condition a voluntary  
 25 dismissal on "terms that the court considers proper." If the Court grants plaintiff's

26  
 27 <sup>44</sup> Nor is there any putative class to be concerned about in connection with deciding  
 28 the motion, because plaintiff's counsel have withdrawn their class certification  
 motion and admitted that the putative class has been "removed from the litigation."  
 Pl.'s Mot. to Dismiss at 1.



1 motion, it should do so on the conditions that (1) plaintiff and/or plaintiff's counsel  
 2 pay JAB's attorney's fees and costs, and (2) if plaintiff's counsel files a similar  
 3 lawsuit against JAB, it do so in this Court.

4 **A. If The Court Grants The Motion,**  
 5 **It Should Award Fees And Costs To JAB**

6 One of the conditions the Court may impose on a voluntary dismissal with  
 7 prejudice is the payment of defendant's costs and fees. *E.g., Coliseum Square Ass'n,*  
 8 *Inc. v. Dep't of Hous. & Urban Dev.*, 2002 WL 31886808, at \*3 (E.D. La. Dec. 18,  
 9 2002) (granting Rule 41(a) motion to dismiss with prejudice and requiring plaintiffs  
 10 to "pay all reasonable costs and attorneys' fees incurred by [defendant] in defending  
 11 the claims brought against it in this matter"). Although it is true, as plaintiff notes,  
 12 that "payment of fees and costs should not *ordinarily* be imposed as a condition for  
 13 voluntary dismissal with prejudice" (Pl.'s Mot. to Dismiss at 9 (emphasis added)),  
 14 this is assuredly not an ordinary case. As plaintiff also notes, "[f]or a case to be  
 15 'extraordinary,' the case must be 'either groundless, unreasonable, vexatious, or  
 16 pursued in bad faith.'" *Id.* (emphasis omitted). This case fits the bill.

17 The extraordinary circumstances of this case are apparent from its recent  
 18 history, among other things. On June 30, 2016, plaintiff withdrew his summary  
 19 judgment motion (Pl.'s Not. of Withdrawal of Mot. for Partial Sum. J. (Dkt. 107)),  
 20 less than a day after JAB notified him that unless he withdrew the motion JAB would  
 21 seek Rule 11 sanctions on the ground that the motion falsely represented that plaintiff  
 22 had standing to sue JAB. *Ex Parte Opp. Beroukhim Dec.* (Dkt. 112-1), Ex. A.  
 23 Shortly thereafter, plaintiff filed a motion for leave to amend his complaint and  
 24 substitute in a new plaintiff (Pl.'s Mot. for Leave (Dkt. 108)), which he then also  
 25 withdrew. Pl.'s Not. of Withdrawal of Mot. for Leave (Dkt. 114). At the same time,  
 26 plaintiff withdrew his class certification motion, which had been fully briefed. Pl.'s  
 27 Not. of Withdrawal of Mot. for Class Cert. (Dkt. 115). Finally, plaintiff filed the  
 28 instant motion to voluntarily dismiss the case with prejudice, accompanied by a



1 motion to withdraw as counsel. Pl.’s Not. of Mot. & Mot. to Withdraw as Counsel  
2 for Pl. (Dkt. 117).

3 These are not ordinary occurrences in civil litigation. It’s not every day that  
4 counsel seek to dismiss their case and withdraw from representing their client on the  
5 ground that continuing to litigate the case would “violat[e] the duty of candor to the  
6 court.” Pl.’s Mot. to Dismiss at 6. That is about as close as it gets to an outright  
7 admission that a lawsuit is frivolous.

8 Moreover, the record shows not only that the case was groundless from its  
9 inception, but that plaintiff’s counsel was willfully blind to its lack of merit. It is not  
10 as if plaintiff’s counsel was hoodwinked by a master con man. The story plaintiff  
11 told was so ludicrous, and the only corroboration he offered so fishy, that the only  
12 reasonable conclusion is that counsel consciously avoided learning the truth. *See*  
13 *U.S. v. Kaufman*, 2014 WL 2048198, at \*7 (S.D.N.Y. May 19, 2014) (“Red flags  
14 about the legitimacy of a transaction can be used to show both actual knowledge and  
15 conscious avoidance” (internal quotation marks and citation omitted)); *U.S. v. Eaglin*,  
16 571 F.2d 1069, 1074 (9th Cir. 1977) (“no person can intentionally avoid knowledge  
17 by closing his eyes to facts which should prompt him to investigate, and deliberate  
18 avoidance of such knowledge is the equivalent of actual knowledge.”). And in May  
19 2016, at the latest, counsel’s willful blindness to their client’s lack of standing  
20 became actual knowledge of it.

21 In *Ballan v. Upjohn Company*, the court held that plaintiff’s counsel were  
22 inadequate class counsel because discovery revealed that the named plaintiff had  
23 never bought the product during the class period. 159 F.R.D. 473, 490 (W.D. Mich.  
24 1994). The court held that counsel had done “an appalling job of selecting class  
25 representatives” and had “fail[ed] to conduct even a passable investigation of the  
26 proposed named plaintiffs.” *Id.* at 489; *see also Williams v. Balcors Pension*  
27 *Investors*, 150 F.R.D. 109, 119 (N.D. Ill. 1993) (finding class counsel inadequate  
28 because their investigation of the named plaintiffs was “woefully inadequate.”).

1 Counsel's conduct in this case is even more egregious, given the red flags they  
2 ignored and the actual knowledge they obtained. They have needlessly and  
3 recklessly imposed enormous fees and costs on JAB that it should not have to bear.

4 Plaintiff claims that awarding JAB its fees and costs would be inappropriate  
5 because this "is not a frivolous lawsuit." Pl.'s Mot. to Dismiss at 7. To support that  
6 claim, they fail to cite anything from the extensive discovery they conducted and  
7 instead cite *newspaper articles* asserting that JAB is "among the worst offenders" in  
8 terms of price comparison advertising. *Id.* They claim, with no other support, that  
9 "[t]here is significant reason to believe that JAB violated California law with respect  
10 to its pricing policies." *Id.* at 9.

11 But even assuming this statement is true -- and it is not in fact true -- it hardly  
12 shows their case has merit. Simply proving a violation of law does not make a case  
13 meritorious. Plaintiff's counsel are not private attorneys general; they cannot ignore  
14 essential elements like standing and damages. Tellingly, plaintiff's counsel does *not*  
15 claim they have "significant reason to believe" that their client ever bought any  
16 products from JAB. And despite plaintiff's suggestion to the contrary, the standing  
17 rules are not relaxed for class actions. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S.  
18 26, 40 n.20 (1976) ("That a suit may be a class action . . . adds nothing to the question  
19 of standing, for even named plaintiffs who represent a class must allege and show  
20 that they personally have been injured" (internal quotation marks and citation  
21 omitted)). A class action is not prosecuted in the abstract; it may only be prosecuted  
22 through an individual named plaintiff. *See id.* And if that plaintiff lacks standing, the  
23 case is -- by definition -- meritless.

24 Plaintiff's counsel disingenuously asserts that although they "must ethically  
25 withdraw from their representation of Mr. Lucas[,] [t]hat does not make this case  
26 'groundless, unreasonable, vexatious or pursued in bad faith.'" Pl.'s Mot. to Dismiss  
27 at 9. Of course it does. They moved to dismiss and withdraw precisely because they  
28

1 know their case is baseless. As they concede, such a case justifies the imposition of  
2 fees.

3 Counsel are able to assert that their case is not groundless (even though they  
4 want to dismiss it and withdraw as counsel) only because they refuse to disclose the  
5 reasons for their withdrawal. They say they cannot “ethically” state these reasons.  
6 *Id.* at 1. Counsel are using the ethics rules as a fig leaf. No rule of ethics bars them  
7 from admitting that their client never bought products from JAB and has no case -- in  
8 fact, as officers of the Court, their “duty of candor to the Court” (*id.* at 6) should  
9 affirmatively *require* them to make this admission. They need not disclose any  
10 attorney-client communications to do so. *See Upjohn Co. v. U.S.*, 449 U.S. 383, 395  
11 (1981) (the attorney-client privilege “extends only to *communications* and not to  
12 facts.” (citation omitted)).

13 Putting aside the issue of fees, JAB is unquestionably entitled to its costs. A  
14 voluntary dismissal with prejudice makes JAB the prevailing party for purposes of  
15 Rule 54(d), and as the prevailing party, JAB “presumptively should be allowed to  
16 collect its costs . . . .” *Phillips v. P.F. Chang’s China Bistro, Inc.*, 2016 WL 3136925,  
17 at \*3 (N.D. Cal. June 6, 2016).

18 **B. If The Court Grants The Motion, It Should Require Plaintiff’s**  
19 **Counsel To File Any Similar Lawsuit Against JAB In This Court**

20 Plaintiff’s counsel has threatened to sue JAB again over its comparison price  
21 advertising. As a condition of dismissal of this case, the Court should require any  
22 such lawsuit to be filed in this Court. This Court has put a considerable amount of  
23 time and effort into this action, and that should not go to waste. Moreover, plaintiff’s  
24 counsel should not be rewarded for their conduct in this case by allowing them to  
25 shop around for a new judge for their next case.

26 **Conclusion**

27 For the foregoing reasons, JAB respectfully requests that the Court deny this  
28 motion. If the Court grants the motion, it should (1) award JAB its costs and fees,

1 and set a briefing schedule to determine the same, and (2) require plaintiff's counsel  
2 to file any future lawsuit against JAB regarding price comparison advertising in this  
3 Court.

4  
5 Dated: August 1, 2016.

ARNOLD & PORTER LLP

6 By: s/ James F. Speyer  
7 James F. Speyer  
8 E. Alex Beroukhim  
9 Attorneys for Defendant  
10 Jos. A. Bank Clothiers, Inc.  
11 Email: james.speyer@aporter.com  
12 alex.beroukhim@aporter.com  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

ARNOLD & PORTER LLP  
JAMES F. SPEYER (SBN 133114)  
james.speyer@aporter.com  
E. ALEX BEROUKHIM (SBN 220722)  
alex.beroukhim@aporter.com  
777 South Figueroa Street, Forty-Fourth Floor  
Los Angeles, California 90017-5844  
Telephone: 213.243.4000  
Facsimile: 213.243.4199

Attorneys for Defendant  
Jos. A. Bank Clothiers, Inc.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

DAVID M. LUCAS  
10528 Pinion Trail  
Escondido, CA 92026

and

ERIC L. SALERNO  
7467 Redhill Way  
Browns Valley, CA 95918

*On Behalf of Themselves and Those  
Similarly Situated,*

Plaintiffs,

vs.

JOS. A. BANK CLOTHIERS, INC., a  
Delaware Corporation,  
c/o C T Corporation System  
818 West Seventh Street  
Los Angeles, CA 90017,

Defendant.

Case No.: 3:14-cv-01631-LAB (JLB)

**DECLARATION OF E. ALEX  
BEROUKHIM IN SUPPORT OF  
JOS. A. BANK CLOTHIERS, INC.'S  
OPPOSITION TO PLAINTIFF'S  
MOTION TO VOLUNTARILY  
DISMISS WITH PREJUDICE**

Date: August 15, 2016  
Time: 11:30 a.m.  
Crtrm: 14A  
Judge: Hon. Larry Alan Burns

Action Filed: July 9, 2014

***Oral Argument Requested***

**DECLARATION OF E. ALEX BEROUKHIM**

I, E. Alex Beroukhim, declare:

1. I am a partner with the law firm of Arnold & Porter LLP and counsel of record for Defendant Jos. A. Bank Clothiers, Inc. ("JAB") in this matter. I have personal knowledge of the facts stated herein and, if called as a witness, could testify competently thereto.

2. Attached as **Exhibit 1** is a true and correct copy of Steven Trader, *Jos. A. Bank Seeks Quick Win In Inflated Price Suit*, Law 360 (June 23, 2016), <http://www.law360.com/articles/810345/jos-a-bank-seeks-quick-win-in-inflated-price-suit>.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on August 1, 2016 in Davis, California.

s/ E. Alex Beroukhim  
E. Alex Beroukhim

# **EXHIBIT 1**






[Advanced Search](#)

- [Arnold & Porter](#)
  - [My Account](#)
  - [My Feeds and Alerts](#)
  - [My Briefcase](#)
  - [Newsletter Signup](#)
  - [Help](#)


[Arnold & Porter](#)


- [Arnold & Porter](#)
  - [My Account](#)
  - [My Feeds and Alerts](#)
  - [My Briefcase](#)
  - [Help](#)
  - [Newsletter Signup](#)



[Advanced Search](#)
[Close](#)

- [Adv. Search & Platform Tools](#)
- [Browse all sections](#)
- [Banking](#)
- [Bankruptcy](#)
- [Class Action](#)
- [Competition](#)
- [Employment](#)
- [Energy](#)
- [Insurance](#)
- [Intellectual Property](#)
- [Product Liability](#)
- [Securities](#)
- [Rankings](#)
- [Law360's MVPs](#)
- [Glass Ceiling Report](#)
- [Global 20](#)
- [Law360 400](#)
- [Diversity Snapshot](#)
- [Practice Group Partner Rankings](#)

- [Practice Groups of the Year](#)
- [Pro Bono Firms of the Year](#)
- [Rising Stars](#)
- [Trial Aces](#)
- [Site Menu](#)
- [Join the Law360 team](#)
- [Search legal jobs](#)
- [Learn more about Law360](#)
- [Read testimonials](#)
- [Contact Law360](#)
- [Sign up for our newsletters](#)
- [Site Map](#)
- [Help](#)

Is Your Law Firm Making You Happy?

[Click here to take our lawyer satisfaction survey.](#)

## Jos. A. Bank Seeks Quick Win In Inflated Price Suit

Share us on: By **Steven Trader**

Law360, New York (June 23, 2016, 5:44 PM ET) -- The consumer accusing [Jos. A. Bank Clothiers Inc.](#) of inflating its suit prices to make discounts seem better has offered no evidence that he paid more than market value, and may not have even bought suits there in the first place, the retailer told a California federal judge Wednesday.

In order to succeed on the proposed class action's sole remaining claim, for restitution under California's Unfair Competition Law, lead plaintiff David M. Lucas must provide evidence that the amount he paid for 12 "discounted" suits during four Jos. A. Bank shopping trips exceeded the market value of what he received, which he has not done, the retailer said Wednesday in its bid for quick judgment.

In fact, Lucas can't even offer concrete proof that he purchased the suits in the first place, Jos. A. Bank said.

After a round of discovery, records show that Lucas was living in Virginia at the time he allegedly purchased six suits from two different stores in San Diego, California in 2012, the retailer said. What's more, Lucas testified that he used his [Navy Federal Credit Union](#) debit card for every purchase, yet bank statement records never show a single purchase from any Jos. A. Bank store, the company wrote.

When confronted with both of these issues, Lucas revised his statement to reflect that two of the purchases did not take place in San Diego, and as for the latter issue, Jos. A. Bank has not heard back from the shopper's counsel, the retailer said.

According to the southern California court's docket, Lucas on Wednesday likewise filed a motion for partial summary judgment, though it was under seal and couldn't be accessed. Counsel for Lucas did not immediately return a request for comment.

Lucas and fellow suit buyer Eric Salerno [sued back in July 2014](#), claiming the company tricked consumers by continually misrepresenting that its merchandise is being offered at a discount from an inflated regular price that it never actually charges. The pair sought restitution and injunctive relief under California's UCL and Consumer Legal Remedies Act.

Last May, U.S. District Judge Larry Alan Burns partially granted Jos. A. Bank's motion for judgment on the pleadings, finding that Lucas and Salerno weren't entitled to injunctive relief because they weren't likely to be

Ex. 1, p. 4

harm again, but said the pair could seek restitution if they could prove they paid more than market value for the suits. In February, Salerno voluntarily removed himself from the lawsuit.

In April, Judge Burns denied Jos. A. Bank's first motion for summary judgment, calling it premature in light of ongoing discovery. But evidence gathering has now closed, the motion is ripe for consideration, and quick judgment should be granted, Jos. A. Bank wrote Wednesday.

In order to calculate the differential between price versus value, the fair market value of the suit must be determined, yet Lucas's economic expert during deposition testimony admitted that he made no effort to determine the fair market value of any Jos. A. Bank product by looking at competing items of similar quality and brand strength.

Likewise, the company argued, Lucas' proposed restitution model is fatally flawed, because it essentially depends on a consumer survey asking what price shoppers would be willing to pay.

Daniel Frech, an attorney for Lucas, told Law360 in an email late Thursday that Lucas testified under oath that he bought the suits in question, and has produced an account statement reflecting those transactions. Jos. A. Bank's suggestion that Lucas's testimony is implausible "is an attack on his character and no less," Frech said.

Likewise, the retailer's motion "effectively tells the court no more than that it's experts disagree with Lucas's experts -- which is insufficient for summary judgment," Frech added.

The consumers are represented by Hassan A. Zavareei, Jeffrey Kaliel and Sophia Goren of [Tycko & Zavareei LLP](#), and Stuart E. Scott and Daniel Frech of [Spangenberg Shibley & Liber LLP](#).

Jos. A. Bank Clothiers, Inc. is represented by James F. Speyer and E. Alex Beroukhim of [Arnold & Porter LLP](#).

The case is David Lucas et al. v. Jos. A. Bank Clothiers Inc., case number [3:14-cv-01631](#), in the U.S. District Court for the Southern District of California.

— Additional reporting by Lisa Ryan. Editing by Ben Guilfoxy.

## Related Articles

- [Jos. A. Bank Inflates Prices Presale, Suit Says](#)

[View comments](#)

[Sign in to comment](#)

- [Add to Briefcase](#)
- [Printable Version](#)
- [Rights/Reprints](#)
- [Editorial Contacts](#)

## Documents

- [Summary Judgment](#)

## Related

## Sections

- [California](#)
- [Class Action](#)
- [Consumer Protection](#)
- [Retail & E-Commerce](#)

## Case Information

### Case Title

[Lucas et al v. Jos. A. Bank Clothiers, Inc.](#)

### Case Number

[3:14-cv-01631](#)

### Court

California Southern

### Nature of Suit

Other Statutory Actions

### Judge

[Larry Alan Burns](#)

### Date Filed

July 9, 2014

### Law Firms

- [Arnold & Porter](#)
- [Spangenberg Shibley](#)
- [Tycko & Zavareei](#)

### Companies

- [Jos. A. Bank Clothiers Inc.](#)
- [Navy Federal Credit Union](#)

### Most Popular

- 1 [Venable Atty Steamed At Counsel's 'Violent' Coffee Caper](#)
- 2 [3 Trump Campaign Promises Keeping BigLaw On Edge](#)
- 3 [Yates Memo Driving Wedge Between Companies And Workers](#)
- 4 [Lateral Movement Slows At Nation's Largest Law Firms](#)
- 5 [DOJ Challenges Health Insurance Megamergers](#)

© 2016, Portfolio Media, Inc. [About](#) | [Contact Us](#) | [Legal Jobs](#) | [Careers at Law360](#) | [Terms](#) | [Privacy Policy](#) | [Law360 Updates](#) | [Help](#) **Beta Tools:** [Track docs](#) | [Track attorneys](#) | [Track judges](#)

[Visit Our Site Map](#)



Already have access? [Click here to login](#)

**Get instant access to the one-stop news source for business lawyers**

[Register Now!](#)

**Get free access to Law360 right now.**

Professional email address required

[Register Now!](#)



**Sign up for our free California newsletter**

**You must correct or enter the following before you can sign up:**

Please provide a professional email:

Select more newsletters to receive for free

No Thanks

[Sign up now](#)

**Thank You!**

ARNOLD & PORTER LLP  
 JAMES F. SPEYER (SBN 133114)  
 james.speyer@aporter.com  
 E. ALEX BEROUKHIM (SBN 220722)  
 alex.beroukhim@aporter.com  
 777 South Figueroa Street, Forty-Fourth Floor  
 Los Angeles, California 90017-5844  
 Telephone: 213.243.4000  
 Facsimile: 213.243.4199

Attorneys for Defendant  
 Jos. A. Bank Clothiers, Inc.

UNITED STATES DISTRICT COURT  
 SOUTHERN DISTRICT OF CALIFORNIA

DAVID M. LUCAS  
 10528 Pinion Trail  
 Escondido, CA 92026

and

ERIC L. SALERNO  
 7467 Redhill Way  
 Browns Valley, CA 95918

*On Behalf of Themselves and Those  
 Similarly Situated,*

Plaintiffs,

vs.

JOS. A. BANK CLOTHIERS, INC., a  
 Delaware Corporation,  
 c/o C T Corporation System  
 818 West Seventh Street  
 Los Angeles, CA 90017,

Defendant.

Case No.: 3:14-cv-01631-LAB (JLB)

**PROOF OF SERVICE**

Date: August 15, 2016  
 Time: 11:30 a.m.  
 Crtrm: 14A  
 Judge: Hon. Larry Alan Burns

Action Filed: July 9, 2014

**PROOF OF SERVICE**

1. I am over eighteen years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 777 South Figueroa Street, Forty-Fourth Floor, Los Angeles, California 90017-5844.

2. On August 1, 2016, I served the following document(s):

**[SEE ATTACHED LIST OF DOCUMENTS]**

3. I served the document(s) on the following person(s):

**Hassan A. Zavareei**  
**Jeffrey Kalief**  
**Sophia Goren, Esq.**  
**TYCKO & ZAVAREEI LLP**  
**1828 L Street, NW, Suite 1000**  
**Washington, DC 20036**  
**202.973.0900**  
**202.973.095 (FAX)**  
[hzavareei@tzlegal.com](mailto:hzavareei@tzlegal.com)  
[jkaliel@tzlegal.com](mailto:jkaliel@tzlegal.com)  
[sgoren@tzlegal.com](mailto:sgoren@tzlegal.com)

**Stuart E. Scott**  
**Daniel Frech**  
**SPANGENBERG SHIBLEY & LIBER LLP**  
**1001 Lakeside Avenue East, Suite 1700**  
**Cleveland, OH 44114**  
**216.696.3232**  
**216.696.3924 (Fax)**  
[sscott@spanglaw.com](mailto:sscott@spanglaw.com)  
[dfrech@spanglaw.com](mailto:dfrech@spanglaw.com)

4. The documents were served by the following means:

☐ **By U.S. Mail.** I enclosed the document(s) in a sealed envelope or package addressed to the person(s) at the address(es) in Item 3 and **(check one)**:

☐ deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid.

☐ placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business' practice for collecting and processing correspondence for mailing. On the same day the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I am employed in the county where the mailing occurred. The envelope or package was placed in the mail at Los Angeles, California.

☐ **By Overnight Delivery/Express Mail.** I enclosed the documents and an unsigned copy of this declaration in a sealed envelope or package designated by **[name of delivery company or U.S. Postal Service for Express Mail]**



addressed to the persons at the address(es) listed in Item 3, with **[Express Mail postage or, if not Express Mail, delivery fees]** prepaid or provided for. I placed the sealed envelope or package for collection and delivery, following our ordinary business practices. I am readily familiar with this business' practice for collecting and processing correspondence for express delivery. On the same day the correspondence is collected for delivery, it is placed for collection in the ordinary course of business in a box regularly maintained by **[name of delivery company or U.S. Postal Service for Express Mail]** or delivered to a courier or driver authorized by **[name of delivery company]** to receive documents.

☐ **By Messenger Service.** I served the documents by placing them in an envelope or package addressed to the persons at the address(es) listed in Item 3 and providing them to a professional messenger service for service. (*See Declaration of Messenger below.*)

☐ **By Facsimile Transmission.** Based on an agreement between the parties to accept service by facsimile transmission, which was confirmed in writing, I faxed the document(s) and an unsigned copy of this declaration to the person(s) at the facsimile numbers listed in Item 3 on **August 1, 2016**, at **[type time]**. The transmission was reported as complete without error by a transmission report issued by the facsimile machine that I used immediately following the transmission. A true and correct copy of the facsimile transmission report, which I printed out, is attached hereto.

☐ **By Electronic Service (E-mail).** Based on a court order or an agreement of the parties to accept service by electronic transmission, I transmitted the document(s) and an unsigned copy of this declaration to the person(s) at the electronic notification address(es) listed in Item 3 on **August 1, 2016** before 5:00 p.m. PST.

☐ The transmission of the document was reported as complete and without error by electronic receipt of a delivery confirmation, a true and correct copy of which is attached hereto.

☐ I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

☒ **Via Court Notice of Electronic Filing.** The document(s) will be served by the court via NEF and hyperlink to the document. On **August 1, 2016**, I checked the CM/ECF docket for this case or adversary proceeding and determined that the person(s) listed in Item 3 are on the Electronic Mail Notice List to receive NEF transmission at the email addresses indicated in Item 3 **[or on the attached service list, if applicable]**.

☐ **STATE:** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

☒ **FEDERAL:** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Dated: August 1, 2016.

Signature: s/ James F. Speyer

Type or Print Name: James F. Speyer

**LIST OF DOCUMENTS**

1. JOS. A. BANK, INC.'S OPPOSITION TO PLAINTIFF'S MOTION TO VOLUNTARILY DISMISS WITH PREJUDICE
2. DECLARATION OF E. ALEX BEROUKHIM IN SUPPORT OF JOS. A. BANK CLOTHIERS, INC.'S OPPOSITION TO PLAINTIFF'S MOTION TO VOLUNTARILY DISMISS WITH PREJUDICE