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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

BRIAN L. GREENSPUN, an individual; THE BRIAN L. GREENSPUN SEPARATE PROPERTY TRUST, DATED JULY 11, 1990; THE AMY GREENSPUN ARENSON 2010 LEGACY TRUST,

Plaintiffs,

vs.

STEPHENS MEDIA, LLC, a Nevada limited liability company; STEPHENS HOLDING COMPANY OF ARKANSAS, an Arkansas corporation; SF HOLDING CORP., an Arkansas foreign corporation, d/b/a STEPHENS MEDIA GROUP; DR PARTNERS, a Nevada general partnership, d/b/a STEPHENS MEDIA GROUP; STEPHENS MEDIA INTELLECTUAL PROPERTY, LLC, a Delaware limited liability company; MICHAEL FERGUSON, an individual; WARREN A. STEPHENS, an individual; and DOES I –X, inclusive,

Defendants.

Case No. 2:13-cv-01494-JCM-PAL

DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 41(a)(2)

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Defendants, through their counsel of record, hereby submit their Response to Plaintiff's Motion to Dismiss Pursuant to Fed. R. Civ. P. 41(a)(2). This Response is based on the papers and pleadings on file herein, the exhibits attached hereto, the Points and Authorities that follow, and any oral argument the Court may allow.

POINTS AND AUTHORITIES

I. INTRODUCTION

Nearly twelve months after filing the Complaint in this action against seven corporate and individual Defendants, seeking and obtaining an Emergency Temporary Restraining Order, twice seeking (and failing) to obtain an Emergency Preliminary Injunction, forcing Defendants to engage in significant discovery—including the production of over 55,000 thousand pages of documents, the retention and payment of more than $15,000 to a potential expert witness, the service of written discovery requests, the issuance of subpoenas to third parties, and the arrangement of the deposition of Stephens, Inc.'s Chief Executive Officer in Little Rock, Arkansas (only to thereafter be cancelled by Plaintiff)—Plaintiff Brian Greenspun now seeks to walk away from the proceedings he improvidently started by voluntarily dismissing this action *without* prejudice pursuant to Fed. R. Civ. P. 41(a)(2). As will be set forth herein, any dismissal of this action should be conditioned on Plaintiff's payment of the attorneys' fees and costs Defendants have incurred while litigating this matter over the last year.

Both in prior communications between counsel, *see* ECF No. 101, Ex. 2, and in the Motion itself, Plaintiff contends that Defendants are not permitted to recover their attorneys' fees and costs because "substantial federal authority has held that even a successful defendant cannot recover fees or costs from a plaintiff in an antitrust action." *Id.* at 10:18-28 (citing cases). Even if this statement had universal application, which is debatable, it is beside the

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point. Defendants do not suggest they are entitled to fees and costs in their capacity as prevailing parties in an antitrust action but, instead, contend that the Court should impose fees and costs as a condition of Plaintiff's requested voluntary dismissal under Fed. R. Civ. P. 41(a)(2). Such conditions are "commonplace" to protect defendants where, as here, the plaintiff seeks to dismiss an action without prejudice. The Ninth Circuit has repeatedly endorsed this practice, *see, e.g., Westlands Water Dist. v. United States*, 100 F.3d 94 (9th Cir. 1996), as has this Court in an opinion issued less than six months ago. *See Archway Ins. Svcs., LLC v. Harris*, 2014 WL 643785 (D.Nev. Feb. 18, 2014) (Mahan, J.) (granting plaintiff's motion to voluntarily dismiss one of its claims with prejudice pursuant to Fed. R. Civ. P. 41(a)(2) but conditioning dismissal on defendants' right to move for attorney's fees attributable to defending the subject claim).

We address these and other authorities supporting Defendants' position in the Argument below. Before doing so, we briefly recount the procedural background of the litigation.

II. BACKGROUND

A. The Proposed Transaction That Would "Moot This Action."

Though Plaintiff understandably tries to downplay the amount of activity that occurred in this litigation over the past year, the reality is that Defendants incurred substantial legal fees and costs defending themselves against the serious, albeit unripe and unfounded, antitrust charges leveled against them by Plaintiff. *See* Declaration of J. Colby Williams ("Williams Decl.") at ¶ 3. Prior to recounting the work giving rise to those fees and costs, Defendants first wish to address a theme that runs throughout Plaintiffs' Motion to the effect that the parties engaged in no substantive litigation after the briefing on Defendants' Rule 12(b)(6) motion as "certain

parties and non-parties in this action were attempting to complete a business transaction since early 2014, the finalization of which would moot this action." Mot. at 4:12-17.

While the foregoing statement may describe Plaintiff's approach to the litigation in its latter phases, Defendants did not have the luxury of being able to stop all work in the case. Williams Decl. ¶ 4. That is because Defendants had no involvement in the discussions regarding the prospective business transaction that "would moot this action." *Id.* Those discussions occurred exclusively between Plaintiff and his siblings in their capacities as directors and shareholders of Las Vegas Sun, Inc. and The Greenspun Corporation. *Id.* Defendants had no details of the prospective Greenspun transaction and certainly had no assurances it would actually close. *Id.* Nor did Defendants have any idea whether the prospective Greenspun transaction would moot the entire action or simply moot the pending Motion to Withdraw filed by Plaintiff's local counsel. *Id.*; *see also, e.g.,* ECF No. 82 at 1:28 – 2:1 ("The parties are in the process of finalizing an agreement which will moot *the instant Renewed Motion to Withdraw as Counsel* [Dkt. No. 70].") (emphasis added).[1]

The only substantive information regarding the scope of the proposed transaction and its potential impact on the subject litigation was provided to the Court in multiple sealed declarations from Plaintiff's local counsel—declarations that Defendants have not seen to this

[1] It is important to recognize that "the parties" who made this and similar representations to the Court in the five Stipulations to Extend Time for Plaintiffs to File a Response to Lewis Roca Rothgerber's Renewed Motion to Withdraw as Counsel (*i.e.*, ECF Nos. 75, 77, 82, 91, and 96) were the respective Nevada and California attorneys representing Plaintiff. *See id.* Defendants had no role in drafting or submitting these stipulations. Williams Decl. ¶ 5. They would note, however, that the very fact it was necessary to submit *five* stipulations extending the time for Plaintiff to oppose his local counsel's Motion to Withdraw underscores the tenuous nature of the prospective Greenspun transaction and why it was necessary for Defendants to continue performing at least the bare minimum of tasks necessary to defend themselves in the litigation. *Id.*

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day. *Id.* ¶ 6*; see also, e.g.,* ECF No. 95. While undersigned counsel had periodic telephone conversations with Plaintiff's local counsel in an effort to find out where the litigation was going, Plaintiff's counsel advised that he was constrained by the attorney-client privilege and the confidential nature of Plaintiff's discussions with his siblings from providing any detailed information other than he was hopeful the litigation would ultimately be resolved through the prospective Greenspun transaction. *Id.*[2]

Hindsight, of course, is 20-20. Now that Plaintiff and his siblings have reached a deal whereby Plaintiff has acquired the Las Vegas Sun newspaper and will not be consummating the proposed termination of the Joint Operating Agreement ("JOA") with the Las Vegas *Review-Journal*, it is convenient for Plaintiff to belatedly opine that Defendants were not required to actively litigate this action after early 2014. Such a myopic view, however, ignores the uncertain nature of the prospective Greenspun transaction and the many months it took to complete. Defendants, meanwhile, were facing serious charges of anti-competitive behavior as well as a variety of procedural rules and court-imposed deadlines, all of which required them to continue performing tasks and incurring attorney's fees and costs to defend themselves against Plaintiff's baseless claims. We turn to those tasks now.

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[2] An example of the disadvantage under which Defendants labored because of the sealed declarations is reflected in the Court's Order denying certain Defendants' Motion to Dismiss without prejudice (ECF No. 100). The Court did not base its ruling on the substantive arguments made by Plaintiff and Defendants in their respective briefing on the Motion but, instead, on a representation contained in one of the sealed declarations: "[t]he parties have indicated they have reached an agreement which will resolve the instant lawsuit. (*See, e.g.*, doc. #95)." ECF No. 100 at 1:18-19. Once again, the representations made in the sealed declarations were made by Plaintiff or his counsel, not Defendants. Williams Decl. ¶ 7. Thus, the net effect is that Defendants had one of their motions denied based on statements from Plaintiff they had never seen or had the opportunity to address.

B. Litigation History

Plaintiff filed his Verified Complaint (ECF No. 1) and Emergency Motion for Temporary Restraining Order and Preliminary Injunction (ECF No. 2) on August 20, 2013 seeking to enjoin Defendants and non-parties The Greenspun Corporation and Las Vegas Sun, Inc. from proceeding with a non-binding Letter of Intent ("LOI") which contemplated a potential transaction that would, *inter alia*, terminate the JOA under which the Las Vegas Sun and Las Vegas *Review-Journal* newspapers were published. Williams Decl. ¶ 8. The Court issued an Order granting a temporary restraining order on August 27, 2013 and directing the parties to address a number of issues of particular interest to His Honor. ECF No. 9. Defendants filed an extensive Opposition (ECF No. 16) to the Motion on August 30, 2013 wherein they explained, among other defects, that Plaintiff's antitrust claims were not ripe because the subject LOI was not binding, the formal contract contemplated by the LOI had not even been negotiated, let alone finalized, and any final contract would have to be approved by the United States Department of Justice. Williams Decl. ¶ 8. Plaintiff filed his Reply (ECF No. 20) in support of the Emergency Motion on September 4, 2013, and the Court conducted a hearing on September 6, 2013 after which it denied Plaintiff's Motion and dissolved the temporary restraining order on grounds Plaintiff's Complaint was "premature and not ripe." ECF No. 34.

Notwithstanding the Court's previous ruling, Plaintiff filed a second Motion for Temporary Restraining Order and Preliminary Injunction (ECF Nos. 36-37) on September 19, 2013. The only factual difference from Plaintiff's first failed effort to obtain a preliminary injunction was that Defendants and the Greenspun entities had now signed the LOI. Williams Decl. ¶ 9. The LOI, however, was still non-binding, there was still no

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definitive agreement, and there was still no Justice Department approval. *Id.* Thus, Defendants commenced with the preparation of an opposition brief explaining these facts. *Id.* Fortunately, the Court *sua sponte* denied Plaintiff's Motion in an Order dated September 25, 2013 (ECF No. 45) without a hearing and before Defendants were required to file their opposition. *Id.*

Plaintiff's local counsel filed a Motion to Withdraw as Attorney on September 24, 2013 (ECF No. 41), which the Court ultimately denied on December 9, 2013. ECF No. 64.

Defendants Stephens Media, LLC and Stephens Media Intellectual Property Group, LLC filed their Answer to the Complaint on October 1, 2013 (ECF No. 47). The same day, Defendants DR Partners, Michael Ferguson, SF Holding Corp., Warren Stephens, and Stephens Holding Corp. filed a Motion to Dismiss the Complaint Pursuant to Fed. R. Civ. P. 12(b)(6) on grounds the antitrust allegations asserted against them were wholly deficient (ECF No. 48). Plaintiff responded (ECF No. 61), and Defendants filed a reply (ECF No. 62). As set forth above, the Court denied Defendants' Motion without prejudice (ECF No. 100) on July 10, 2014. *See supra* at 5:23-28.

The Court issued an Order (ECF No. 63) establishing the discovery cut-off date and related deadlines in this action on December 9, 2013. The Order required the parties to conduct the Fed. R. Civ. P. 26(f) conference by December 19, 2013. Counsel for the parties conducted the Rule 26(f) conference in Las Vegas, Nevada on December 16, 2013 wherein they agreed, *inter alia*, to exchange Initial Disclosures on January 10, 2014 and to submit a Stipulated Protective Order to govern the production of confidential documents in the litigation. Williams Decl. ¶ 11. Defendants timely served their Initial Disclosures on the January 10, 2014 due date. *Id.* For his part, Plaintiff served his Initial Disclosures more than

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two weeks late on January 29, 2014. *Id.* The parties also submitted a proposed Stipulated Protective Order (ECF No. 65) to the Court on January 17, 2014, which the Court approved on January 27, 2014 (ECF No. 66). After approval of the Stipulated Protective Order, Defendants produced over 55,000 documents to Plaintiff on January 29, 2014 as part of their initial disclosure obligations. Williams Decl. ¶ 11.

Defendants were likewise engaging in other discovery efforts in an effort to keep the case moving. For example, Defendants served Plaintiff with a First Set of Interrogatories and a First Set of Requests for Production of Documents on January 24, 2014. Williams Decl. ¶ 12. When Defendants had neither received any responses from Plaintiff to the foregoing discovery within the allotted 30-day time period nor any requests to extend the time for responding, Defendants were forced to reach out to Plaintiff to inquire as to the status. *See id.* at Ex. 1 (E-mail chain between counsel). Pursuant to Plaintiff's request and even though the discovery responses were already late, Defendants granted Plaintiff a 30-day extension of time, thus making Plaintiff's responses due on March 28, 2014. *Id.* Plaintiff, however, never responded to the subject discovery requests. *Id.*

Defendants further agreed to make Defendant Warren Stephens available for a full-day deposition in Little Rock, Arkansas on February 13, 2014 (a date selected by Plaintiff) even though Mr. Stephens had little involvement in the facts giving rise to the lawsuit and had previously moved to dismiss the meritless antitrust claims asserted against him personally. Williams Decl. ¶ 13. Mr. Stephens is the President and Chief Executive Officer of Stephens, Inc. and, thus, has an incredibly hectic schedule. *Id.* Defendants secured a conference room, made security arrangements for the attendees, and booked plane flights and hotel rooms in anticipation of the deposition. *Id.* After these arrangements were made and

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paid for, Plaintiff postponed Mr. Stephens' deposition because Plaintiff was required to attend a subsequently noticed meeting of The Greenspun Corporation that was set in Las Vegas for the same date. *Id.* Defendants offered a number of alternatives to keep the deposition on February 13, all to no avail. *See id.* at Ex. 2 (E-mail chain between counsel).

On or about February 24, 2014, Defendants served subpoenas on non-parties Las Vegas Sun, Inc. and Greenspun Media Group, LLC requesting production of documents by March 26, 2014. Williams Decl. ¶ 14. These entities, through independent counsel at Greenberg Traurig, requested several extensions of time within which to respond to these subpoenas, which Defendants granted. *Id.* Because of the closing of the transaction referenced in Plaintiff's instant Motion to Dismiss, Defendants ultimately agreed to release these entities from responding to the subpoena. *See id*. at Ex. 3 (E-mail chain between counsel).

Given the specialized nature of the antitrust issues involved in the litigation, including what constitutes a "failing newspaper" and how to define the relevant market, Defendants began the process of retaining consultants and potential expert witnesses in December 2013. Williams Decl. ¶ 15. Indeed, the two stipulations to extend the discovery dates in the litigation made specific reference to the fact that the parties were in the process of retaining experts and would be providing them with documents obtained from the aforementioned discovery requests and subpoenas. *See* ECF Nos. 73; 81. Defendants continued these efforts in early 2014 and formally retained one individual to provide economic consulting services and potential expert testimony on the foregoing issues. *Id.* Defendants paid this consultant over $15,000 through February 2014.

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On January 30, 2014, Plaintiff's local counsel filed its Renewed Motion to Withdraw as Counsel (ECF No. 70). The Motion was unique in that Plaintiff's local counsel, on the one hand, was seeking permission to withdraw from the case, but Plaintiff, on the other hand, intended to oppose his local counsel's Motion through his California antitrust counsel. Williams Decl. ¶ 16. Plaintiff never actually filed an opposition to this Motion as his local counsel and California counsel entered into five stipulations over a five-month period whereby they continued extending the time for Plaintiff to oppose the motion based on "an agreement which would moot the instant Renewed Motion to Withdraw as Counsel." *See* ECF Nos. 75, 77, 82, 91, and 96.[3]

As touched on above, certain of these stipulations were accompanied by sealed declarations from Plaintiff's local counsel to which Defendants were not privy. Williams Decl. ¶ 17. Though undersigned counsel tried inquiring of Plaintiff's counsel as to the status of the litigation throughout this five-month period, Plaintiff's counsel was at times nonresponsive and when contact was made, the information provided was cryptic at best. *See id.* at Ex. 4 (e-mail chain between counsel). Finally, on July 1, 2014, Plaintiff's counsel sent a one-line e-mail advising that the prospective Greenspun "transaction closed." *Id.* at Ex. 5. The next day, General

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[3] Plaintiff's Motion to Dismiss states that "*[t]he parties* further informed this Court that a transaction was being contemplated that would moot the motion to withdraw, *as well as this action in its entirety*," *see* Mot. at 4:24-26 (emphasis added), and then cites the two Stipulations to Extend the Discovery Cut-Off Date and Related Deadlines (ECF Nos. 73 and 81) as the purported sources for these representations in the record. Respectfully, this is just wrong. The first stipulation never even addresses the subject of the potential agreement. *See* ECF No. 73. The second stipulation references the potential agreement, but only in the context of potentially mooting Plaintiff's counsel's withdrawal motion, *not* the entire case. *See* ECF No. 81 at 3:23-25 ("As referenced in the foregoing stipulation [to extend time for Plaintiff to oppose the withdrawal motion], *Plaintiff* is hopeful that events occurring in the next 14 days will render *the withdrawal motion moot*.") (emphasis added). While Plaintiff may have represented in one of his sealed declarations that the prospective Greenspun transaction would moot *the entire action*, Defendants did not and could not make such a representation given their utter lack of information about the potential intra-family agreement.

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Counsel for Defendant Stephens Media, LLC received formal notice that the Greenspun entities no longer wished to pursue the transactions outlined in the non-binding LOI. *Id*. at Ex. 6.

Plaintiff's local counsel thereafter contacted Defendants' counsel and requested that Defendants stipulate to dismiss the action. Williams Decl. ¶ 18. Defendants declined to stipulate unless Plaintiff agreed to compensate Defendants for the attorneys' fees and costs they had incurred in the litigation. *See* Mot. at Ex. 2. When Plaintiff refused to pay any fees and costs, this Motion followed.

III. ARGUMENT

A. Standards Governing Dismissals Under Fed. R. Civ. P. 41(a)(2).

"Federal Rule of Civil Procedure 41(a)(2) allows a plaintiff, pursuant to an order of the court, *and subject to any conditions the court deems proper*, to dismiss an action without prejudice at any time." *Westlands Water Dist. v. United States*, 100 F.3d 94, 96 (9th Cir. 1996) (emphasis added). "[U]nless a defendant can show that it will suffer some plain legal prejudice as a result" of the dismissal, the Court should normally grant the motion. *See Archway Ins. Svcs., LLC v. Harris*, 2014 WL 643785, *4 (D.Nev. Feb. 18, 2014) (quoting *Smith v. Lenches*, 263 F.3d 972, 975 (9th Cir. 2001)). Such prejudice may be found where "actual legal rights are threatened or where monetary or other burdens appear to be extreme or unreasonable." *Bollinger v. Lilley*, 2007 WL 2406786, *1 (D.Nev. Aug. 17, 2007) (quotation omitted). A Rule 41(a)(2) motion to dismiss is addressed to the sound discretion of the district court, and will not be disturbed absent an abuse of discretion. *See Westlands*, 100 F.3d at 96.

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B. It Is "Commonplace" For Courts To Impose Attorneys' Fees And Costs Where, As Here, A Defendant Seeks A Voluntary Dismissal Without Prejudice Under Rule 41(a)(2).

Plaintiff's Motion repeatedly makes clear that Plaintiff is seeking to dismiss this action *without* prejudice. *See, e.g.*, Mot. at 2:5, 2:24, 6:1, 8:13 – 10:2 and 11:2-9. When a defendant seeks to dismiss an action without prejudice under Rule 41(a)(2), "[a]n award of reasonable attorney's fees is the typical condition imposed by a district court[.]" *Porter v. ABB Power T&D, Inc.*, 2008 WL 2437940, *2 (W.D. Mo. June 13, 2008); *see also Citizens Against Longwall Min. v. Colt LLC, IEC (Montgomery) LLC*, 2008 WL 1335609, *1 (C.D.Ill. April 8, 2008) (plaintiff typically must pay defendant's attorney's fees); *Baldanzi v. WFC Holdings Corp.*, 2010 WL 125999, *4 (S.D.N.Y. January 13, 2010) (conditioning voluntary dismissal upon plaintiffs compensating defendants for fees and costs associated with motion practice); *Bohon v. City of Stanwood*, 2008 WL 2230701, **1-2 (W.D.Wash. May 29, 2008) (dismissal without prejudice granted upon payment of defendants' costs); 9 Fed. Prac. & Proc. Civ. § 2366 (3d. ed.) (database updated April 2014) ("the district judge at least should require that the plaintiff pay the costs of the litigation and that practice has become commonplace[.]") (footnote omitted) (collecting cases).

Plaintiff's primary argument as to why Defendants are not entitled to attorneys' fees and costs is that this is an antitrust action, and only prevailing plaintiffs, *not* prevailing defendants can recover their attorneys' fees and costs. *See* Mot. at 7:24 – 8:12, 9:1-7, and 10:18-28 (citing cases). This argument misses the mark as Defendants are not seeking fees and costs as prevailing parties in an antitrust action but are, instead, requesting the Court to require Plaintiffs to pay Defendants' fees and cost as a condition of dismissal under Rule 41(a)(2) and the legal authorities interpreting the same. *See, e.g.*, 9 Fed. Prac. & Proc. Civ. § 2366 (3d. ed.) (database

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updated April 2014) (recognizing that while "[i]t appears somewhat anomalous to require the payment of an attorney's fee if the plaintiff would not have been liable for the fee had the plaintiff lost the case on the merits, [ ] the cases support this result.") (footnote omitted) (collecting cases).[4] Both the Ninth Circuit and this Court have recognized the propriety of imposing fees and costs as a condition of voluntarily dismissing actions or claims after the defendant has answered the complaint. *See Westlands; Archway Ins. Svcs.; supra*.

In *Westlands*, for example, the plaintiff water districts filed their complaint and moved for a preliminary injunction five days later, which the district court denied. 100 F.3d at 96. Three months after filing the complaint, the districts unsuccessfully sought a stipulation from defendants to dismiss the action without prejudice. *Id.* When the defendants refused, the plaintiffs moved for a voluntary dismissal under Rule 41(a)(2). *Id.* The district court denied the motion on grounds that uncertainty would remain if the parties' claims were not litigated, that the plaintiffs had been dilatory in seeking dismissal, and that the defendants had incurred substantial expense defending the action. *Id.*

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[4] It should also be noted that there is no absolute prohibition on defendants in antitrust suits recovering attorney's fees and costs from unsuccessful plaintiffs provided there is another appropriate basis for the award. *See, e.g., Lockary v. Kayfetz,* 974 F.2d 1166, 1175 (9th Cir. 1992) (plaintiff nonprofit corporation was sanctioned in the form of attorney's fees for bringing factually frivolous antitrust claims against a utility district and two of its directors; the claims were dismissed early in the case and the plaintiff failed to produce any evidence supporting its theories); *Angelico v. Lehigh Valley Hosp., Inc.,* 184 F.3d 268, 279 (3d Cir. 1999) (plaintiff physician that had brought antitrust claims against hospital and attorney defendants acted in bad faith by refusing to dismiss antitrust claims against attorney defendants and was appropriately required to pay attorney's fees pursuant to the court's inherent authority); *Reudy v. Clear Channel Outdoors, Inc.,* 693 F.Supp.2d 1091, 1100-01 (N.D.Cal. 2010) (rejecting plaintiffs' argument "that the Sherman Act trumps a private contract when it comes to a fee award" to prevailing defendants) *aff'd sub nom Reudy v. CBS Corporation*, 430 Fed. Appx. 568, 569 (9th Cir. 2011) (holding "there is no support for appellant's contention that the fee-shifting rule applicable to antitrust claims displaces the different rule set forth in the agreement.").

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The Ninth Circuit reversed and remanded, holding that mere uncertainty because a dispute remains unresolved is not legal prejudice. *Id.* at 97. The Court further found that, although they could have sought dismissal sooner, defendants had not been dilatory. *Id.* Finally, the Court instructed that "expenses incurred in defending against a lawsuit does not amount to legal prejudice" so as to preclude dismissal. *Id.* Importantly, the *Westlands* court went on to explain that "[t]he defendants' interests can be protected by conditioning dismissal without prejudice upon payment of appropriate costs and attorney's fees." *Id.* (citing *Hamilton v. Firestone Tire & Rubber Co., Inc.*, 679 F.2d 143, 146 (9th Cir. 1982)). The Ninth Circuit then remanded the action to the district court for a determination of whether fees and costs should be imposed as a condition of dismissal. *Id.* at 98. In other words, while the fees and costs a defendant incurs litigating a case may not constitute the legal prejudice required to preclude a voluntary dismissal under Rule 41(a)(2), the district court can nonetheless protect the defendant by conditioning the dismissal on the payment of these items. That is exactly what Defendants seek here.

Likewise instructive is this Court's recent decision in *Archway Ins. Svcs*. In that case, the plaintiffs sought to dismiss a portion of their breach of contract claim *with prejudice* and requested that defendants stipulate to the dismissal as such consent was necessary because defendants had previously moved for summary judgment. 2014 WL 643785 at *4. Defendants did not respond to plaintiffs' request but instead filed a second motion for summary judgment on the contract claim. *Id.* Plaintiffs then moved for voluntary dismissal under Rule 41(a)(2), which defendants opposed on grounds they would be prejudiced in light of the "significant fees and costs incurred litigating this specific claim for over two years." *Id.* at *5.

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Relying on the Ninth Circuit's precedent in *Westlands* and *Hamilton*, this Court recognized that the expense incurred in defending against a lawsuit does not amount to the type of legal prejudice required to deny dismissal. *Id.* It further recognized, however, that the "defendants' interests in avoiding substantial costs can be protected by conditioning the dismissal upon plaintiffs paying appropriate fees and costs to defendants." *Id.* (citing *Westlands*, *Hamilton*, and Fed. R. Civ. P. 41(a)(2)). Thus, the Court granted the plaintiff's motion to voluntarily dismiss, but conditioned the dismissal on defendants' right to move for attorney's fees and costs (i) for work performed litigating the dismissed claim up to the point plaintiffs first sought the voluntary dismissal, and (ii) only for work that could not be used in future litigation. *Id.* Again, the same result is warranted in this action.[5]

C. Plaintiff Greenspun's Request For Voluntary Dismissal Should Be Conditioned On The Payment Of Defendants' Attorneys' Fees And Costs.

In *Westlands*, the Ninth Circuit remanded the case to the district court to determine whether fees and costs should be imposed as a condition of the voluntary dismissal where the defendants had to defend against a single motion for preliminary injunction, and the plaintiff first sought dismissal a mere three months after filing the litigation. Much more was required of Defendants in this action.

Here, Defendants had to litigate this matter for nearly a year and were forced to do substantially more than defend against a single preliminary injunction motion. *See supra* at 6-

[5] Because the dismissal requested in *Archway Ins. Svcs.* was *with prejudice*, thereby precluding the plaintiffs from asserting the cause of action again, the Court concluded that the second prong of its ruling was satisfied as defendants would not be able to use this work again in future litigation. *Id.* at *5. Though Plaintiff in this action seeks dismissal *without prejudice*, which would theoretically allow him to re-file a future lawsuit, given that he now owns the Las Vegas Sun newspaper the likelihood of a suit based on the same or similar set of facts appears small and similarly renders the prior work performed by Defendants' counsel of no use in the future.

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11. As set forth above, this matter was hotly contested at the outset and required significant motion practice on an expedited basis in the specialized area of antitrust law. *Id.* at 6-7. Thereafter, Defendants actively participated in the initial discovery process in order to begin developing evidence in support of their defenses and to comply with the Court's scheduling order and related deadlines. *Id.* at 7-9. This is in stark contrast to Plaintiff who, despite being responsible for commencing the litigation and requiring Defendants to respond with alacrity to his "emergency" motions, demonstrated a casual indifference to deadlines and moving the case once he suffered multiple setbacks in motion practice. While it is certainly true that the activity level in the litigation decreased as Plaintiff began negotiating the prospective Greenspun transaction with his siblings, Defendants had no assurances that the intra-family transaction would be finalized given their lack of definitive information about the nature of the transaction and its chances of success. *Id.* at 9-10. Accordingly, Defendants were obligated to continue performing at least the bare minimum of work necessary to keep their end of the case moving and to remain in compliance with the Court's rules and orders.

In the end, Plaintiff's desire to voluntarily dismiss this action without conditions after a year of litigation is unfounded and, more importantly, unjust. After all, Plaintiff has now obtained what he wanted—outright ownership of the Las Vegas Sun newspaper and the continued existence of the JOA. Plaintiff's siblings and the Greenspun entities—which were never sued by Plaintiff in this action despite the Court's recognition they likely constituted indispensable parties (ECF No. 9 at 2:12-15)—likewise obtained what they wanted by ridding themselves of the financial burdens associated with operating a failing newspaper. At the opposite end of the spectrum, Defendants were dragged into a lawsuit, forced to incur six figures worth of attorney's fees and costs throughout a year of meritless antitrust litigation, and

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have nothing to show for it as the proposed JOA transaction giving rise to this action will not be consummated—which is the very outcome that made Plaintiff's lawsuit unripe in the first place. Fairness, equity, and the Federal Rules of Civil Procedure all dictate that Plaintiff must now pay Defendants their attorneys' fees and costs as a condition of dismissing this ill-conceived litigation.

IV. CONCLUSION

Based on the foregoing, Defendants respectfully submit that Plaintiff's requested voluntary dismissal pursuant to Fed. R. Civ. P. 41(a)(2) should only be granted on the condition Plaintiff is required to pay Defendants' attorneys' fees and costs. Should the Court enter a ruling as requested by Defendants, they will prepare a subsequent motion for attorney's fees consistent with the provisions of LR 54-16.

DATED this 11th day of August, 2014.

CAMPBELL & WILLIAMS

By ***/s/ J. Colby Williams***
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that service of the foregoing **Response to Plaintiff's Motion to Dismiss Pursuant to Fed. R. Civ. P. 41(a)(2)** was served on the 11th day of August, 2014 via the Court's CM/ECF electronic filing system addressed to all parties on the e-service list.

__**/s/ *J. Colby Williams***__________________
An employee of Campbell & Williams