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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

STEPHEN AGUIAR,	)	Case No. 5:14-cv-02612-PSG
	)	
v.	)	<b>ORDER GRANTING PLAINTIFF’S</b>
	)	<b>MOTION FOR VOLUNTARILY</b>
	)	<b>DISMISSAL AND DENYING AS</b>
FACEBOOK INC.,	)	<b>MOOT DEFENDANT’S MOTION TO</b>
	)	<b>DISMISS</b>
Defendant.	)	<b>(Re: Docket Nos. 5, 9)</b>

The court has two motions before it, both seeking to dismiss this action. On June 13, 2014 Defendant Facebook Inc. filed a motion under Fed. R. Civ. P 12(b)(6) to dismiss the action with prejudice for failure to state a claim.<sup>1</sup> In response, Plaintiff Stephen Aguiar filed his own motion seeking to voluntarily withdraw the action without prejudice to refiling.<sup>2</sup>

Because neither an answer nor a summary judgment motion has been filed, Aguiar may, at any time, file a notice of voluntary dismissal to “automatically terminate[] the action” without prejudice.<sup>3</sup> A motion to dismiss under Rule 12(b)(6) is insufficient to divest Aguiar of this right.<sup>4</sup>

<sup>1</sup> See Docket No. 5.

<sup>2</sup> See Docket No. 9.

<sup>3</sup> See Fed. R. Civ. P. 41(a)(1)(A-B) (“[T]he plaintiff may dismiss an action without a court order by filing a notice of dismissal before the opposing party serves either an answer or a motion for

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No additional order from the court is required to dismiss the action.<sup>5</sup> With the case dismissed, the court DENIES AS MOOT Facebook’s motion to dismiss with prejudice.

**IT IS SO ORDERED**

Dated: July 22, 2014

  
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PAUL S. GREWAL  
United States Magistrate Judge

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summary judgment . . . Unless the notice or stipulation states otherwise, the dismissal is without prejudice.”); *see also Swedberg v. Marotzke*, 339 F.3d 1139, 1142 (9th Cir. 2003) (quoting *Hamilton v. Shearson-Lehman Am. Exp., Inc.*, 813 F.2d 1532, 1534 (9th Cir. 1987)).

<sup>4</sup> *See id.* at 1146 (holding that a plaintiff retains the right to voluntarily dismiss his case without prejudice after a defendant files a motion to dismiss under Rule 12(b)(6) so long as the court has not taken any action to convert that motion into a motion for summary judgment).

<sup>5</sup> *See id.*