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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

ARTHUR FISCHMAN, derivatively
on behalf of SEMPRA ENERGY and
SOUTHERN CALIFORNIA GAS
COMPANY,

Plaintiff,

v.

DEBRA L. REED; JOSEPH A.
HOUSEHOLDER; STEVEN D.
DAVIS; JUSTIN C. BIRD; WILLIAM
C. RUSNACK, WILLIAM D. JONES;
WILLIAM G. OUCHI; JAMES G.
BROCKSMITH, JR.; WILLIAM P.
RUTLEDGE; LYNN SCHENK,
ALAN L. BOECKMANN; JACK T.
TAYLOR; JAMES C. YARDLEY;
KATHLEEN L. BROWN; PABLO A.
FERRERO; LUIS M. TELLEZ;
DENNIS V. ARRIOLA; JIMMIE I.
CHO; MICHAEL M. SCHNEIDER;
DOUG SCHNEIDER; SCOTT
FURGERSON; GEORGE MINTER; J.
BRET LANE; MARTHA B.
WYRSCH; JESSE J. KNIGHT, JR;
and DOES 1-25, Inclusive,

Defendants,

and

SEMPRA ENERGY; and
SOUTHERN CALIFORNIA GAS
COMPANY

Nominal Defendants.

CASE NO. 16-cv-1006-WQH-AGS
ORDER

HAYES, Judge:

The matter before the Court is the motion for voluntary dismissal of this action

1 without prejudice. (ECF No. 62).

2 **I. Background**

3 On April 25, 2016, Plaintiff Arthur Fischman, derivatively on behalf of Sempra
4 Energy (“Sempra”) and Southern California Gas Company (“SoCalGas”), initiated this
5 action by filing a shareholder derivative complaint against members of the Board of
6 Directors of both companies for their actions relating to a natural gas leak at the Aliso
7 Canyon natural gas storage facility. (ECF No. 1). On August 1, 2016, the Nominal
8 Defendants Sempra and SoCalGas filed a motion to dismiss with prejudice on the
9 grounds that Plaintiff failed to adequately plead facts to demonstrate demand futility
10 pursuant to Federal Rule of Civil Procedure 23.1. (ECF No. 34).

11 On March 3, 2017, the Court granted Nominal Defendants’ motion to dismiss and
12 dismissed the complaint without prejudice. (ECF No. 61). The Court directed Plaintiff
13 to file any motion for leave to amend his complaint within thirty days of the court order
14 being issued. *Id.* at 25. On April 28, 2017, Plaintiff moved for voluntary dismissal
15 without prejudice pursuant to Federal Rule of Civil Procedure 42(a)(2). (ECF No. 62).
16 In support of Plaintiff’s motion, Plaintiff attached a declaration of Plaintiff’s counsel,
17 Francis A. Bottini, Jr. (ECF No. 62-1).

18 May 22, 2017, Defendants jointly responded in opposition to Plaintiff’s motion
19 for voluntary dismissal without prejudice. (ECF No. 63). On May 36, 2017, Plaintiff
20 replied to Defendants’ joint response in opposition. (ECF No. 64). On June 9, 2017,
21 Defendants filed a supplemental brief in support of their response in opposition. (ECF
22 No. 65). On June 12, 2017, Plaintiff responded to Defendants’ supplemental brief.
23 (ECF No. 66).

24 **II. Contentions of the Parties**

25 In Plaintiff’s counsel’s declaration, Mr. Bottini states that “Plaintiff has decided
26 that, instead of seeking leave to amend his complaint, he would exercise his right under
27 Rule 41(a)(2) to voluntarily dismiss his action without prejudice.” (ECF No. 62-1 at
28 1; Bottini Decl. ¶ 5). Plaintiff contends that Defendants bear the burden of showing a

1 “prejudice to some legal interest, some legal claim, some legal argument.” (ECF No.
2 64 at 11 (quoting *Westlands Water Dist. v. United States*, 100 F.3d 94, 97 (9th Cir.
3 1996))). Plaintiff contends that “[n]o law or facts supports Defendants’ claim of ‘legal
4 prejudice.’” *Id.*

5 Defendants contend that the Court should dismiss the action with prejudice for
6 three separate reasons. (ECF No. 63). First, Defendants contend that “dismissal
7 without prejudice is not appropriate when it would result in plain legal prejudice to the
8 defendant[s].” *Id.* at 2. Second, Defendants contend that “[a] derivative action should
9 be dismissed with prejudice when a plaintiff fails to sufficiently plead satisfaction of
10 the demand requirement and has made no showing an amendment would cure the
11 deficiency.” *Id.* at 3. Third, Defendants contend that Plaintiff’s motion for voluntary
12 “dismissal without prejudice is invalid because . . . it [is] an attempt to avoid the
13 imminent dismissal of his claims with prejudice for failure to meet the standing
14 requirement for his derivative action.” *Id.* at 5.

15 **III. Ruling of the Court**

16 Rule 41(a)(2) of the Federal Rules of Civil Procedure states:

17 (2) By Court Order; Effect. Except as provided in Rule 41(a)(1), an action
18 may be dismissed at the plaintiff’s request only by court order, on terms
19 that the court considers proper. If a defendant has pleaded a counterclaim
20 before being served with the plaintiff’s motion to dismiss, the action may
be dismissed over the defendant’s objection only if the counterclaim can
remain pending for independent adjudication. Unless the order states
otherwise, a dismissal under this paragraph (2) is without prejudice.

21 Fed. R. Civ. P. 41(a)(2).

22 “Rule 41 vests the district court with discretion to dismiss an action at the
23 plaintiff’s instance upon such terms and conditions as the court deems proper. That
24 broad grant of discretion does not contain a preference for one kind of dismissal or
25 another.” *Hargis v. Foster*, 312 F.3d 404, 412 (9th Cir. 2002). If a court determines
26 that dismissal should be conditioned upon certain terms, the plaintiff requesting
27 dismissal “has the choice between accepting the conditions and obtaining dismissal and,
28 if he feels that the conditions are too burdensome, withdrawing his dismissal motion

1 and proceeding with the case on the merits.” *Lau v. Glendora Unified School Dist.*, 792
2 F.2d 929, 930-31 (9th Cir. 1986). The court must allow the plaintiff a “reasonable
3 period of time within which to refuse the conditional voluntary dismissal by
4 withdrawing her motion for dismissal or to accept the dismissal despite the imposition
5 of conditions.” *Id.* at 931.


6 “A district court should grant a motion for voluntary dismissal under Rule
7 41(a)(2) unless a defendant can show that it will suffer some plain legal prejudice as a
8 result.” *Smith v. Lenches*, 263 F.3d 972, 975 (9th Cir. 2001). Plain legal prejudice is
9 defined in the Ninth Circuit as “prejudice to some legal interest, some legal claim, some
10 legal argument.” *Westlands Water Dist. v. United States*, 100 F.3d 94, 97 (9th Cir.
11 1996). “Plain legal prejudice, however, does not result simply when defendant faces
12 the prospect of a second lawsuit or when plaintiff merely gains some tactical
13 advantage.” *Hamilton v. Firestone Tires & Rubber Co.*, 679 F.2d 143, 145 (9th Cir.
14 1982).

15 Defendants bear the burden of showing a “prejudice to some legal interest, some
16 legal claim, some legal argument.” *Westlands*, 100 F.3d at 97; *Lenches*, 263 F.3d at
17 975. Defendants have not shown that a dismissal without prejudice would result in
18 legal prejudice. The inconvenience of another lawsuit does not constitute legal
19 prejudice. *Hamilton*, 679 F.2d at 145. The Court concludes that Defendants would not
20 suffer a legal prejudice if this action is dismissed without prejudice. Plaintiff’s motion
21 for voluntary dismissal of this action without prejudice is granted. (ECF No. 62).

22 **V. Conclusion**

23 IT IS ORDERED that Plaintiff’s motion to voluntary dismiss this action without
24 prejudice is GRANTED. (ECF No. 62).

25 DATED: August 4, 2017

26 
27 **WILLIAM Q. HAYES**
28 United States District Judge