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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 GDS INDUSTRIES, INC., A California  
12 Corporation,  
13 Plaintiff,  
14 v.  
15 GREAT AMERICAN INSURANCE  
16 COMPANY, A Surety; DOES 1 through  
17 100,  
18 Defendant.  
19  
20

Case No.: 16-CV-1506-AJB-BLM

**ORDER GRANTING PLAINTIFF'S  
MOTION TO VOLUNTARILY  
DISMISS UNDER FEDERAL RULE  
OF CIVIL PROCEDURE 41(a)(2)**

(Doc. No. 12)

21 Presently before the Court is Plaintiff GDS Industries, Inc.'s ("Plaintiff") motion to  
22 dismiss brought pursuant to Federal Rule of Civil Procedure 41(a). (Doc. No. 12.)  
23 Defendant Great American Insurance Co. ("Defendant") opposes the motion. (Doc. No.  
24 14.) Having reviewed the parties' moving papers and controlling legal authority, and  
25 pursuant to Local Civil Rule 7.1.d.1, the Court finds the matter suitable for decision on the  
26 papers and without oral argument. Accordingly, the hearing date currently set for  
27 **December 22, 2016, at 2:00 p.m. in Courtroom 3B** is hereby **VACATED**. For the reasons  
28 set forth below, the Court **GRANTS** Plaintiff's motion.

1 **BACKGROUND**

2 This dispute arises from nonpayment for materials, equipment, and services Plaintiff  
3 rendered to nonparty Rodeway Engineering Works, Inc. (“Rodeway”).<sup>1</sup> (Doc. No. 1-2 ¶¶  
4 8–13, 18.) Defendant is a surety company that duly made, executed, and filed a payment  
5 and performance bond whereby Defendant guaranteed to pay in the event Rodeway failed  
6 to do so. (*Id.* ¶¶ 20–21.) Plaintiff asserts it submitted a formal bond claim to Defendant on  
7 February 9, 2016, and Defendant ultimately denied Plaintiff’s request “in bad faith and  
8 without following standard claims handling practices” on April 7, 2016. (*Id.* ¶ 23.)

9 Plaintiff instituted this lawsuit in San Diego Superior Court on May 10, 2016. (Doc  
10 No. 1 ¶ 1; *see* Doc. No. 1-2.) On June 15, 2016, Defendant answered the complaint in state  
11 court. (Doc. No. 1 ¶ 3; *see* Doc. No. 1-4.) Defendant subsequently removed the action to  
12 this Court the following day. (Doc. No. 1 at 2.) Plaintiff filed the instant motion to  
13 voluntarily dismiss the action pursuant to Federal Rule of Civil Procedure 41(a)<sup>2</sup> on  
14 September 22, 2016. (Doc. No. 12.) Defendant filed an opposition to the motion, (Doc. No.  
15 14), and Plaintiff filed a reply, (Doc. No. 15). This order follows.

16 **LEGAL STANDARD**

17 Rule 41(a)(1) permits the plaintiff to voluntarily dismiss an action without court  
18 order by either filing a notice of dismissal before the opposing party has served an answer  
19 or motion for summary judgment, or a stipulation of dismissal by all parties who have  
20 appeared. Where dismissal under Rule 41(a)(1) is unavailable, Rule 41(a)(2) permits an  
21 action to be “dismissed at the plaintiff’s request” by court order on terms the court  
22 considers proper. Fed. R. Civ. P. 41(a)(2).

23 The decision to grant or deny a request to dismiss pursuant to Rule 41(a)(2) is within  
24 the district court’s sound discretion. *Sams v. Beech Aircraft Corp.*, 625 F.2d 273, 277 (9th  
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27 <sup>1</sup> Rodeway is not a party to this action because it has declared bankruptcy. (Doc. No. 1-2 ¶  
28 2; Doc. No. 12-1 at 1.)

<sup>2</sup> All references to “Rule” are to the Federal Rules of Civil Procedure.

1 Cir. 1980). However, “[a] district court should grant a motion for voluntary dismissal under  
2 Rule 41(a)(2) unless a defendant can show that it will suffer some plain legal prejudice as  
3 a result.” *Smith v. Lenches*, 263 F.3d 972, 975 (9th Cir. 2001).

4 The Ninth Circuit has held that “legal prejudice” means “prejudice to some legal  
5 interest, some legal claim, [or] some legal argument.” *Westlands Water Dist. v. United*  
6 *States*, 100 F.3d 94, 97 (9th Cir. 1996). This inquiry focuses on “the rights and defenses  
7 available to a defendant in future litigation.” *Id.* For example, legal prejudice may result  
8 when a dismissal without prejudice “would result in the loss of a federal forum, or the right  
9 to a jury trial, or a statute-of-limitations defense.” *Id.* A defendant may also suffer plain  
10 legal prejudice if dismissal without prejudice prevents it from bringing a motion for  
11 attorneys’ fees as a prevailing party given that “dismissal without prejudice precludes  
12 prevailing party status.” *United States v. Ito*, 472 F. App’x 841, 842 (9th Cir. 2012) (citing  
13 *Cadkin v. Loose*, 569 F.3d 1142, 1149 (9th Cir. 2009); *Oscar v. Alaska Dep’t of Educ. &*  
14 *Early Dev.*, 541 F.3d 978, 981 (9th Cir. 2008)). A district court may also consider such  
15 factors as the stage of litigation, the moving party’s delay in requesting voluntary dismissal,  
16 and indications of forum shopping. *See Cent. Mont. Rail v. BNSF Ry. Co.*, 422 F. App’x  
17 636, 638 (9th Cir. 2011).

18 Legal prejudice is not, however, established “because a dispute remains unresolved”  
19 or by the mere “threat of future litigation.” *Westlands Water Dist.*, 100 F.3d at 96–97; *see*  
20 *also Hyde & Drath v. Baker*, 24 F.3d 1162, 1169 (9th Cir. 1994) (“The inconvenience of  
21 defending another lawsuit or the fact that the defendant has already begun trial preparations  
22 does not constitute prejudice.”). Neither is legal prejudice present simply because the  
23 plaintiff “gains some tactical advantage.” *Hamilton v. Firestone Tire & Rubber Co.*, 679  
24 F.2d 143, 145 (9th Cir. 1982).

25 Nor does “the expense incurred in defending against a lawsuit . . . amount to legal  
26 prejudice,” notably because dismissal without prejudice may be conditioned “upon the  
27 payment of appropriate costs and attorney fees.” *Westlands Water Dist.*, 100 F.3d at 97.  
28 Still, “[i]mposition of costs and fees as a condition for dismissing without prejudice is not

1 mandatory[.]” *Id.*; see *Stevedoring Servs. of Am. v. Armilla Int’l B.V.*, 889 F.2d 919, 921  
2 (9th Cir. 1989) (holding district court did not abuse discretion in refusing to require  
3 payment of costs and attorney’s fees).

4 By order, a district court may dismiss an action with prejudice on a motion for  
5 voluntary dismissal under Rule 41(a)(2). *Smith*, 263 F.3d at 976; see Fed. R. Civ. P.  
6 41(a)(2) (“*Unless the order states otherwise*, a dismissal under this paragraph (2) is without  
7 prejudice.” (emphasis added)). “Attorneys’ fees and costs will not be imposed as a  
8 condition for voluntary dismissal with prejudice because there is no risk of future  
9 litigation.” *Larsen v. King Arthur Flour Co.*, No. C 11-05495 CRB, 2012 WL 2590386, at  
10 \*1 (N.D. Cal. July 3, 2012) (citing *Burnette v. Godshall*, 828 F. Supp. 1439, 1443 (N.D.  
11 Cal. 1993)); see also *Gonzalez v. Proctor & Gamble Co.*, No. 06cv869 WQH (WMc), 2008  
12 WL 612746, at \*3 (S.D. Cal. Mar. 4, 2008) (“An award of costs and attorneys’ fees should  
13 generally be denied if the voluntary dismissal is granted with prejudice[.]”).

#### 14 DISCUSSION

15 Plaintiff first states it may dismiss this action pursuant to Rule 41(a)(1)(A)(i). As  
16 stated above, that section permits a plaintiff to dismiss an action without court order by  
17 filing “a notice of dismissal before the opposing party serves either an answer or a motion  
18 for summary judgment[.]” Fed. R. Civ. P. 41(a)(1)(A)(i). Here, Plaintiff asserts that  
19 because Defendant only filed its answer in state court before removing the action to federal  
20 court, Plaintiff may invoke Rule 41(a)(1)(A)(i). Not so. Rule 81(c)(2) provides that “[a]fter  
21 removal, repleading is unnecessary unless the court orders it.” Fed. R. Civ. P. 81(c)(2).  
22 Accordingly, Defendant’s state court answer, (Doc. No. 1-4), is sufficient to bar voluntary  
23 dismissal under Rule 41(a)(1)(A)(i).

24 Alternatively, Plaintiff asks the Court to dismiss this action under Rule 41(a)(2).  
25 Plaintiff asserts dismissal without prejudice and conditions is appropriate because of the  
26 early stage of litigation, this action having been filed only a few months ago; Plaintiff  
27 sought dismissal within weeks of reviewing Caltrans documents that weakened Plaintiff’s  
28 case; and there is no risk that Defendant will incur duplicative expenses because Plaintiff

1 has no intention of refiling this lawsuit and has even offered to dismiss this action with  
2 prejudice. (Doc. No. 12-1 at 5.) In response, Defendant asserts Plaintiff knew its lawsuit  
3 was time-barred before filing the operative complaint and only filed the instant motion  
4 when informed that Defendant intended to file a case-dispositive motion. (Doc. No. 14 at  
5 5.) Accordingly, Defendant asks that if the Court is inclined to dismiss this action, it must  
6 do so with prejudice. (*Id.*)

7         The Court agrees that Plaintiff’s request for dismissal should be granted. This case  
8 is in the very early stages of litigation, having been filed a mere four months prior to  
9 Plaintiff’s motion. Little discovery has been conducted, and while Defendant represents it  
10 intended to file a case-dispositive motion, a review of the docket reflects that no such  
11 motion practice has occurred. *See Smith*, 263 F.3d at 976 (finding “no fault with the district  
12 court’s reasoning” and dismissal of claims with prejudice where the district court “stressed  
13 that [defendant] could not argue high litigation costs because discovery had not begun, it  
14 had not commenced trial preparations, and no motions challenging the merits of this case  
15 had come before the court”).

16         However, the Court finds that dismissal without prejudice would constitute legal  
17 prejudice to Defendant in that Defendant would be prevented from bringing a motion for  
18 attorneys’ fees as a prevailing party under California Civil Code section 9564. *See Cal.*  
19 *Civ. Code* § 9564(c) (“In an action to enforce the liability on the bond, the court *shall* award  
20 the prevailing party a reasonable attorney’s fee.” (emphasis added)); *Ito*, 472 F. App’x at  
21 842 (finding district court abused its discretion in dismissing action without prejudice  
22 because defendants were precluded by the dismissal from bringing a motion for attorney’s  
23 fees). In light of the foregoing, the Court **GRANTS** Plaintiff’s motion and **DISMISSES**  
24 this action **WITH PREJUDICE**. The Court exercises its discretion and declines to award  
25 fees and costs as a condition of dismissal. *Gonzalez*, 2008 WL 612746, at \*3 (“An award  
26 of costs and attorneys’ fees should generally be denied if the voluntary dismissal is granted

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1 with prejudice.”). This order, however, does not preclude Defendant from bringing a  
2 properly noticed and supported motion for attorney’s fees.<sup>3 4</sup>

3 **CONCLUSION**

4 For the reasons set forth above, the Court **GRANTS** Plaintiff’s motion to voluntarily  
5 dismiss this action pursuant to Federal Rule of Civil Procedure 41(a)(2). (Doc. No. 12.)  
6 The Court **DISMISSES** this action **WITH PREJUDICE**. The Court exercises its  
7 discretion and declines to award fees and costs as a result of this dismissal.

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9 **IT IS SO ORDERED.**

10 Dated: November 29, 2016

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12 Hon. Anthony J. Battaglia  
13 United States District Judge  
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18 <sup>3</sup> Defendant cites to California Rule of Court 3.1702 as the rule setting forth the timeframe  
19 within which a motion for attorney’s fees may be brought. (Doc. No. 14 at 7.) The Court  
20 reminds Defendant that it removed this case to federal court, and while the Court must look  
21 to state substantive law in diversity cases, federal procedural rules govern. *See Hanna v.*  
22 *Plumer*, 380 U.S. 460, 465 (1965) (“federal courts are to apply state substantive law and  
23 federal procedural law” (citing *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938))). Accordingly,  
24 Rule 54 governs any motion for attorney’s fees Defendant may wish to bring. *See Fed. R.*  
25 *Civ. P. 54(d)(2)(B)(i)* (“Unless a statute or a court order provides otherwise, the motion  
26 must . . . be filed no later than 14 days after the entry of judgment[.]”)

27 <sup>4</sup> Plaintiff asks the Court to hold at this time that no prevailing party exists. (Doc. No. 15  
28 at 3–4.) While the Court is cognizant that this case is in the early stages of litigation and  
Plaintiff brought its motion within weeks of reviewing newly released Caltrans documents,  
the Court feels it more appropriate to rule on the prevailing party issue following full  
briefing on the issue. The Court also reminds Plaintiff that “expenses incurred in defending  
the litigation . . . do not establish legal prejudice.” *Real Estate Disposition Corp. v. Nat’l*  
*Home Auction Corp.*, No. CV 08-00435 SJO (Ex), 2009 WL 764529, at \*2 (C.D. Cal. Mar.  
19, 2009). This applies with equal force to Plaintiff as it does to Defendant.