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2 [attorney name redacted], Esq. (CSBN ////////////////)
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7 Attorney for Plaintiff
8 **Note: all names have been changed.**

9 **SUPERIOR COURT OF CALIFORNIA**
10 **COUNTY OF LOS ANGELES**

11 MICHAEL JONES,
12 Plaintiff
13 vs.
14 THOMAS SASAKI, et al,
15 Defendants

Case Number: [redacted]

**PLAINTIFF’S OPPOSITION TO
DEFENDANT SASAKI’S MOTION TO
VACATE VOLUNTARY DISMISSAL
AND SUSTAIN DEMURRER WITH
PREJUDICE; MEMORANDUM OF
POINTS AND AUTHORITIES**

Complaint filed: [redacted]
Courtroom: [redacted]
Date: [redacted]
Time: 10:00 a.m.

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18 TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

19 Defendant Thomas Sasaki (hereinafter “**SASAKI**”) has filed a Motion to Vacate
20 Voluntary Dismissal and Sustain Demurrer With Prejudice (hereinafter “**the Motion**”).
21 Plaintiff Michael Jones hereby submits this Opposition to the Motion on the grounds that,
22 pursuant to Code of Civil Procedure (hereinafter “**CCP**”) § 581(c), he has an absolute right to
23 voluntarily dismiss without prejudice because “the actual commencement of trial” has not
24 occurred.

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2 The Opposition is based upon the accompanying Memorandum of Points and
3 Authorities, upon the pleadings and papers on file herein, and upon any other evidence that
4 may be presented at the hearing on the Motion.
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6 Respectfully submitted,

7 Dated: _____

[redacted]

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10 [redacted], Attorney for Plaintiff
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Memorandum of Points and Authorities

Definitions set forth above in the Opposition are incorporated herein by reference.

The Court should DENY the Motion for the following reasons.

1. Factual Background

SASAKI filed a demurrer to the Fourth Cause of Action in Plaintiff's Second Amended Complaint (hereinafter the "DEMURRER"), which was set for hearing on Oct. 18, 2007 (hereinafter the "HEARING"). Prior to the HEARING and pursuant to CCP § 581(c), Plaintiff filed a voluntary dismissal without prejudice as to the Fourth Cause of Action against SASAKI (hereinafter the "VOLUNTARY DISMISSAL").

At the HEARING, the Court ordered that the DEMURRER was moot because of the VOLUNTARY DISMISSAL. A true and correct copy of the Minute Order from the Court mooting the demurrer (hereinafter the "MINUTE ORDER") is attached hereto as **Exhibit A**.

SASAKI now moves the Court to vacate the VOLUNTARY DISMISSAL and to sustain the DEMURRER without leave to amend.

2. The Court Should DENY the Motion Because the "Actual Commencement of Trial" Has Not Occurred.

CCP § 581(c) provides, "A plaintiff may dismiss his or her complaint, or any cause of action asserted in it, in its entirety, or as to any defendant or defendants, with or without prejudice prior to the actual commencement of trial." (Emphasis added.)

There has been no trial in this action. Indeed, the VOLUNTARY DISMISSAL occurred prior to the commencement of the HEARING.

Furthermore, notwithstanding the posting of a tentative ruling on the DEMURRER, no decision sustaining the demurrer had yet been made. "[W]e note that such right of voluntary dismissal.... would.... not be impaired prior to a decision sustaining the demurrer."

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2 Wells v. Marina City Properties, Inc. (1981) 29 Cal.3d 781 @ 789-790. “The plaintiff had
3 the statutory right to dismiss its case without prejudice, even on the eve of the hearing.”

4 Franklin Capital Corp. v. Wilson (4TH Dist., 2007)148 Cal.App.4th 187 @ 190

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6 Therefore, the Court should DENY the Motion because the “actual commencement of
7 trial” has not occurred.

8 **3. The Court Should DENY the Motion Because the Court Had**
9 **Discretion at the HEARING to Accept or Reject the VOLUNTARY**
10 **DISMISSAL, and It Exercised Its Discretion by Accepting It.**

11 In its ruling on the DEMURRER, the Court effectively ratified Plaintiff’s
12 VOLUNTARY DISMISSAL. “OFF CALENDAR. Motion [i.e. Demurrer] is moot, the
13 fourth cause of action having been dismissed by plaintiff.” MINUTE ORDER p. 1 ¶ 2.

14 SASAKI cites Groth Bros. Oldsmobile, Inc. v. Gallagher (1st Dist., 2002) 97
15 Cal.App.4th 60 for the proposition that Court erred in its ruling at the HEARING because the
16 tentative ruling served, in effect, as the “the actual commencement of trial,” thereby barring
17 the VOLUNTARY DISMISSAL. The Court did not err.

18 As Weil and Brown observe in California Practice Guide: Civil Procedure Before
19 Trial, “It is unclear whether the mere pendency of a dispositive demurrer or motion cuts off
20 plaintiff’s ‘absolute’ right to dismiss without prejudice.” Id. @ 11:25. “[V]oluntary dismissal
21 after the filing of an amended complaint and before a ruling on the demurrer to that amended
22 complaint is permissible.” Christensen v. Dewor Developments (1983) 33 Cal.3d 778 @ 785.

23 Thus, the Court should DENY the motion because it had discretion at the HEARING
24 to accept or reject the VOLUNTARY DISMISSAL, and it exercised its discretion by
25 accepting it.

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3 **4. Conclusion**

4 For the foregoing reasons, the Court should stand behind its ruling at the HEARING
5 by DENYING the Motion.

6 Respectfully submitted,

7 Dated: _____

Tourtlot & Butler

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10 Laurie J. Butler, Attorney for Plaintiff

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Exhibit A
MINUTE ORDER