

1 RICHARD R. WIEBE (SBN 121156)  
2 425 California Street, Suite 2025  
3 San Francisco, CA 94104  
4 Telephone: (415) 433-3200  
5 Facsimile: (415) 433-6382

6 THOMAS E. MOORE III (SBN 115107)  
7 TOMLINSON ZISKO MOROSOLI & MASER LLP  
8 200 Page Mill Road, Second Floor  
9 Palo Alto, CA 94306  
10 Telephone: (650) 325-8666  
11 Facsimile: (650) 324-1808

12 ARTHUR V. PLANK (SBN 072265)  
13 ALLONN E. LEVY (SBN 187251)  
14 HOPKINS & CARLEY LLC  
15 70 S. First Street  
16 San Jose, CA 95113  
17 Telephone: (408) 286-9800  
18 Facsimile: (408) 998-4790

19 CINDY A. COHN (SBN 145997)  
20 ELECTRONIC FRONTIER FOUNDATION  
21 454 Shotwell Street  
22 San Francisco CA 94110  
23 Telephone: (415) 436-9333  
24 Facsimile: (415) 436-9993

25 Attorneys for Defendant ANDREW BUNNER

26 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
27 COUNTY OF SANTA CLARA

28 DVD COPY CONTROL  
ASSOCIATION, INC.,  
Plaintiff,

v.

ANDREW THOMAS  
MCLAUGHLIN; ANDREW  
BUNNER; et al.,  
Defendants.

Case No. CV - 786804

**DATE: May 11, 2004**

**TIME: 9:00 a.m.**

**DEPT.: 2**

**HONORABLE WILLIAM J. ELFVING**

**DEFENDANT ANDREW BUNNER'S  
NOTICE OF MOTION AND MOTION TO  
VACATE PLAINTIFF  
DVD COPY CONTROL ASSOC., INC.'S  
VOLUNTARY DISMISSAL, AND  
MEMORANDUM IN SUPPORT THEREOF**



1                   **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION**

2   **INTRODUCTION**

3                   Four years ago, at the insistence of plaintiff DVD Copy Control Association, Inc.  
4 defendant Andrew Bunner was preliminarily enjoined from republishing the widely  
5 available computer program “DeCSS.” The Court issued the preliminary injunction  
6 pending a final determination on the merits of DVD CCA’s claim that Mr. Bunner’s  
7 republication of DeCSS misappropriated DVD CCA’s alleged trade secrets written inside  
8 each copy of the program “CSS.” Millions of copies of CSS and the alleged trade secrets  
9 written down within it have been distributed to the public by DVD CCA’s licensees.

10                   Over two years ago, Mr. Bunner, at that point having already been silenced by the  
11 injunction for almost two years, filed his motion for summary judgment to vindicate with  
12 finality his right to free speech and to determine with finality the merits of DVD CCA’s  
13 claim. The evidence submitted in support of that motion demonstrates that the so-called  
14 “trade secrets” are publicly available throughout the world, and that there is no merit to  
15 DVD CCA’s trade secret claim.

16                   Faced with the prospect of defeat, DVD CCA chose not to contest the merits of the  
17 summary judgment motion. Instead, it persuaded this Court to stay the summary  
18 judgment motion, continuing the hearing of Mr. Bunner’s motion until after the Supreme  
19 Court’s decision of DVD CCA’s appeal. Most recently, just seven weeks ago it  
20 persuaded the Court to extend the stay further and to continue the hearing of Mr.  
21 Bunner’s summary judgment motion until the Court of Appeal decides the appeal  
22 pending before it.

23                   Now, with an imminent ruling by the Court of Appeal looming, to be followed by  
24 the long-delayed hearing on Mr. Bunner’s still-pending summary judgment motion,  
25 DVD CCA seeks to evade the inevitable by attempting to voluntarily dismiss without  
26 prejudice the trial court action and by moving to dismiss the appeal pending before the  
27 Court of Appeal.

1 DVD CCA's purported voluntary dismissal without prejudice is ineffectual and  
2 should be vacated. California law prohibits a plaintiff from voluntarily dismissing an  
3 action without prejudice while a defendant's summary judgment motion is pending and  
4 has been continued at the plaintiff's request. Thus, DVD CCA's purported dismissal of  
5 the action is ineffectual and should be vacated, the trial court action continues to exist,  
6 and the appeal is not moot.

## 7 **ARGUMENT**

8 Pursuant to Code of Civil Procedure sections 473, 663, and 1008, defendant  
9 Andrew Bunner hereby respectfully moves the Court to vacate the voluntary dismissal of  
10 the action without prejudice filed by plaintiff DVD Copy Control Association, Inc. on  
11 January 21, 2004, and entered by the Clerk on the same day. For the reasons explained  
12 below, the dismissal should be vacated because it is void and was erroneously entered.  
13

### 14 **I. Procedural Background**

15 Mr. Bunner filed his summary judgment motion in this action on November 28,  
16 2001, seeking a final determination on the merits of DVD CCA's trade secret claim. As  
17 this Court is aware, Mr. Bunner presented an extensive evidentiary record demonstrating  
18 beyond dispute that the purported CSS trade secrets are no secrets at all but the subject of  
19 widespread public distribution and republication throughout the world. Accordingly, he  
20 is entitled to judgment in his favor in this action.

21 Mr. Bunner's summary judgment motion was calendared by the Court for  
22 hearing on January 29, 2002, with DVD CCA's opposition due January 15, 2002. On  
23 January 10, 2002, five days before its opposition was due, DVD CCA filed an ex parte  
24 application to stay the summary judgment proceedings; over Mr. Bunner's opposition,  
25 the Court vacated the previously-calendared hearing date. After the Supreme Court  
26 granted review of DVD CCA's appeal, DVD CCA then filed a motion to stay the  
27 summary judgment proceedings until the Supreme Court's decision of the appeal, which  
28 this Court granted on June 19, 2002 over Mr. Bunner's opposition. After the Supreme

1 Court's decision of the appeal became final, DVD CCA moved for a further stay of Mr.  
2 Bunner's summary judgment motion until the Court of Appeal's decision of the remand,  
3 which this Court granted on December 17, 2003 over Mr. Bunner's opposition.

4 Now, on the brink of an imminent ruling by the Court of Appeal and subsequent  
5 summary judgment proceedings in this Court, DVD CCA wishes to deny Mr. Bunner a  
6 decision on the merits that would finally decide whether or not CSS is a trade secret or  
7 instead is publicly available information. It has filed with the Clerk of this Court a  
8 purported voluntary dismissal of the action without prejudice.

9  
10 **II. DVD CCA's Purported Voluntary Dismissal Is Without Legal Effect And**  
11 **Should Be Vacated**

12 DVD CCA's purported voluntary dismissal is void and without effect, for  
13 California law wisely prohibits litigants from playing fast and loose with the judicial  
14 system in this fashion. Mr. Bunner is entitled to the clarity and the certainty of a decision  
15 on the merits of his summary judgment motion, and is likewise entitled to a decision on  
16 the merits of his appeal.

17 A plaintiff who seeks and obtains a postponement of the hearing of a defendant's  
18 pending summary judgment motion instead of filing a timely opposition cannot use the  
19 delay it has obtained as an opportunity to voluntarily dismiss the action without prejudice  
20 and thereby escape a decision on the merits. Code of Civ. Pro. § 581, subs. (b)(1), (c);  
21 *Cravens v. State Board of Equalization*, 52 Cal.App.4th 253, 255 (1997) ("a plaintiff may  
22 not frustrate the summary judgment statute by interposing a voluntary dismissal without  
23 prejudice in lieu of opposition to a defendant's motion"); *Mary Morgan v. Melzark*, 49  
24 Cal.App.4th 765, 769 (1996) (no right to voluntary dismissal without prejudice where  
25 summary judgment hearing continued at plaintiff's request); *Miller v. Marina Mercy*  
26 *Hospital*, 157 Cal.App.3d 765, 767 (1984) (no right to voluntary dismissal without  
27 prejudice after summary judgment motion filed). A similar rule has been applied in other  
28 procedural context as well. *Groth Bros. Oldsmobile, Inc. v. Gallagher*, 97 Cal.App.4th

1 60, 66 (2002) (demurrer pending before hearing; no right to voluntary dismissal without  
2 prejudice); *Gray v. Superior Court*, 52 Cal.App.4th 165, 167 (1997) (advisory  
3 proceedings before referee pending; no right to voluntary dismissal without prejudice);  
4 *Hartbrodt v. Burke*, 42 Cal.App.4th 168, 169 (1996) (motion to dismiss pending; no right  
5 to voluntary dismissal without prejudice: “a plaintiff cannot defeat a defendant’s right to  
6 obtain a determination on the merits by simply filing a voluntary dismissal when  
7 statutory authority entitles the defense to a final judgment”).

8 “The thread running through all these cases seems to be one of fairness . . . .”  
9 *Gray v. Superior Court*, 52 Cal.App.4th at 173. As these cases explain, although Code of  
10 Civil Procedure section 581 permits a voluntary dismissal without prejudice before the  
11 “commencement of trial” (Code Civ. Pro. § 581, subs. (b)(1), (c)), “limitations have  
12 evolved through the courts’ construction of the term ‘commencement of trial.’ The  
13 meaning of the term ‘trial’ is not restricted to jury or court trials on the merits, but  
14 includes other procedures that effectively dispose of the case.” *Mary Morgan v. Melzark*,  
15 49 Cal. App. 4th at 769 (citations and internal quotation marks omitted).

16 In the context of summary judgment proceedings in particular, it is necessary to  
17 reconcile section 581 with the policies and procedures of the summary judgment statute,  
18 Code of Civil Procedure section 437c. “Logic and fairness dictate that the right of a  
19 plaintiff to voluntarily dismiss an action before commencement of trial is restricted not  
20 only by statutory limitations and judicial constructions of the phrase ‘commencement of  
21 trial’; it is also limited by the dismissal procedure’s conjunction with other judicial  
22 procedures. The interrelationship between various provisions of the Code of Civil  
23 Procedure must be considered when interpreting any one provision so that statutory  
24 harmony is achieved.” *Mary Morgan v. Melzark*, 49 Cal.App.4th at 771.

25 Accordingly, the court in *Mary Morgan* held, “[w]e will not eviscerate the  
26 summary judgment procedure by permitting a plaintiff to voluntarily dismiss his or her  
27 action after commencement of a summary judgment hearing and continuation for the  
28 express and exclusive purpose of permitting the plaintiff an opportunity to present

1 opposition evidence. The trial court correctly determined that appellant was not entitled  
2 to dismiss its action without prejudice and reassert the same allegations that it could not,  
3 or would not, defend when challenged by respondents' summary judgment motions."  
4 *Mary Morgan v. Melzark*, 49 Cal.App.4th at 771-72; accord, *Cravens v. State Board of*  
5 *Equalization*, 52 Cal.App.4th at 255 ("a plaintiff may not frustrate the summary judgment  
6 statute by interposing a voluntary dismissal without prejudice in lieu of opposition to a  
7 defendant's motion").

8 So, too, here. Over two years ago, Mr. Bunner filed and calendared his motion for  
9 summary judgment and submitted to the Court an undisputed evidentiary record  
10 demonstrating his entitlement to judgment in his favor. Rather than filing an opposition  
11 within the allotted time and allowing the motion to proceed to decision, DVD CCA  
12 sought and obtained repeated postponements of the hearing and decision of the motion.  
13 It may not now take advantage of that self-created two-year delay to voluntarily dismiss  
14 the action.

15 Moreover, courts have been guided by strong considerations of fairness and  
16 judicial policy in interpreting the voluntary dismissal statute. The court in *Groth*  
17 *Brothers* well articulated how permitting unrestricted voluntarily dismissals after a  
18 dispositive motion has been presented for decision would seriously harm the judicial  
19 system: "If [a plaintiff] could do so, litigation would become interminable, because a  
20 party who was led to suppose a decision would be adverse to him could prevent such  
21 decision and begin anew, thus subjecting the defendant to annoying and continuous  
22 litigation. An important additional interest has also been identified. . . . [T]he injustice to  
23 the defendant is not the greatest evil of such a practice; the wasting of the time and  
24 money of the people in a fruitless proceeding in the courts is something far more serious.  
25 [¶] . . . The obvious consequence of such a statutory construction would be to prolong,  
26 rather than to terminate, lawsuits. It would not serve the orderly and timely disposition of  
27 civil litigation. No good reason appears why encouragement should be given to such  
28 tactics, the effect of which is to expose defendants to duplicative annoying and

1 continuous litigation, to burden our trial court with fruitless proceedings, and to delay the  
2 ultimate resolution of the validity of the plaintiff's pleading." *Groth Bros. Oldsmobile,*  
3 *Inc. v. Gallagher*, 97 Cal.App.4th at 67-68 (citations and internal quotation marks  
4 omitted).

5 These fundamental considerations of fairness and justice additionally support the  
6 conclusion that DVD CCA's purported dismissal is contrary to the purpose of the  
7 voluntary dismissal statute. DVD CCA repeatedly stated to this Court, in January 2001,  
8 June 2001, and in December 2003, that its sole purpose in seeking a stay was to improve  
9 the quality of the Court's decision on the merits of Mr. Bunner's summary judgment  
10 motion: "The Supreme Court's anticipated analysis of the important issues of California  
11 public policy at stake in this case clearly would inform this Court's consideration of the  
12 arguments that Mr. Bunner now advances in his Summary Judgment Motion." 5/3/02  
13 DVD CCA Memo. In Support Of Its Motion To Stay at 6:11-13; see also 1/11/02 DVD  
14 CCA Ex Parte Application at 5:11-14 (same); 11/12/03 DVD CCA Memo. In Support Of  
15 Motion To Stay at 3:9-12 ("The rationale behind the stay was that, because Bunner's  
16 appeal involves issues at the heart of the Summary Judgment Motion, this Court should  
17 wait to see how the Court of Appeal and the Supreme Court decide the matter before  
18 ruling on these issues itself."). It told the same thing to the Court of Appeal in the writ  
19 proceedings in which Mr. Bunner sought to have the stay lifted. 7/29/02 DVD CCA Opp.  
20 To Petition For Writ Of Mandate at 3 (Ct. App. No. H024755).

21 In initially seeking a stay, DVD CCA assured this Court and Mr. Bunner that Mr.  
22 "Bunner is in no way prejudiced by waiting until after the California Supreme Court has  
23 ruled to bring his motion." 5/3/02 DVD CCA Memo. In Support Of Motion To Stay at  
24 3:5-6. In obtaining an extension of the stay in December 2003, it again assured this Court  
25 that "Bunner's cries of urgency are all the less persuasive given that, under the expedited  
26 briefing schedule on remand, the matter will be fully briefed before the Court of Appeal  
27 in less than six weeks." 11/12/03 DVD CCA Memo. In Support Of Motion To Stay at  
28 4:1-3. And most recently, it told the Court of Appeal in December 2003 that the Court of



1 Appeal should “allow the case to be adjudicated before the superior court” (12/22/03  
2 DVD CCA Supp. Reply Br. at 4) and should “reject Bunner’s suggestion that ‘DVD CCA  
3 has used the existence of this preliminary injunction appeal as an excuse for postponing  
4 for years the final resolution by the trial court of the merits of its claim’ ” (*id.* at 3).

5 All of these lulling assurances by DVD CCA that Mr. Bunner would someday  
6 receive a decision on the merits of his summary judgment motion have now proved false.  
7 DVD CCA has maintained a preliminary injunction against Mr. Bunner that for at least  
8 two years (since the filing of the summary judgment evidence) it has known cannot be  
9 justified under California’s Uniform Trade Secret Act. It should not be permitted to walk  
10 away from this case after its egregious impositions on California’s court system and on  
11 Mr. Bunner.

12 This case has consumed hundreds of hours of judicial time. There were extensive  
13 preliminary injunction proceedings, discovery proceedings, an appeal of the preliminary  
14 injunction to the Court of Appeal, an appeal of the preliminary injunction to the Supreme  
15 Court, and the current remand proceedings before the Court of Appeal. There have three  
16 motions to stay briefed and heard by this Court, and writ proceedings in the Court of  
17 Appeal and the Supreme Court challenging the stays.

18 Likewise, defending Mr. Bunner for over four years in this case has consumed  
19 many hundreds of hours of attorney effort worth hundreds of thousands of dollars. In  
20 addition to the proceedings listed above, there have also been extensive document  
21 discovery and depositions. It would be unfair and unjust in the extreme to both the  
22 judicial system and to Mr. Bunner to conclude that DVD CCA may voluntarily dismiss  
23 the action without prejudice at this late date after repeatedly postponing for years Mr.  
24 Bunner’s pending summary judgment motion.<sup>1</sup>

---

25  
26 <sup>1</sup> In the past, DVD CCA has asserted that Mr. Bunner’s summary judgment motion  
27 deserved to be stayed because, it contended, he could have been filed a year earlier than it  
28 was, while the preliminary injunction appeal was first pending in the Court of Appeal.  
5/3/02 DVD CCA’s Stay Memo. at 2. This assertion is both false and irrelevant. Code of  
Civil Procedure section 2019, subdivision (d) requires the plaintiff in a trade secret case

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20

**CONCLUSION**

DVD CCA's purported voluntary dismissal of the action should be vacated and the Court should decide the appeal on the merits.

Dated: February 18, 2004

Respectfully submitted,

---

Richard R. Wiebe  
Attorney for Defendant Andrew Bunner

---

21 to identify its trade secrets with particularity. Because Mr. Bunner's motion is based on  
22 the fact that DVD CCA's alleged trade secrets are publicly known, that motion could not  
23 be made until DVD CCA made its section 2019(d) identification of what its alleged trade  
24 secrets were. After much delay, DVD CCA did not finally complete its required  
25 description of its trade secrets pursuant to section 2019(d) until December 20, 2000,  
26 almost a year after it began this litigation. A few weeks later, on January 16, 2001, the  
27 Court of Appeal stayed all trial court proceedings (by order issued in appeal H021153);  
28 this stay lasted until August 31, 2001 and prohibited Mr. Bunner from filing any  
summary judgment motion. Mr. Bunner then prepared his motion for summary judgment  
together with the extensive evidentiary submission supporting it and promptly filed it as  
soon as it was complete, on November 28, 2001.