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20 *Attorneys for Plaintiffs*

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23 **UNITED STATES DISTRICT COURT**  
24 **CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION**  
25

26 HERMELINDA LUNA,  
27 ALEXANDRIA HANKS ON  
28 BEHALF OF THE ESTATE OF  
TANIA D. HANKS, ETHEL  
HERRERA, JEANETTE JONES,  
BECKY CANZONERI,  
MARGARET REED and BRENDA  
VERSIC

Plaintiffs,

v.

JOHNSON & JOHNSON,  
JOHNSON & JOHNSON  
CONSUMER INC., AND DOES 1-  
25, inclusive,

Defendants.

Case No. 2:18-cv-04830

**NOTICE OF MOTION AND  
MOTION FOR VOLUNTARY  
DISMISSAL PURSUANT TO FED.  
R. CIV. P. 41(a)(2)**

Judge: Hon. George H. Wu  
Dept.: 9D  
Hearing set for: July 29, 2019

Trial Date: October 15, 2019  
Action Filed: March 6, 2018

1 COME NOW, Plaintiffs, by and through counsel, and pursuant to Rule  
2 41(a)(2) of the Federal Rules of Civil Procedure, move for voluntary dismissal of this  
3 action. This motion is made following the conference of counsel pursuant to L.R. 7-  
4 3 which took place on June 7, 2019.

### 5 I. INTRODUCTION

6 Plaintiffs filed this action in the Superior Court of California, County of Los  
7 Angeles on March 6, 2018 alleging claims against Johnson & Johnson and Johnson  
8 & Johnson Consumer Inc. (collectively “J&J”) and Does 1-25 for violations of  
9 California Health & Safety Code §25249.5 (Proposition 65) and California Business  
10 & Professions Code § 17200, *et seq.*, and § 17500, *et seq.*, arising from Defendants’  
11 failure to warn consumers of exposure to asbestos and talc containing asbestiform  
12 fibers in Defendants’ products. Complaint, Doc. # 1-1. J&J removed the case to this  
13 Court on May 31, 2018, pursuant to 28 U.S.C. §§ 1332(a), 1441(b), and 1446. Notice  
14 of Removal, Doc. # 1.

15 On November 8, 2018, the Court held a scheduling conference and ordered  
16 that no further pleading amendments would be allowed. Thereafter, Plaintiffs  
17 discovered that the rights to “Shower to Shower”—one of the line of products  
18 involved in this action—was sold by J&J to Valeant Pharmaceuticals North America,  
19 LLC (“Valeant”) in 2012. Because Valeant now owns and distributes this line of  
20 products, it is necessary to assert claims against Valeant to ensure that all necessary  
21 parties and relevant time periods are accounted for. To that end, and as soon as  
22 Plaintiffs recognized Valeant’s potential liability, Plaintiffs served Valeant with the  
23 requisite notice of violation of Health & Safety Code §25249.5 (“Proposition 65”) on  
24 February 11, 2019. Importantly, both Valeant and J&J continue to source talc,  
25 containing asbestos and asbestiform talc, from *the same* Chinese talc mine to be used  
26 in consumer body powders, among other products, in California.

1 Plaintiffs filed a Motion for Leave to File Amended Complaint to add Valeant  
2 as a defendant and assert claims against it on April 18, 2019. Doc. # 70. Valeant and  
3 J&J filed oppositions to Plaintiffs' motion on May 20, 2019. Docs. # 82, 84.  
4 Plaintiffs' motion is set to be heard July 1, 2019<sup>1</sup>.

5 In addition to Plaintiffs' discovery of facts giving rise to claims against  
6 Valeant, recent testing by the FDA revealed asbestos in talc cosmetic products sold  
7 by Claire's stores. In March 2019, the FDA issued a warning to consumers not to  
8 use certain Claire's products.<sup>2</sup> This new information indicates there may be a  
9 potential basis for holding Claire's liable for violations similar to those by J&J. There  
10 may also be evidence of **additional** violating substances (not just asbestos) in the  
11 Johnson & Johnson Body Powder products sold in California, such as silica, arsenic  
12 and/or lead. In fact, as the science develops, it is becoming clear that any talc product  
13 sold in California that is sourced from the subject Chinese mine should include a  
14 Prop 65 warning. Including all of those products in a single Prop 65 litigation is the  
15 most efficient means to adjudicate that claim. In short, this action does not  
16 encompass all appropriate products, parties or claims. Additional time is necessary  
17 to identify the proper parties and claims, if any, to be asserted against those parties.

18 For the reasons below, Plaintiffs move this Court to enter an order dismissing  
19 their claims without prejudice to refile and without being conditioned upon  
20 payment of costs and attorney's fees. Alternatively, Plaintiffs ask the Court to  
21 dismiss their claims with prejudice, in which case the opportunity for costs and fees  
22 under Rule 41(d) will not apply.

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27 <sup>1</sup> Plaintiffs have filed a Request to Vacate the hearing set for July 1, 2019, concurrently with this Motion.

28 <sup>2</sup> See, e.g., Claire's Recalls Makeup Products That Tested Positive For Asbestos, Mar. 13, 2019,  
<https://www.cbsnews.com/news/claies-recalls-makeup-makeup-that-tested-positive-for-asbestos/>.

## II. ARGUMENT

### A. Rule 41(a)(2) Standard.

“Rule 41(a)(2) permits a plaintiff, with the approval of the court, to dismiss an action without prejudice **at any time.**” *Stevedoring Servs. of Am. v. Armilla Intern. B.V.*, 889 F.2d 919, 921 (9th Cir. 1989); Fed. R. Civ. P. 41(a)(2) (emphasis added) (“[A]n action may be dismissed at the plaintiff’s request only by court order, on terms that the court considers proper.”). “A motion for voluntary dismissal under Rule 41(a)(2) is addressed to the district court’s sound discretion and the court’s order will not be disturbed unless the court has abused its discretion.” *Stevedoring Servs.*, 889 F.2d at 921. “The purpose of the rule is to permit a plaintiff to dismiss an action without prejudice so long as the defendant will not be prejudiced or unfairly affected by dismissal.” *Stevedoring Servs.*, 889 F.2d at 921 (internal cites omitted).

### B. Dismissal Will Not Result In Legal Prejudice To J&J.

“Within the Ninth Circuit a district court should grant a motion for voluntary dismissal unless a defendant can show that it will suffer some plain legal prejudice as a result.” *Quismundo v. Trident Society, Inc.*, No. 3:17-cv-1930-CAB (WVG), 2018 WL 1963782, \*2 (S.D. Ca. Apr. 25, 2018) (citing *Smith v. Lenches*, 263 F.3d 972, 975 (9th Cir. 2001)); *Bennett v. Dhaliwal*, 721 Fed. Appx. 577, 578 (9th Cir. 2017), *cert. denied sub nom.* 139 S.Ct. 269 (2018). Legal prejudice means “prejudice to some legal interest, some legal claim, some legal argument.” *Zanowick v. Baxter Healthcare Corp.*, 850 F.3d 1090, 1093 (9th Cir. 2017); *Smith*, 263 F.3d at 976. “A dismissal under Rule 41(a)(2) is normally without prejudice.” *Smith*, 263 F.3d at 976.

J&J will not be prejudiced by the dismissal of Plaintiffs’ claims. Any future litigation by these Plaintiffs against J&J will involve additional defendants, which may reduce any proportionate liability and provide J&J available cross-claims and/or claims for indemnity. Further, “uncertainty because a dispute remains unresolved or

1 because the threat of future litigation causes uncertainty does not result in plain legal  
2 prejudice.” *Smith*, 263 F.3d at 976 (internal quotes and ellipses omitted). “Also, plain  
3 legal prejudice does not result merely because the defendant will be inconvenienced  
4 by having to defend in another forum or where a plaintiff would gain a tactical  
5 advantage by dismissal.” *Id.* (holding change from federal to state forum was not  
6 legal prejudice)<sup>3</sup>; *see Zanowick*, 850 F.3d at 1093 (while a change from federal to  
7 state court may create a tactical disadvantage to defendants, that is not legal  
8 prejudice) (district court did not abuse its discretion in dismissing consumer’s claims  
9 arising from asbestos exposure without prejudice, notwithstanding his widow’s  
10 failure to comply with 90-day time limit for filing motion for substitution of a  
11 deceased party); *Hamilton v. Firestone Tire & Rubber Co., Inc.*, 679 F.2d 143, 145  
12 (9th Cir. 1982) (“Plain legal prejudice...does not result simply when defendant faces  
13 the prospect of a second lawsuit, or when plaintiff merely gains some tactical  
14 advantage.”); *Bennett*, 721 Fed. Appx. at 578 (District court abused its discretion in  
15 rejecting plaintiffs’ voluntary motion to dismiss FCTA action without prejudice, and  
16 in subsequently dismissing action for failure to prosecute, where plaintiffs repeatedly  
17 notified the district court and before trial of their intention not to proceed with the  
18 FTCA action, eventually seeking to dismiss that suit without prejudice pursuant to  
19 Rule 41(a)(2), and where United States would not have suffered any legal prejudice  
20 from voluntary dismissal). Because the dismissal of Plaintiffs’ claims will not result  
21 in legal prejudice to J&J, the Court should grant Plaintiffs’ motion.

22 **C. Dismissal Should Not Be Conditioned Upon Plaintiffs Paying Costs And**  
23 **Fees.**

24 Although costs and attorney fees may be imposed upon a plaintiff who is  
25 granted a voluntary dismissal under Fed. R. Civ. P. 41(a)(2), “no circuit court has  
26 held that payment of the defendant’s costs and attorney fees is a prerequisite to an

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28 <sup>3</sup> *See also Smith*, 263 F.3d at 976 (“[T]he need to defend against state law claims in state court is not ‘plain legal prejudice’ arising from voluntary dismissal of the federal claims in the district court.”).

1 order granting voluntary dismissal.” *Stevedoring Servs.*, 889 F.2d at 921.  
 2 “Moreover, several courts have specifically held that such payment is not required.”  
 3 *Stevedoring Servs.*, 889 F.2d at 921 (collecting cases, and holding that the district  
 4 court did not abuse its discretion by refusing to require the plaintiff to pay the  
 5 defendant’s costs and attorney fees in case involving a contract dispute).

6 Even where fees are awarded, “a defendant is entitled only to recover, as a  
 7 condition of dismissal under Fed. R. civ. P. 41(a)(2), attorneys fees or costs for work  
 8 which is not useful in continuing litigation between the parties.” *Koch v. Hankins*, 8  
 9 F.3d 650, 652 (9th Cir. 1993) (finding “[t]he district court abused its discretion in  
 10 finding the amount of costs without differentiating between work product which was  
 11 rendered useless and that which might be of use in the [other] litigation.”).<sup>4</sup> *See also*  
 12 *Smith*, 263 F.3d at 978 (“[T]here was nothing wrong with plaintiffs’ decision initially  
 13 to pursue parallel actions in state and federal court.”).<sup>5</sup> “Only those costs incurred  
 14 for the preparation of work product rendered useless by the dismissal should be  
 15 awarded as a condition of voluntary dismissal.” *Id.*

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 18 <sup>4</sup> In reversing the district court’s award of costs and attorney’s fees, the court of appeals stated:

19 The district court did not determine which costs arose from the preparation of work product  
 20 which might be useful in the continuing litigation between the parties, and which costs arose  
 21 from the preparation of work product rendered useless by the dismissal of appellants’ federal  
 22 action. Appellees’ bill of costs sets forth lump sum amounts for such things as “Depositions  
 23 and Reporters.” It provides no basis for a finding as to whether the depositions were useful  
 24 in the parties’ continuing litigation. During the hearing on appellees’ bill of costs, the district  
 25 court specifically asked defense counsel whether the depositions were usable in appellants’  
 26 state court actions. The response of appellees’ counsel was equivocal, at best. The district  
 27 court did not pursue the issue, choosing instead to award all of appellees’ deposition costs  
 28 “for the reasons” cited by appellants’ counsel. While counsel’s reasons were not necessarily  
 irrelevant to the conditioning of the voluntary dismissal of appellants’ action, none related  
 to whether the depositions would be useful in the parties’ continuing litigation.

*Koch*, 8 F.3d at 652.

<sup>5</sup> *C.f.*, *Hamilton*, 679 F.2d at 146 (“Appellant’s contention that appellee should have been estopped from  
 requesting a voluntary dismissal, because appellant was put to significant expense in preparing and filing its  
 pleadings, is without merit. The very purpose of Rule 41(a)(2) is to allow a District Court, in its discretion,  
 to dismiss an action without prejudice even after responsive pleadings have been filed by the defendant.”).



1            “In determining whether to award costs to a defendant after a voluntary  
2 dismissal without prejudice, courts generally consider the following factors: (1) any  
3 excessive and duplicative expense of a second litigation; (2) the effort and expense  
4 incurred by a defendant in preparing for trial; (3) the extent to which the litigation  
5 has progressed; and (4) the plaintiff’s diligence in moving to dismiss.” *Santa Rosa*  
6 *Memorial Hospital v. Kent*, 688 Fed. Appx. 492, 494 (9th Cir. 2017) (internal quotes,  
7 ellipses, and brackets omitted). “The merits of the plaintiff’s case are also relevant.”  
8 *Id.* (District court did not abuse its discretion when it declined to award costs and fees  
9 and dismissed without prejudice action by hospitals against Department of Health  
10 Care Services pertaining to Medicaid reimbursement rates. Although department  
11 incurred duplicative expenses and summary judgment motions were before the court,  
12 the district court’s decision was justified by its consideration of the legitimate factor  
13 of the merit of the Plaintiffs’ claims.); see *Quismundo*, 2018 WL 1963782 at \*3  
14 (declining to award fees and costs when dismissing without prejudice of plaintiff’s  
15 claims for violations of the California Labor Code and California Business &  
16 Professions Code where dismissal did not expose defendants to excessive or  
17 duplicative expenses because most of the work performed would remain useful in the  
18 litigation in state court, and work that would not be of further use was of the  
19 defendant’s own making).

20            Here, the totality of the factors weigh against imposing costs and attorney’s  
21 fees on Plaintiffs. Any additional litigation against J&J will not result in excessive  
22 or duplicative expenses, as the costs J&J has incurred thus far for the preparation of  
23 work product will not be rendered useless. Indeed, J&J has retained many of the  
24 same experts for this case that it has used in other talc litigation against it across the  
25 country. The parties have yet to file *Daubert* motions, motions for summary  
26 judgment, and pretrial motions. And Plaintiffs exercised diligence in moving to  
27 dismiss this action after realizing the need to assert claims against additional  
28

1 defendants, as well as the need for discovery of other potential defendants.  
2 Moreover, recent judgments in personal injury cases involving J&J’s products and  
3 the FDA’s warnings about asbestos in cosmetic products demonstrates the merits of  
4 Plaintiffs’ case.

5 However, in the event the Court is inclined to award costs and attorney’s fees,  
6 Plaintiffs ask the Court to clarify that such an award will ripen only upon Plaintiffs  
7 filing a new “action based on or including the same claim against the same defendant”  
8 consistent with Rule 41(d). *See Fed. R. Civ. P. 41(d)* (“If a plaintiff who previously  
9 dismissed an action in any court files an action based on or including the same claim  
10 against the same defendant, the court...may order the plaintiff to pay all or part of  
11 the costs of that previous action.”).

12 Alternatively, Plaintiffs ask the court to dismiss the action with prejudice and  
13 without costs and attorney’s fees.

### 14 III. CONCLUSION

15 For the foregoing reasons, Plaintiffs pray this Court grants their Motion for  
16 Voluntary Dismissal pursuant to Rule 41(a)(2).

17  
18  
19 DATED: June 18, 2019

**THE LANIER LAW FIRM, P.C.**

20  
21 By: /s/ Michael Akselrud

22 Michael A. Akselrud  
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**PROOF OF SERVICE**

I am over the age of 18 years and not a party to the within entitled action. I am employed at The Lanier Law Firm, PC, 21550 Oxnard Street, 3rd Floor, Woodland Hills, CA 91367.

On June 18, 2019, I filed the foregoing document with the Clerk of the Court:

**NOTICE OF MOTION AND MOTION FOR VOLUNTARY DISMISSAL  
PURSUANT TO FED. R. CIV. P. 41(a)(2)**

BY ELECTRONIC MEANS: On the above date, I filed the above-mentioned documents by electronic means with the U.S. District Court for the Central District of California, over the internet, through its Case Management/Electronic Case Filing System (CM/ECF). As such, the Court electronically mailed said documents to the parties registered to receive notice through this system

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on June 18, 2019, at Los Angeles, California.

/s Michael Akselrud  
Michael Akselrud