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16 **UNITED STATES DISTRICT COURT**
17 **CENTRAL DISTRICT OF CALIFORNIA WESTERN DIVISION**

18 HERMELINDA LUNA,
19 ALEXANDRIA HANKS ON BEHALF
OF THE ESTATE OF TANIA D.
20 HANKS, ETHEL HERRERA,
JEANETTE JONES, BECKY
21 CANZONERI, MARGARET REED
and BRENDA VERSIC,
22

23 Plaintiffs,

24 v.

25 JOHNSON & JOHNSON, JOHNSON
& JOHNSON CONSUMER INC., AND
DOES 1-25, inclusive,
26

27 Defendants.
28

Case No. 2:18-cv-04830-GW(KSx)

**DEFENDANTS' OPPOSITION TO
PLAINTIFFS' MOTION FOR
VOLUNTARY DISMISSAL
PURSUANT TO FED. R. CIV. P.
41(a)(2)**

Date: July 29, 2019
Time: 8:30 AM
Dept: 9D
Judge: Hon. George H. Wu

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

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1 **I. INTRODUCTION**

2 Plaintiffs provide no good reason for this Court to grant their Motion for
3 Voluntary Dismissal Pursuant to Fed. R. Civ. P. 41(a)(2) (the “Motion”). A
4 voluntary dismissal at this end-stage of the litigation will cause Defendants Johnson
5 & Johnson (“J&J”) and Johnson & Johnson Consumer Inc. (“JJCI”) plain legal
6 prejudice. For that reason, the Motion should be denied.

7 The Lanier Law Firm commenced this action as a transparent tactical
8 maneuver to improve their litigation position in personal injury actions that they
9 have pending against Defendants across the country. They saw Proposition 65 as a
10 potential vehicle to obtain a court-ordered cancer warning on Defendants’ talcum
11 powder products – a warning that the Federal Food and Drug Administration twice
12 found unwarranted. *See* Declaration of Elyse Echtman (“Echtman Decl.”) at ¶¶ 3-
13 4, Exs. A-B.

14 Before filing this case, the Lanier Law Firm’s own website represented that
15 current talcum powder products are safe. *Id.* at ¶ 5, Ex. C. Another personal injury
16 plaintiffs’ firm conceded in closing arguments that Defendants’ current talc source
17 is asbestos-free. *Id.* at ¶ 6, Ex. D. Plaintiffs also had laboratory results showing
18 that the regular quarterly talc testing that Defendants perform in the ordinary course
19 of business has repeatedly and consistently confirmed no asbestos detected in the
20 talc. Plaintiffs’ own go-to microscopy expert testified, before having been hired for
21 talcum powder litigation, that the claim that cosmetic talcum powder products
22 contain asbestos is an “urban legend.” *Id.* at ¶ 7, Ex. E.¹ Until he was hired by
23 plaintiffs’ lawyers pursuing talc cases, he had never detected asbestos in cosmetic
24 talc. *Id.*

25 Against that factual backdrop, approximately two years ago, Plaintiffs
26 commenced the steps necessary to institute a Proposition 65 action against

27
28 ¹ *See* Exhibit E (155:8-13).

1 Defendants. They assert in this action that a Proposition 65 warning is required for
2 current Johnson’s Baby Powder (“JBP”) and Shower to Shower (“STS”) products,
3 on the grounds that the products allegedly contain “asbestos” and “talc containing
4 asbestiform fibers.” Plaintiffs have pursued these claims through fact discovery
5 and three rounds of expert disclosures. Now, with a fully developed record that
6 shows what Plaintiffs have known all along – that the products are safe – they ask
7 the Court to voluntarily dismiss so that they can try again. Plaintiffs seek a
8 voluntary dismissal for the patently improper reason of avoiding an inevitable
9 adverse ruling on the merits.

10 A voluntary dismissal is inappropriate when a case is at the summary
11 judgment stage and headed to trial. Plaintiffs apparently are dissatisfied with the
12 record that they developed and strategic decisions that they made, which is why
13 they seek Court permission for a complete do-over. They claim that they want to
14 (1) perform additional fact investigation; (2) join additional defendants; and
15 (3) potentially expand the scope of their Proposition 65 claims to include more
16 substances. *See* Motion, Dkt. No. 96. The time for that investigation and those
17 strategic decisions has long-passed. Defendants have devoted substantial resources
18 to the defense of this case and are ready for a binding merits determination in their
19 favor that no cancer warning should be put on their products.

20 For all of these reasons, this Court should deny Plaintiffs’ Motion. In the
21 alternative, this Court should make a dismissal contingent upon the prior payment
22 of Defendants’ costs and attorneys’ fees, to reimburse Defendants for the
23 substantial amounts of money spent to defend this litigation that Plaintiffs chose to
24 abandon at the eleventh hour.

25 **II. PROCEDURAL HISTORY**

26 Plaintiffs began setting the groundwork for this case approximately two years
27 ago, and this case has been actively litigated for more than one year’s time, as
28 shown by the procedural history set forth below.

1 **A. Commencement of the Action**

2 Plaintiffs took their first formal steps toward commencing this action in
3 August 2017. On August 24, 2017, they served a Notice of Violation of California
4 Health & Safety Code § 25249.6 on Defendants and the Office of the California
5 Attorney General, as well as District Attorneys and City Attorneys across the state.
6 That Notice of Violation was accompanied by a Certificate of Merit of the same
7 date. Pursuant to Proposition 65, an investigation is required prior to execution of a
8 Certificate of Merit. Cal. Health & Safety Code § 25249.7(d)(1). Plaintiffs’
9 Certificate of Merit, which is signed by one of their attorneys at the Lanier Law
10 Firm, represents that such an investigation had been done. *Id.* Thus, Plaintiffs
11 began their work on this matter in mid-2017, at the very latest.

12 At the time of that initial investigation, Plaintiffs’ counsel already had the
13 benefit of full litigation discovery from Defendants. For example, they are counsel
14 in *Ingham v. Johnson & Johnson*, Case No. 1522-CC10417 (22nd Judicial Circuit
15 Court of the City of St. Louis, Missouri), a case commenced in August 2015.
16 Plaintiffs’ counsel has represented to this Court that they needed no further fact
17 discovery for their prosecution of this action. *See* Plaintiffs’ Reply to Defendants’
18 Opposition to Plaintiffs’ Motion for an Order Modifying Scheduling Order and
19 Permitting Plaintiffs to File an Amended Complaint, Dkt. No. 90, at 2:5-6.

20 On March 6, 2018, Plaintiffs filed their Complaint in the Superior Court of
21 California, County of Los Angeles. The Complaint asserts three causes of action
22 against Defendants for violations of Proposition 65 and Business & Professions
23 Code §§ 17200 and 17500. All claims are premised on an alleged failure to warn as
24 required by Proposition 65. Plaintiffs assert that the JBP and STS products contain
25 two Proposition 65 scheduled chemicals, asbestos and “talc containing asbestiform
26 fibers,” in excess of applicable “no significant risk levels.” Plaintiffs served the
27 Complaint on JJCI on May 2, 2018, and on J&J on May 4, 2018.

28

1 **B. Removal to This Court**

2 On May 31, 2018, Defendants removed the action to this Court based on
3 diversity jurisdiction. *See* Notice of Removal, Dkt. No. 1. Plaintiffs moved for
4 remand on the primary grounds that they purportedly had no injury in fact to
5 support Article III standing. *See* Motion to Remand, Dkt. No. 27. Plaintiffs made
6 this argument notwithstanding that the Complaint expressly alleges “injury in fact.”
7 *See* Defendants’ Opposition to Plaintiffs’ Motion to Remand, Dkt. No. 36, 1:2-12;
8 4:3-13; *see also* Minutes of Plaintiffs’ Motion to Remand Case to the Superior
9 Court of California, Dkt. No. 39. Following the Court’s denial of Plaintiffs’
10 remand motion, Plaintiffs informed Defendants’ counsel that they intended to
11 amend the complaint to remove the claims brought under California Business &
12 Professions Code §§ 17200 and 17500, and once again move for remand back to
13 state court. Echtman Decl. at ¶ 8, Ex. F. However, they did not do so. Plaintiffs
14 opted to continue litigating this matter in this Court.

15 **C. Defendants’ Motion to Dismiss and Answers**

16 After removing the case, Defendants moved to dismiss pursuant to Rule
17 12(b)(6) of the Federal Rules of Civil Procedure, on the grounds that the Complaint
18 failed to meet *Iqbal/Twombly* pleading standards, and contained insufficient
19 conclusory allegations about purported asbestos content in present-day talc products
20 that should not be credited. *See* Motion to Dismiss, Dkt. No. 20. As set forth
21 above, Plaintiffs’ counsel previously had conceded that cosmetic talc products
22 currently on the market are safe. *See* Echtman Decl. at ¶ 5, Ex. C. The Court
23 denied the motion, on September 18, 2018, finding that the allegations were
24 sufficient at this stage of the case.

25 Defendants each filed an Answer to the Complaint on October 2, 2019. *See*
26 Dkt. Nos. 45-46.

27 **D. The Court-Ordered Case Schedule**

28 The Court held a Rule 16 conference on November 8, 2018 that was attended

1 by counsel for all parties, and at which it entered a Case Management Schedule.
2 Dkt. No. 51. The Court's case deadlines are: (1) fact discovery cut-off of May 10,
3 2019; (2) mediation cut-off of May 22, 2019; (3) mediation status conference on
4 May 23, 2019 at 8:30 a.m.; (4) expert discovery cut-off of July 12, 2019; (5) motion
5 hearing cut-off of September 16, 2019; (6) pretrial conference on October 3, 2019
6 at 8:30 a.m.; and (7) trial on October 15, 2019 at 9:00 a.m. All of those deadlines
7 remained intact and were met, with the exception of the expert discovery cut-off.
8 While all expert reports have been served, Plaintiffs requested an extension of the
9 expert discovery deadline to avoid producing their experts for deposition until after
10 this Motion is decided.

11 **E. Fact Discovery**

12 The parties conducted the required Rule 26(f) conference and submitted a
13 Joint Rule 26(f) Report. See Joint Rule 26(f) Report, Dkt. No. 49. The parties also
14 served Rule 26 initial disclosures. Defendants served document requests and
15 requests for admission on Plaintiffs on November 23, 2018. Plaintiffs responded to
16 those discovery requests on December 21, 2018.

17 Defendants served notices of deposition for each of the seven Plaintiffs on
18 February 28, 2019, scheduling depositions for March 21-29, 2018. See Declaration
19 of Elyse Echtman in Support of Opposition to Motion to Amend, Dkt. No. 85-2, at
20 ¶ 21. Plaintiffs asked that Defendants agree to adjourn the depositions to mutually
21 agreeable dates in April 2019, and promised to provide April dates that would work
22 for each Plaintiff. *Id.* at ¶ 22. At the end of March, defense counsel prompted
23 Plaintiffs to provide the promised dates. *Id.* In response, Plaintiffs backtracked on
24 their agreement, declining to provide deposition dates, and asserting that no
25 Plaintiff depositions should take place because they had now decided to add another
26 defendant (Valeant) to the case. *Id.* at ¶ 23. In view of the impending May 10,
27 2019 fact discovery deadline, Defendants sought relief from Magistrate Judge
28 Stevenson, who entered an Order directing Plaintiffs to provide dates for their

1 depositions to take place prior to the May 10, 2019 discovery cut-off. *Id.* at ¶ 24.

2 Only five of the seven Plaintiffs cooperated to sit for depositions. At those
3 depositions, Defendants learned that four of those five Plaintiffs did not even know
4 that they were plaintiffs in litigation. That testimony is set forth below:

5 Q. *Are you a plaintiff in any lawsuits?*

6 A. *No, ma'am.*

7 Echtman Decl. at ¶ 9, Ex. G (Deposition of Margaret Reed, 13:16-17) (emphasis
8 added).

9 Q. *Are you a plaintiff in any lawsuits?*

10 ...

A. *No.*

11 *Id.* at ¶ 10, Ex. H (Deposition of Alexandra Hanks-Caldwell, 17:20-22) (emphasis
12 added).

13 Q. BY MS. NAHABET: *Are you suing anybody in litigation?*

14 ...

15 THE WITNESS: *I'm not really suing anybody. I
16 fell at work and I had to do an IA, I had to tell them
17 that I fell. Well, because I broke my elbow so I had to
18 tell them I fell. So they did -- so they have somebody
19 that's trying to get me to the doctors and stuff.
20 That's it.*

21 ...

22 Are you suing anybody in relation to that fall
23 that you just mentioned?

24 A. *No.*

25 Q. Do you know if you're suing anybody else?

26 A. *No.*

27 Q. So you haven't sued anyone relating to your
28 ovarian cancer?

A. *No.*

Id. at ¶ 11, Ex. I (Deposition of Hermelinda Luna, 25:7-26:1) (emphasis added).

Q. *Are you a plaintiff in any lawsuits?*

...

THE WITNESS: *No, ma'am.*

...

1 Q. Have you sued anyone relating to your
2 ovarian cancer?

3 ...
4 THE WITNESS: No, ma'am.

5 *Id.* at ¶ 13, Ex. K (Deposition of Becky Canzoneri, 37:7-14) (emphasis added).

6 In addition, none of them had seen the Complaint. *Id.* at ¶¶ 9-13.² Most of
7 them had never heard of Proposition 65 and were not aware of its warning
8 requirements.

9 Q. *Are you familiar at all with something*
10 *known as Proposition 65 in California?*
11 A. *No.*

12 *Id.* at ¶ 9, Ex. G (Deposition of Margaret Reed, 33:25-34:2) (emphasis added).

13 Q. *Are you familiar with Proposition 65?*
14 A. *No.*

15 *Id.* at ¶ 11, Ex. I (Deposition of Hermelinda Luna, 64:25-65:1) (emphasis added).

16 Q. Ms. Canzoneri, are you familiar with
17 Proposition 65?

18 A. Somewhat.

19 Q. *What do you know about Proposition 65?*

20 A. *That it is not good for you.*

21 Q. Do you know anything else about
22 Proposition 65?

23 A. I don't know.

24 Q. Are you familiar with the Proposition 65
25 warning?

26 A. Yes.

27 Q. *What do you know about the Proposition 65*
28 *warning?*

A. *I don't know, ma'am.*

Id. at ¶ 13, Ex. K (Deposition of Becky Canzoneri, 59:16-60:4) (emphasis added).

When they were shown the Complaint, the individuals were under the

² See Exhibit G (Deposition of Margaret Reed, 38:8-10); Exhibit H (Deposition of Alexandra Hanks-Caldwell, 66:1-4, Ex. 1); Exhibit I (Deposition of Hermelinda Luna, 79:9-13, Ex. 2); Exhibit J (Deposition of Ethel Herrera, 81:14-21, Ex. 1); and Exhibit K (Deposition of Becky Canzoneri, 66:20-23, Ex. 1).

1 misimpression that it sought personal injury damages for ovarian cancer. *Id.* at
 2 ¶¶ 9-10, 12-13.³ Not one of the five Plaintiffs who was deposed had undertaken a
 3 search for responsive documents and things in response to Defendants’ document
 4 requests. *Id.* at ¶¶ 9-13.⁴ In fact, none of those Plaintiffs was aware that
 5 Defendants had propounded discovery requests. *Id.*

6 **F. Expert Discovery**

7 The parties stipulated to a staggered expert disclosure schedule. That
 8 schedule provided that (1) Plaintiffs serve expert disclosures on exposure on
 9 February 7, 2019 (Dkt. No. 58); (2) Defendants serve rebuttal expert reports on
 10 exposure and the “no significant risk level” on April 22, 2019 (Dkt. No. 67); and
 11 (3) Plaintiffs serve rebuttal reports on the “no significant risk level” on June 6,
 12 2019. *Id.*

13 **1. Plaintiffs’ Initial Expert Disclosure**

14 On February 7, 2019, Plaintiffs produced an “Analysis of Johnson & Johnson
 15 Baby Powder and Valeant Shower to Shower Talc Products for Amphibole
 16 Asbestos” from William E. Longo, Ph.D (“Longo Expert Report”), a microscopy
 17 expert whom plaintiffs’ counsel regularly relies upon in talc personal injury
 18 litigation. Echtman Decl. at ¶ 14, Ex. L. In Dr. Longo’s report, he presents results
 19 of his laboratory’s testing of 14 bottles of JBP. Six of the 14 JBP bottles were
 20 purchased by plaintiffs’ lawyers off-the-shelf in 2016 and 2017. Dr. Longo’s test
 21 results for *all six* of those sealed off-the-shelf bottles *show no asbestos detected*. *Id.*
 22 at pgs. 89-112. Dr. Longo similarly detected *no asbestos* in another four unsealed
 23

24 ³ See Exhibit G (Deposition of Margaret Reed, 40:25-41:4); Exhibit H
 25 (Deposition of Alexandra Hanks-Caldwell, 70:7-12); Exhibit J (Deposition of
 Ethel Herrera, 85:10-12); and Exhibit K (Deposition of Becky Canzoneri, 72:16-
 18).

26 ⁴ See Exhibit G (Deposition of Margaret Reed, 59:20-61:21; 63:20-64:11);
 27 Exhibit H (Deposition of Alexandra Hanks-Caldwell, 95:12-96:24; 97:25-
 98:15); Exhibit I (Deposition of Hermelinda Luna, 127:4-128:17; 131:6-23);
 28 Exhibit J (Deposition of Ethel L. Herrera, 105:9-107:22; 109:3-110:11); and
 Exhibit K (Deposition of Becky Canzoneri, 110:2-111:10; 115:15-116:11).

1 JBP bottles that lawyers had obtained from plaintiffs in personal injury actions
2 against Defendants. *Id.* at pgs. 114-129. Dr. Longo claims to have detected
3 asbestos in four of the 14 JBP bottles that he tested, which are also unsealed bottles
4 obtained from personal injury plaintiffs. *Id.* at pgs. 131-142.⁵ Dr. Longo’s
5 laboratory assistants made 100 observations for each of those four bottles using the
6 transmission electron microscopy testing method, with 99 of 100 observations
7 reported as non-detects, and only one observation for each reported as finding a
8 single trace microscopic asbestos “fiber” or “bundle.” *Id.*

9 Dr. Longo also tested four Valeant STS products that were not manufactured
10 or sold by these Defendants. With respect to those four bottles, two were purchased
11 by plaintiffs’ lawyers off-the-shelf in 2016 and 2017. Dr. Longo claims to have
12 detected asbestos in one of those two bottles. *Id.* at pages 144-156. He also claims
13 to have detected asbestos in two STS bottles obtained from personal injury
14 plaintiffs. Plaintiffs have described one of the STS bottles as a JJCI product, but
15 Defendants’ fact investigation has shown that it is actually a Valeant product. *See*
16 *id.* at ¶ 15, Ex. M (Declaration of Doyle S. Freeman dated May 9, 2019 at 2:17-20).

17 Dr. Longo relies on his collective test results for these 18 JBP and STS
18 bottles to opine on supposed asbestos exposure from JBP and STS usage. He
19 performed his own exposure estimates relying upon two inhalation exposure studies
20 that he had previously performed in connection with other litigation using other
21 bottles that had been purchased on eBay.⁶ *Id.* at ¶ 14, Ex. L, pgs. 82, 84-87. Dr.
22 Longo extrapolated from his prior studies to opine that a typical consumer using
23 JBP or STS today would be exposed to asbestos in excess of the established
24 Proposition 65 “no significant risk level” or “safe harbor” of 100 fibers inhaled per
25

26 ⁵ As noted below, Defendants dispute all of Dr. Longo’s purported detections of
asbestos. There is no asbestos in the talc.

27 ⁶ Defendants’ investigation has exposed that one of the products Dr. Longo used in
28 his inhalation exposure studies was purchased from the father of an attorney at a
plaintiff-side law firm pursuing talc personal injury litigation.

1 day. *Id.* at pgs. 86-87.

2 Dr. Longo's report contains no observations or opinions on "talc containing
3 asbestiform fibers," which the International Agency for Research on Cancer defines
4 as something distinct from asbestos.⁷ Dr. Longo claims to have detected "fibrous
5 talc" in two JBP bottles that he dates from 2004 and 2006, but he does not opine
6 that this "fibrous talc" is asbestiform or might somehow qualify as "talc containing
7 asbestiform fibers." *Id.* at pgs. 117 & 125.

8 **2. Defendants' Expert Disclosures**

9 On April 22, 2019, Defendants served eight expert reports. Defendants'
10 experts rebut Dr. Longo's opinions, show that there is no asbestos in Defendants'
11 products and show that the products pose no cancer risk. Those eight experts are:
12 (1) Dr. Gregory B. Diette, MD, MHS (opining that cosmetic talcum powder
13 products pose no cancer risk); (2) Dr. Robert Downs, Ph.D. (detecting no asbestos
14 in JBP using state of the art testing); (3) Dr. M. Darby Dyar, Ph.D. (opining that Dr.
15 Longo's testing is unreliable and does not comply with generally accepted testing
16 methods); (4) Dana M. Hollins, MPH, CIH (opining that no Proposition 65 warning
17 is warranted); (5) Dr. Brooke T. Mossman, Ph.D. (opining that cosmetic talcum
18 powder products present no cancer risk); (6) Michael Peterson, MEM, DABT
19 (opining that no Proposition 65 warning is warranted); (7) Dr. Cheryl C. Saenz, MD
20 (opining that perineal exposure to cosmetic talcum powder presents no cancer risk);
21 and (8) Dr. Matthew Sanchez, Ph.D. (detecting no asbestos in JBP using generally
22 accepted testing methods and showing that Dr. Longo's testing is unreliable and
23

24 ⁷ "Talc may . . . form true mineral fibres that are asbestiform in habit. . . . Talc
25 containing asbestiform fibres is a term that has been used inconsistently in the
26 literature. In some contexts, it applies to talc containing asbestiform fibres of talc
27 or talc intergrown on a nanoscale with other minerals, usually anthophyllite. In
28 other contexts, the term . . . has erroneously been used for talc products that
contain asbestos. Similarly, the term asbestiform talc has erroneously been used
for talc products that contain elongated mineral fragments that are not
asbestiform." (IARC 2012, Volume 100 C at 230). California relies upon IARC
in determining whether a substance should be included on the Proposition 65 list.
27 CCR §25904(b).

1 does not comply with generally accepted testing methods).

2 The reports from Defendants' Industrial Hygiene experts, Dr. Hollins and
3 Mr. Peterson, show that Dr. Longo made glaring data errors in his exposure
4 analysis. When those experts followed Dr. Longo's methodology, accepting all of
5 Dr. Longo's test results as true (notwithstanding that Defendants dispute those
6 results), but correcting Dr. Longo's data errors, they found that any claimed
7 asbestos exposure is decidedly below the established California safe harbor level of
8 100 fibers inhaled per day. When Dr. Longo's data errors are corrected, his
9 methodology results in an average exposure at no more than half of the safe harbor
10 level. Echtman Decl. at ¶¶ 16-17, Exs. N-O. An exposure below the safe harbor
11 does not require a Proposition 65 warning as a matter of law.

12 Defendants also included expert reports on their own affirmative asbestos
13 testing from Dr. Sanchez of R.J. Lee Group and Dr. Downs of the University of
14 Arizona. Dr. Sanchez's report details regular quarterly testing that R.J. Lee has
15 been performing for JJCI in the ordinary course of business since 2009. It shows
16 that the R.J. Lee laboratory is accredited to perform asbestos testing on bulk
17 materials by a nationally recognized accreditation organization, that R.J. Lee has
18 regularly tested JJCI's talc for asbestos using accredited methodology, and that all
19 reported test results have been negative for asbestos content. *See* 27 CCR § 25900;
20 Echtman Decl. at ¶ 18, Ex. P, pg. 194. For purposes of this litigation, Dr. Sanchez
21 also tested 12 sealed off-the-shelf JBP bottles. No asbestos was detected in any of
22 those 12 bottles. *Id.* at pgs. 194-195.

23 Dr. Downs independently tested another five sealed off-the-shelf JBP bottles
24 using state of the art methods and equipment. He detected no asbestos in any of
25 those bottles. *Id.* at ¶ 19, Ex. Q.

26 **3. Plaintiffs' Rebuttal Expert Disclosures**

27 On June 6, 2019, Plaintiffs served two rebuttal expert disclosures, from Dr.
28 Longo and Dr. David Egilman. Dr. Longo's Rebuttal Expert Report presents a new

1 and revised exposure analysis that includes data from a recently conducted
2 exposure study (that Dr. Longo did not produce). Dr. Longo's revised exposure
3 analysis shows potential asbestos exposure levels that are even lower than his
4 original exposure analysis, and that are far below the Proposition 65 safe harbor
5 level of 100 fibers inhaled per day.

6 In Dr. Longo's Rebuttal Expert Report, he opines that daily personal use of
7 JBP and STS products results in average asbestos exposure of 23 fibers inhaled per
8 day. *Id.* at ¶ 20, Ex. R, pg. 249. That exposure level is less than one-quarter of the
9 safe harbor level of 100 fibers inhaled per day.

10 Dr. Longo further opines that, if a person uses JBP in connection with
11 diapering a baby five times per day, it will result in an average asbestos exposure of
12 115 fibers inhaled in that day. *Id.* In providing that opinion, Dr. Longo neglects to
13 take into account that daily exposure rates are averaged over the course of a 70-year
14 lifetime for Proposition 65 purposes. *See* 27 CCR § 25721(c)-(d). If you assume
15 that a typical baby powder user has two children, and diapers each of them five
16 times daily, for a total of four years of baby diapering, Dr. Longo's opinion
17 extrapolates to an average of 7 fibers inhaled per day. *Id.* at ¶¶ 21-22, Ex. S, pg.
18 266; Ex. T, pgs. 274, 276, 278. This number is far below the safe harbor level.

19 **G. The Court-Ordered Mediation**

20 On May 13, 2019, the parties participated in a half-day private mediation at
21 JAMs in New York before the Hon. Helen Freedman, ret'd, in accordance with this
22 Court's order referring the parties to private mediation. Dkt. No. 51. On May 23,
23 2019, the parties appeared before the Court for a post-mediation status conference.

24 **H. Plaintiffs' Motion to Amend and Add Valeant as a Defendant**

25 On April 18, 2019, Plaintiffs filed a Motion for Leave to File Amended
26 Complaint, seeking to add Valeant, the current manufacturer of STS, as a party and
27 to extend the case schedule to accommodate that addition. Dkt. No. 70.

28 Defendants opposed the motion on grounds that Plaintiffs cannot show "good

1 cause” for the amendment, because they knew or should have known about
2 Valeant’s 2012 purchase of the STS product line since long before this case was
3 commenced. Dkt. No. 85. The motion is fully briefed, notwithstanding that
4 Plaintiffs filed their reply papers ten days after the May 24, 2019 due date. Dkt.
5 No. 87; Dkt. No. 90. Plaintiffs now seek to abandon that motion, opting to achieve
6 the same result with a voluntary dismissal.

7 **I. The Motion for Voluntary Dismissal**

8 Plaintiffs provide inappropriate reasons for this dismissal Motion. They
9 explain that they want a voluntary dismissal in order to commence a new action that
10 includes Valeant and Claire’s Stores as additional defendants. But, Defendants
11 would be prejudiced in defending a case that involves defendants that sell different
12 products with different ingredients. Under Proposition 65, a defendant is only
13 responsible for its own products and not for “exposure to a listed chemical from any
14 other source or product.” 27 CCR § 25721.

15 Plaintiffs presumably want to include Claire’s Stores because FDA-
16 sponsored testing detected asbestos in three Claire’s powder-based cosmetics. The
17 FDA issued an alert on March 5, 2019 advising consumers not to use Claire’s
18 cosmetic products. *See* [https://www.fda.gov/cosmetics/cosmetics-recalls-alerts/fda-](https://www.fda.gov/cosmetics/cosmetics-recalls-alerts/fda-advises-consumers-stop-using-certain-cosmetic-products)
19 [advises-consumers-stop-using-certain-cosmetic-products](https://www.fda.gov/cosmetics/cosmetics-recalls-alerts/fda-advises-consumers-stop-using-certain-cosmetic-products). *Notably, the FDA’s*
20 *testing of JBP has not detected any asbestos and the FDA has never issued such an*
21 *alert for JBP.* Echtman Decl. at ¶ 23, Ex. U.

22 Introduction of evidence about Claire’s products in an action against
23 Defendants would be unfairly prejudicial. Those products have no relevance to
24 JBP. The talc source and supplier for those products has not been shown.

25 Similarly, the testing that Dr. Longo performed on Valeant STS products
26 should not be admissible in an action against Defendants who are not responsible
27 for the manufacture or sale of those products, even if the talc may once have come
28 from the same source mine.

1 Plaintiffs further state that they may want to add claims about additional
 2 substances allegedly within the talc, representing that: “[t]here may also be
 3 evidence of additional violating substances.” Motion, Dkt. No. 96 at 3 (emphasis
 4 removed). Through the extensive discovery they have taken in other litigation,
 5 Plaintiffs’ counsel is well-aware of JBP’s composition. For example, in prior
 6 deposition testimony from September 2018, Plaintiffs’ expert Dr. Egilman stated
 7 his belief that arsenic and lead content in talc requires a Proposition 65 warning.
 8 Echtman Decl. at ¶¶ 24-25, Exs. V-W.⁸ In that September 2018 time frame,
 9 Plaintiffs still had the option to amend their Complaint in this case. They made a
 10 conscious choice not to include arsenic and lead in this Proposition 65 action. To
 11 allow them to change course at this late date will prejudice Defendants.

12 **III. ARGUMENT**

13 **A. The Motion Should be Denied Because a Dismissal Will Result In** 14 **Legal Prejudice**

15 A plaintiff may unilaterally dismiss an action without a court order by filing
 16 a notice of dismissal before an opposing party serves either an answer or a motion
 17 for summary judgment. Fed. R. Civ. P. 41(a)(1)(A)(i). After that preliminary
 18 stage, absent a stipulation, a court order is required to voluntarily dismiss. Fed. R.
 19 Civ. P. 41(a)(2).

20 A Rule 41(a)(2) dismissal will be without prejudice, unless the Court states
 21 otherwise in its order. A “dismissal with prejudice” ordinarily represents a “final
 22 judgment on the merits” with *res judicata* effect. *Stewart v. U.S. Bancorp*, 297
 23 F.3d 953, 956 (9th Cir. 2002) (citations omitted). However, in this case, which was
 24 brought by private plaintiffs in the public interest, the individual Plaintiffs lack
 25 authority to agree to a dismissal that would have *res judicata* effect on a
 26 subsequently filed Proposition 65 action. *See* Cal. Health & Safety Code

27
 28 ⁸ *See* Exhibit V (36:13-21); Exhibit W (325:21-326:6).

1 § 25249.7(f)(4) (persons bringing actions in the public interest may only effect “a
 2 voluntary dismissal in which no consideration is received from the defendant”
 3 without prior notice to the Attorney General and fact-finding by the Court).
 4 Therefore, any voluntary dismissal, even one seemingly “with prejudice” as to these
 5 Plaintiffs, is effectively without prejudice to duplicative Proposition 65 litigation
 6 against Defendants.

7 Black letter law holds that a motion for voluntary dismissal should be denied
 8 when the dismissal will cause the defendant plain legal prejudice. *eDrop-Off*
 9 *Chicago LLC v. Burke*, No. 12-CV-4095-GW-FMo, 2012 WL 12896520, at *1
 10 (June 1, 2012) (Wu, J.) (denying *ex parte* motion for voluntary dismissal on legal
 11 prejudice grounds) (citations omitted).⁹ “Legal prejudice” means “prejudice to
 12 some legal interest, some legal claim, some legal argument,” and includes “loss of a
 13 federal forum.” *Id.* Where the voluntary dismissal is sought to “avoid an adverse
 14 determination on the merits,” there is plain legal prejudice. *IP Glob. Inv. Am., Inc.*
 15 *v. Body Glove Ip Holdings, LP*, 2019 WL 121191, at *4 (C.D. Cal. Jan. 7, 2019)
 16 (citing *AF Holdings LLC v. Navasca*, 2013 WL 1748011, at *3 (N.D. Cal. Apr. 23,
 17 2013)); *In re Sizzler Rest. Intern., Inc.*, 262 B.R. 811, 823 (C.D. Cal. 2001) (“An
 18 attempt to avoid an adverse decision on the merits may constitute legal prejudice.”).

19 Courts commonly consider four additional factors in analyzing legal
 20 prejudice that include: (1) defendant’s efforts and expenses incurred in preparing
 21 for trial, (2) plaintiff’s diligence in prosecuting her claims, (3) plaintiff’s
 22 explanation of the need to dismiss, and (4) the status of the litigation. *Microhits,*
 23 *Inc. v. Deep Dish Prod., Inc.*, 2011 WL 13143434, at *2 (C.D. Cal. Jan. 6, 2011).
 24 The court may consider the “cumulative weight” of all of these factors in assessing
 25 prejudice. *See Lynch v. Harris*, 132 F.3d 39, at *1 (9th Cir. 1997) (mem. disp.)

26 _____
 27 ⁹ *See also eDrop-Off Chicago LLC v. Burke*, No. 12-CV-4095-GW-FMO, Dkt.
 28 No. 42, Ruling Re: Plaintiff’s Ex Parte Application to Dismiss Defendant
 Midley Inc. dba Purseblog.com (C.D. Cal. June 12, 2012) (final determination
 denying *ex parte* application for motion for voluntary dismissal).

1 (district court did not abuse its discretion in denying motion to dismiss in light of
2 plaintiff's "repeated dilatory tactics").

3 Plaintiffs improperly request dismissal to avoid an adverse ruling on the
4 merits, which alone warrants denial of the motion. In addition, the cumulative
5 weight of all other relevant factors demonstrates plain legal prejudice, because (1)
6 Defendants have devoted substantial effort and expense to defending the case and
7 preparing for trial; (2) Plaintiffs waited far too long to make strategy changes on the
8 parties to join and substances to put at issue; (3) Plaintiffs' explanation for the
9 dismissal lacks merit and signals that they intend to engage in improper forum-
10 shopping; and (4) the litigation is close to trial-ready.

11 **1. Plaintiffs Improperly Seek Dismissal to Avoid an Adverse**
12 **Ruling on the Merits**

13 This case is ripe for summary disposition in Defendants' favor. For that
14 reason, Defendants would suffer plain legal prejudice if the Court were to allow
15 Plaintiffs to voluntarily dismiss. It is well-established that the Court should deny a
16 motion for voluntary dismissal when the purpose is to avoid, as is plainly the case
17 here, an adverse determination on the merits of the action. 8-41 Moore's Fed. Prac.
18 Civ. § 41.40[7][b][v]. A dismissal for the purpose of staving off a merits loss
19 creates plain legal prejudice to the defendant. *IP Glob. Inv. Am., Inc. v. Body Glove*
20 *Ip Holdings, LP*, 2019 WL 121191, at *4 (citing *AF Holdings LLC v. Navasca*,
21 2013 WL 1748011, at *3); *In re Sizzler Rest. Intern., Inc.*, 262 B.R. 811, 823 (C.D.
22 Cal. 2001) ("An attempt to avoid an adverse decision on the merits may constitute
23 legal prejudice.").

24 The case record shows that Defendants have multiple grounds for summary
25 judgment in their favor. First, Defendants' own quarterly asbestos testing with R.J.
26 Lee Group in the ordinary course of business demonstrates that they are entitled to
27 judgment as a matter of law. Pursuant to 27 CCR § 25900, "no knowing and
28 intentional exposure occurs if a [company] in the course of doing business" can

1 show that (a) it tested for the chemical in question within the year prior to the filing
2 of the notice or complaint (*id.* at § 25900(a)(1)); (b) the testing was performed by a
3 laboratory certified or accredited by a nationally recognized accrediting
4 organization to perform the method of detection (*id.* at § 25900(a)(3)); and (c) all of
5 the reported test results show that the chemical in question was not detected (*id.* at §
6 25900(a)(4)). On a quarterly basis from 2009 forward, as part of its quality
7 assurance procedures, JJCI has had R.J. Lee Group, a laboratory accredited to
8 perform asbestos testing, test JJCI’s talc supply for asbestos. All of those quarterly
9 test results have shown no asbestos detected. Based on that testing record, which is
10 detailed in Dr. Sanchez’s expert report, Defendants are entitled to judgment in their
11 favor. *See* Echtman Decl. at ¶ 18, Ex. P.

12 Second, the exposure opinions of Plaintiffs’ own expert, Dr. Longo, show
13 that, even accepting Dr. Longo’s claimed asbestos detections (which Defendants
14 dispute), any potential exposure from JBP or STS usage is far below California’s
15 established safe harbor of 100 fibers inhaled per day. *See* 27 CCR § 25705 (b)(1)
16 (“The following levels . . . shall be deemed to pose no significant risk: . . .
17 Asbestos 100 fibers inhaled/day.”). As set forth above, Dr. Longo opines in his
18 rebuttal report that an average exposure from personal JBP or STS application is 23
19 fibers inhaled per day – less than one-quarter of the safe harbor level. Echtman
20 Decl. at ¶ 20, Ex. R, pg. 249. Dr. Longo’s opinion on baby diapering exposure
21 extrapolates to approximately 7 fibers inhaled per day over a 70-year lifetime. *See*
22 27 CCR § 25721(c) (“[T]he level of exposure . . . shall be determined by
23 multiplying the level in question . . . times the reasonably anticipated rate of
24 exposure for an individual . . . measured over a lifetime of seventy years.”) and
25 (d)(4) (“[F]or exposures to consumer products, lifetime exposure shall be calculated
26 using the average rate . . . of intake or exposure for average users of the consumer
27 product.”). Even if one were to add together Dr. Longo’s personal use and baby
28 diapering numbers, the exposure is only 30 fibers inhaled per day. Accepting the

1 facts in the light most favorable to Plaintiffs shows that JBP requires no cancer
2 warning as a matter of law.

3 Third, Plaintiffs have abandoned their assertion that the products contain
4 “talc containing asbestiform fibers.” Dr. Longo’s initial report contains no opinions
5 on detection of “talc containing asbestiform fibers” as defined by IARC. For that
6 reason, Defendants are entitled to summary judgment on Plaintiffs’ claims
7 concerning “talc containing asbestiform fibers.”

8 Fourth, the record supports summary judgment in Defendants’ favor on
9 Plaintiffs’ claims that Defendants are responsible for alleged asbestos exposure
10 from any STS products. JJCI sold the STS product line to Valeant in September
11 2012 -- more than six years ago. Defendants did not sell the STS product within
12 the statute of limitations period and Plaintiffs have no evidence that any STS
13 product manufactured or sold by Defendants has been available for sale in
14 California within that time period.

15 With the fact and expert records closed, and the merits so definitively in
16 Defendants’ favor, Defendants would suffer plain legal prejudice if the Court were
17 to dismiss the case before reaching a dispositive determination in this action.
18 Accordingly, the Court should deny Plaintiffs’ motion to dismiss.

19 **2. Voluntary Dismissal is Inappropriate at this Late Stage**

20 Voluntary dismissal is inappropriate when a case has been fully litigated and
21 is practically ready for trial. *See Ferguson v. Eakle*, 492 F.2d 26 (3d Cir. 1974)
22 (abuse of discretion to allow dismissal after discovery was closed and parties were
23 headed to final pretrial conference). Courts have found legal prejudice justifying
24 denial of a voluntary motion to dismiss where significant discovery or pretrial
25 preparations have taken place. *Hanginout, Inc. v. Google, Inc.*, 2015 WL
26 11254688, *4-6 (S.D. Cal. Apr. 22, 2015) (denying voluntary motion to dismiss
27 where significant discovery or pretrial preparations have taken place). All of these
28 factors together constitute more than sufficient legal prejudice justifying a denial of

1 Plaintiffs' Motion.

2 Dismissal here is inappropriate considering "the late stage of the
3 proceedings," the Plaintiffs' "benefit of discovery and opportunity to develop
4 supports for [their]claim[s]," the Defendants' "investment of resources in
5 defending the litigation," and the "election to dismiss [their claims] rather than
6 oppose . . . a summary judgment motion." *IP Glob. Inv. Am., Inc.*, 2019 WL
7 121191, at *4. *See also, White v. Donley*, 2008 WL 4184651, at *3 (C.D. Cal. Sept.
8 4, 2008) (denying motion to dismiss where action had been pending for nearly three
9 years, defendant had expended considerable efforts in defending it, and dismissal
10 would circumvent defendant's pending dispositive motion); *IXIA v. Mitchell*, 2009
11 WL 10674095, at *2-3 (C.D. Cal. July 8, 2009) (denying motion where the action
12 was two and a half months away from trial, plaintiff had delayed proceedings by
13 failing to appear at a scheduling conference and allegedly failing to engage in
14 discovery, and had failed to explain why a dismissal was necessary).

15 The cases Plaintiffs cite in support of their Motion are inapposite. Unlike the
16 instant action, the *Smith* case involved existing parallel state and federal actions.
17 *Smith v. Lenches*, 263 F.3d 972 (9th Cir. 2001). The federal claims were
18 voluntarily dismissed *with* prejudice, preventing the federal claims from being
19 litigated in the future. *Id.* The dismissal had no impact on the state court case, and
20 would not have been an extra burden to the defendant since it was already engaged
21 in defending the state court action. *Id.* Moreover, in *Smith*, discovery had not yet
22 started, whereas here, fact discovery has closed and expert discovery is nearly
23 complete.

24 In the case of *Zanowick*, the court held that dismissal was warranted
25 notwithstanding plaintiff's failure to comply with a 90-day time limit for filing a
26 motion for substitution of a deceased party pursuant to Rule 25(a)(1). *Zanowick v.*
27 *Baxter Healthcare Corp.*, 850 F.3d 1090 (9th Cir. 2017). There, the trial court did
28 not abuse its discretion in granting the dismissal where Rule 25(a)(1) requires that a

1 court dismiss an action when a substitution has not been made by plaintiff during
2 the required time period. *Id.* There is no such similar rule requiring a dismissal
3 here.

4 Finally, in *Bennett*, the court found there was a lack of legal prejudice where
5 the only loss was of a *mere potential* defense that had not yet accrued to the
6 defendant. *Bennett v. Dhaliwal*, 721 Fed. Appx. 577, 578 (9th Cir. 2017). Unlike
7 the defendants in the cases Plaintiffs cite, Defendants will suffer plain legal
8 prejudice if the case is dismissed. Accordingly, the Motion should be denied.

9 **3. The Reasons That Plaintiffs Provide for Voluntary Dismissal**
10 **Themselves Demonstrate Prejudice and That Plaintiffs Have**
11 **Been Dilatory With Respect to Their Litigation Strategy**

12 Plaintiffs' explanations for seeking to dismiss this action show that their aim
13 is to cause Defendants legal prejudice and that they delayed far too long in settling
14 on their litigation strategy. Among other things, Plaintiffs want latitude to refile a
15 new action that names Valeant and Claire's Stores as additional defendants.
16 However, under Proposition 65, a person is only responsible for exposure from its
17 own products. Evidence about alleged asbestos content in Valeant's STS product
18 or Claire's Stores' cosmetics products is not relevant to a case against these
19 Defendants. The fact that Plaintiffs want to join Defendants in a new action with
20 other companies that make different products shows that they want to gain an
21 improper and prejudicial advantage by tainting Defendants with testing evidence
22 that should not be admissible against them. *See generally* Fed. R. Evid. 403. *See*
23 *also MJC Am. Ltd. v. Gree Elec. App. of Zhuhai*, 2015 WL 12743880, at *5, 7
24 (C.D. Cal. Apr. 14, 2015) (excluding evidence concerning different products under
25 Rule 403 where it would otherwise be unfairly prejudicial, complicate the case, and
26 has the potential to confuse the jury).

27 Defendants also expect that Plaintiffs' counsel will commence their next
28 Proposition 65 action in state court, just as they commenced this action in state
court. But the next time around, Plaintiffs' counsel most likely will name new

1 plaintiffs who have not suffered an injury-in-fact to prosecute the action, in an
2 attempt to preclude removal to federal court. After all, Plaintiffs' counsel
3 previously communicated that they wanted to modify their claims to divest this
4 Court of jurisdiction. The "loss of a federal forum" (and federal *Daubert* standards
5 for experts) represents plain legal prejudice. See *Westlands Water Dist. v. U.S.*, 100
6 F.3d 94, 97 (9th Cir. 1996); *Eon Corp IP Holdings LLC v. Apple, Inc.*, 2015 WL
7 4914984 (N.D. Cal. Aug. 17, 2015) (motion for voluntary dismissal denied, in part
8 because it raised concerns of improper forum shopping); *Kern Oil and Refining Co.*
9 *v. Tenneco Oil Co.*, 792 F. 2d 1380, 1389-90 (9th Cir. 1986) (voluntary dismissal of
10 a claim denied when it was motivated by improper forum shopping).

11 Moreover, Plaintiffs' explanation for dismissal shows that they have not been
12 diligent in committing to litigation strategy. Plaintiffs began the process of
13 initiating this case approximately two years ago. They had ample time and material
14 available to investigate their claims during those two years. They could and should
15 have settled on which defendants to sue and which substances to name. It is
16 patently unreasonable that they waited two years to decide that they might want to
17 perform additional investigation, might want to add claims about additional
18 substances, and might want to bring a different case that includes Valeant and
19 Claire's Stores as defendants. For those reasons, Plaintiffs' Motion should be
20 denied.

21 **B. In the Alternative, the Court Should Condition a Voluntary**
22 **Dismissal on the Payment of Costs and Attorneys' Fees**

23 If the Court might be inclined to grant a voluntary dismissal, the Court
24 should condition the dismissal on Plaintiffs' payment of Defendants' costs and
25 attorneys' fees. The court has the power to order reimbursement of costs and fees
26 as a condition of dismissal. *Westlands Water Dist.*, 100 F.3d at 97. Conditioning
27 dismissal on prior payment of costs and attorney's fees is common and serves the
28 purpose of protecting the defendant. *Id.*; see also, *Woodfin Suite Hotels, LLC v.*

1 *City of Emeryville*, 2007 WL 81911, at *5 (N.D. Cal. Jan. 9, 2007) (it is
2 “commonplace” to award costs and fees as a condition of dismissal); *Tahaya Mirs*
3 *Inv. Inc. v. Helwan Cement Co. S.A.E.*, No. 2:16-cv-01001-CAS(AFMx), Dkt. 119
4 & 2016 WL 6744902 (C.D. Cal. Nov. 14, 2016) (awarding defendant reasonable
5 attorneys’ fees in the amount of \$445,835.69). A plaintiff who finds the terms or
6 conditions set by the court to be too onerous is entitled to withdraw the motion and
7 proceed with the litigation. 8-41 Moore’s Fed. Prac. Civ. § 41.40[10][f]; *Beard v.*
8 *Sheet Metal Workers Union*, 908 F.2d 474, 476 (9th Cir. 1990).

9 As shown above, this case has been actively litigated for an extended period
10 of time. If the case is dismissed, the vast majority of the resources devoted to this
11 litigation will have been wasted. Defendants seek fees relating to the following:
12 Notice of Removal (Dkt. No. 1); Pro Hac Vice Applications of Elyse D. Echtman
13 (Dkt. No. 6) and Peter A. Bicks (Dkt. No. 7); Motion to Remand (Dkt. No. 27);
14 Motion to Dismiss (Dkt. No. 20); Answers (Dkt. Nos. 45-46); Rule 16 conference
15 (Dkt. No. 51); Rule 26 conference and Joint Rule 26(f) Report (Dkt. No. 49); all
16 fact discovery including requests for production of documents, requests for
17 admissions and depositions of five Plaintiffs, as well as the discovery conference
18 before the Magistrate Judge; all expert discovery, including expert fees; Motion to
19 Amend (Dkt. No. 70); Mediation and Post-Mediation Status Conference; Request to
20 Vacate Motion to Amend Hearing (Dkt. No. 97); and the present Motion for
21 Voluntary Dismissal (Dkt. No. 96).

22 The time and expense spent diligently litigating this matter will not be useful
23 in subsequent Proposition 65 litigation. Plaintiffs’ counsel will likely file any
24 future litigation in state court and Defendants expect that they will seek to preclude
25 removal to federal court. As a result, work relating to the removal, motion to
26 remand, pro hac vice applications (which cannot be repurposed in state court), as
27 well as the Rule 16 and Rule 26 conferences will be of no use. Defendants also
28 expect that Plaintiffs’ counsel will present new and different expert opinions,

1 requiring new expert rebuttal work. They likely will re-draft a new and different
 2 complaint, resulting in a different analysis for both a motion to dismiss and/or
 3 answering pleading. Because Plaintiffs' counsel are likely to replace the named
 4 Plaintiffs in this litigation with others, the costs and fees associated with fact
 5 discovery relating to these specific Plaintiffs will be useless. Finally, as Plaintiffs
 6 intend to include Valeant as a party in any subsequent litigation, work relating to
 7 the motion to amend, as well as the motion for voluntary dismissal will not be
 8 helpful in a future action.

9 Plaintiffs ask that the payment of costs and fees only ripen upon their filing
 10 of a new action, but the amounts Defendants spent on this litigation will be wasted
 11 regardless of whether another case is commenced. Moreover, because this
 12 litigation has been attorney-driven, it is unlikely that these same Plaintiffs would
 13 file the next Proposition 65 case. It is more likely that the attorneys would name
 14 different plaintiffs to bring the same claims. Should the Court grant costs and
 15 attorneys' fees as a condition of dismissal, Defendants seek leave to submit a
 16 separate application detailing the costs and fees that should be awarded.

17 **IV. CONCLUSION**

18 For the reasons stated above, Defendants request that this Court deny
 19 Plaintiffs' Motion. In the alternative, Defendants request the Court grant
 20 Defendants' costs and attorneys' fees as a condition of voluntary dismissal, in an
 21 amount to be determined.

22 Dated: July 8, 2019

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