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**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION**

HERMELINDA LUNA, ALEXANDRIA HANKS ON 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

**PLAINTIFFS' REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR VOLUNTARY DISMISSAL**

Date: July 29, 2019
Judge: Hon. George H. Wu
Dept.: 9D

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

Defendants' argue that Plaintiffs' Motion for Voluntary Dismissal should be denied because "Plaintiffs' provide no good reason" for dismissal. Opposition, Doc. # 104, at 1,13. But Federal Rule of Civil Procedure 41(a)(2) does not require that a plaintiff establish a "good reason" for dismissal. The rule authorizes the Court to dismiss the case "without prejudice so long as the defendant will not be prejudiced or unfairly affected by dismissal." *Stevedoring Servs. of Am. v. Armilla Intern. B.V.*, 889 F.2d 919, 921 (9th Cir. 1989). "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." *Id.* "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). J&J has not demonstrated that it will endure legal prejudice or be unfairly affected by dismissal of this action.

## I. J&J Has Not Demonstrated Legal Prejudice

In urging the denial of Plaintiffs' Motion, J&J recounts the procedural history of this case. As J&J's summary makes clear, the greater weight of attorney preparation and work product has been borne by the Plaintiffs in this case. J&J's own preparation and work product will be useful in continuing litigation between these parties, or between Defendants and plaintiffs in personal injury and other Proposition 65 cases. Indeed, J&J has recycled much of its preparation and work product in this case from personal injury cases against it involving these same products. *See* Opposition, Doc. # 104, at 3 (Plaintiffs made use of "full litigation discovery from Defendants" from the *Ingham* matter, and "Plaintiffs' counsel has represented to this Court that they needed no further fact discovery for their prosecution of this action."). Plaintiffs have not sought to depose J&J's fact

witnesses nor have any of J&J's expert witnesses been deposed, and J&J has not responded to any written discovery in this case. J&J retained many of the same experts for this case that have been and currently are retained in other cases involving exposure to J&J talcum powder products, including *Ingham v. Johnson & Johnson, et al.*, No. 1522-CC10417-01 (Missouri, City of St. Louis 2018), between J&J, represented by the same counsel as in this case, and individuals represented by Plaintiffs' counsel in this case. Further, Plaintiffs moved for dismissal before the expert discovery cut-off (which has since been extended to August 12, 2019, *see* Doc. # 103), three months before the motion hearing cut-off, and prior to the filing of any *Daubert* motions or motions for summary judgment.

J&J's complaint about securing Plaintiffs' depositions rings hollow, as Plaintiffs' basis for postponing their depositions was to spare all parties the time and cost of having Plaintiffs deposed twice. Plaintiffs—who are suffering from ovarian cancer or represent individuals who passed away from ovarian cancer—asked to postpone their depositions until the Court ruled on their motion to add Valeant Pharmaceuticals North America LLC ("Valeant") to the case. Additionally, some Plaintiffs had to reschedule their depositions for medical reasons.

On November 8, 2018, the Court held a scheduling conference and ordered that no further pleading amendments would be allowed. On May 9, 2019 (the day before the discovery cut-off), counsel for J&J sent counsel for Plaintiffs an email containing the Declaration of Doyle S. Freeman, an employee of PTI Royston, the facility that bottles and labels J&J talc products. The email and declaration identified Valeant as the manufacturer of a "Shower to Shower" bottle that was provided to Dr. Longo, Plaintiffs' expert, for testing, and informed Plaintiffs that the bottle was manufactured in 2013. Declaration of Michael A. Akselrud ("Akselrud Dec.") ¶3, Ex. A. While Plaintiffs were aware that J&J sold its "Shower to Shower" rights to Valeant, Plaintiffs were not aware until Defense Counsel's

email that one of the products tested by Plaintiffs for this matter, which was clearly marked as a J&J product, was manufactured by Valeant. Plaintiffs diligently moved to dismiss this action so as to allow for the proper work up and review of this new information.

J&J contends it "would be prejudiced in defending a case that involves defendants that sell different products with different ingredients." Opposition, Doc. # 104, at 13. But Valeant sells J&J's former product, and Valeant and J&J continue to source talc containing asbestos and asbestiform talc from the same Chinese mine that is used in their consumer body powders. Even supposing that Valeant no longer distributes talcum Shower to Shower products, there are clearly still products being sold in California under the Shower to Shower label that have talc from the same source as all other Johnson & Johnson products packaged at PTI Royston in Georgia. Given the late production of the Valeant information, the need for further discovery is evident. Discovery regarding talc products from Claire's Stores is also necessary to determine whether talc used in those products comes from the same mine.[1]

## II. Plaintiffs' Claims Have Merit

Plaintiffs' Motion for Voluntary Dismissal is not "a transparent tactical maneuver" as J&J contends. *See* Opposition, Doc. # 104, at 1, 13.[2] Plaintiffs filed this action amid the growing body of concern and scientific evidence about the deadly and dangerous carcinogens in J&J's talc-based products. Both before and during the pendency of this litigation, J&J has endured numerous monetarily-significant plaintiff verdicts in cases involving these same products. *See Lanzo v. Cyprus Amax Minerals Company, et al.,* No. MID-7385-16AS (New Jersey, Middlesex County 2018); *Ingham v. Johnson & Johnson, et al.*, No. 1522-CC10417-01 (Missouri, City of St. Louis 2018); *Leavitt v. Johnson & Johnson, et*

[1] Plaintiffs have requested information regarding Claire's Stores from the FDA through a Freedom of Information Act Request.
[2] *But see Hamilton v. Firestone Tire & Rubber Co., Inc.*, 679 F.2d 143, 145 (9th Cir. 1982) ("Plain legal prejudice…does not result simply when defendant faces the prospect of a second lawsuit, or when plaintiff merely gains some tactical advantage.").

*al.*, No. RG17882401 (California, County of Alameda 2019); *Olson v. Brenntag, et al.* - Case no. 190328/2017 (New York, County of New York 2019); *Schmitz v. Johnson & Johnson, et al.*, No. RG18923615 (California, County of Alameda 2019). At the same time, however, J&J continued to tout its products as safe and asbestos free, including flagrant use of propaganda to protect its bottom line.

The merit of Plaintiffs' claims is also not contradicted by certain Plaintiffs unfamiliarity with Proposition 65's legalese or specific attorney work product. All Plaintiffs used J&J's asbestos-laden talc products and all of the Plaintiffs have ovarian cancer or represent a family member who passed away from ovarian cancer. There is a plethora of evidence, including current and historical testing, demonstrating that J&J's talc ore sources and its finished talcum powder products contain asbestos. *See, e.g.,* Akselrud Decl. ¶11, Ex. I (Dr. Alice Blount testifying to her findings of asbestos in Johnson's Baby Powder); *Id.* ¶10, Ex. H (Dr. William Longo testifying to his findings of asbestos in Johnson's Baby Powder). It is well established that asbestos causes cancer. *Id*. ¶12, Ex. J.

J&J's reference to another personal injury attorney's remark in closing argument, that Defendants' current talc source is asbestos-free, is of no consequence. Opposition, Doc. # 104, at 1. Attorney statements are not evidence, and that attorney is not a member of any of the law firms representing Plaintiffs. In addition, J&J inappropriately touts the document which purports to identify past data on the Lanier Law Firm's website. *See* Exhibit C to J&J's Opposition. J&J has not established the authenticity of the document. And contrary to J&J's assertion, the document does not state "talcum powder products are safe." *See id.* It actually states "[t]alc that has asbestos is generally accepted as being able to cause cancer." *Id.* This case involves products made from talc that contains asbestos. Further, J&J's assertion that "the FDA's testing of JBP has not detected any asbestos and the FDA has never issued such an alert for JBP" is misleading because the FDA does not conduct robust testing of J&J talcum powder products.

U.S. regulations require only cosmetics companies to conduct the testing necessary to ensure that no restricted ingredients are sold.[3] Furthermore, the U.S. Department of Justice is currently pursuing a criminal investigation into whether Johnson & Johnson lied to the public about the cancer risks from use of J&J talcum powder products.[4] Regarding J&J's limitations defense, to this day J&J continues to sell its asbestos-laden Johnson's Baby Powder in violation of Proposition 65's warning criteria.

**A. J&J Mischaracterizes Plaintiffs' Expert Evidence.**

At the outset, the Court should decline J&J's invitation to follow it down the rabbit trail of a pre-*Daubert* analysis of Dr. Longo's opinions and the sufficiency of Plaintiffs' evidence. However, Plaintiffs will briefly address the arguments against Dr. Longo in J&J's Opposition.[5] First, Defendants state that, for the J&J Baby Powder containers that Dr. Longo tested, he was only able to find one 'fiber' or 'bundle' for every 100 observations made for each of the four bottles Dr. Longo found positive for the presence of asbestos. Defendants make no argument as to whether this is appropriate or not, but instead leave the court with the impression that this is somehow improper. What Defendants fail to mention is that this method, and the analysis, is entirely appropriate under the accepted practices in this field. Akselrud Decl. ¶, Ex. O (ISO22262-1 protocol). ISO22262-1 specifies that this

[3] *See* https://www.fda.gov/cosmetics/cosmetics-laws-regulations/cosmetics-us-law.

[4] https://www.bloomberg.com/news/articles/2019-07-12/j-j-denials-of-asbestos-in-baby-powder-spur-u-s-criminal-probe

[5] Defendants purposefully mislead the Court by claiming, in a single line, that Plaintiffs' expert has previously called the presence of asbestos in talc an 'urban legend' as if that has any relevance to the current issues here. Throughout time, Johnson and Johnson has repeatedly told consumers, the government, other individuals, courts, and juries that their talcum powder has never contained asbestos and never will. Until recently and until he performed testing himself, Dr. Longo had no reason to doubt the lies Johnson & Johnson perpetuated to the public about the "absence" of asbestos in their talcum powder products. Importantly, in his role as an expert long after his 2002 deposition, Dr. Longo had access to and reviewed many formerly-protected documents produced by Johnson & Johnson, including those which demonstrated Johnson & Johnson's own expert, Dr. Alice Blount, found asbestos in Johnson & Johnson talcum powder by using the concentration method **and informed J&J of this multiple times**. Akselrud Decl. at ¶¶11, 18, 19, Exs. I, P, Q. This method, a heavy density liquid separation method (a "pre-concentration method"), was subsequently used by Dr. Longo to test talcum powder products. Furthermore, Dr. Longo learned that despite the fact that the concentration method is the best method to find asbestos in talc, Johnson and Johnson internally and deliberately decided the "limitations" of the concentration method were that it was "too sensitive" and "not in the worldwide company interests" to use it. Using the heavy density liquid separation method, Dr. Longo has repeatedly found asbestos in Johnson and Johnson talcum powder products as discussed further in other areas of this Reply.

exact analysis is appropriate under the detection limits for transmission electron microscopy. *Id*. Further, as discussed more below, Defendants own expert concedes, when it suits him and his client, that one fiber is enough to identify and define a material as asbestos.

Next, Defendants attempt to mislead the Court by characterizing Dr. Longo's updated exposure calculations from his rebuttal report as a single number that falls below the safe harbor level. In truth, Dr. Longo's findings demonstrate a range of exposure levels which do rise above the known safe harbor levels. Akselrud Decl. ¶4, Ex. B. J&J also takes issue with Dr. Longo's method of calculating daily exposure rates. J&J claims that Dr. Longo failed to consider the fact that diapering will not take place over an entire 70-year lifetime. J&J, however, makes no mention of the fact that Dr. Longo considered other uses of talcum powder beyond diapering, including those uses testified to by the Plaintiffs in this case and others. Numerous courts have found Dr. Longo's opinions relevant, reliable, and admissible. Indeed, Dr. Longo provided testimony in many of the above identified plaintiff verdicts involving these same products and Defendants.

**B. J&J's Opposition Champions Apocryphal Expert Opinions**

J&J's claims that Dr. Sanchez and RJ Lee have done regular testing on Johnson & Johnson talcum powder products using accredited methodology and found no asbestos. The truth is that this testing and the apparent findings by Dr. Sanchez and RJ Lee are nothing more than smoke and mirrors. Dr. Sanchez and RJ Lee have shown that when it comes to finding asbestos, they are more adept at finding ways to avoid finding asbestos. For example, when RJ Lee finds a tremolite fiber, they knowingly tilt the slide on their microscope until they can see a talc diffraction pattern come into view, so the beam is then hitting talc, and not asbestos. Akselrud Decl. ¶, Ex. H. They then produce an asbestos-free report. Dr. Sanchez's method for the identification of "asbestos" or "asbestiform," has shown to be unequivocally subjective and impossible to test, for a number of reasons, but

no more simple than his own admission that he cannot define the key element of his rubric or his idea of "population." Testifying in trial in *Herford v. Johnson & Johnson, et al*., No. BC646315 (California, County of Los Angeles, 2017), Dr. Sanchez was asked how he defines "population" and where it comes from:

> Q: Okay. Then here's the other thing I want to know, because we need to be able to objectively test these things. Tell us what the scientific definition is of a population. Just tell me how many fibers that is.
>
> A: That's a silly question sir. There is no quote, unquote "definition." The populations I compare to in this case were in the thousands when I made the comparisons with.
>
> Q: Well, if we see on a TEM grid, which is looking at a very, very small area-if we see two fibers, is that a population?
>
> A: No, that's not enough.
>
> Q: What about three fibers?
>
> A: It's not above background.
>
> Q: Ten?
>
> A: Depending upon the characteristics, you may have enough that you can say within 95 percent certainty these ten particles could only have come from asbestos population. It depends on the nature of the fibers, and then you need to make that comparison.[6]

However, Dr. Sanchez contradicts himself and inconsistently chooses when single fibers can and cannot be "asbestos" depending on the best interest of his client. Dr. Sanchez's laboratory has internally identified "asbestos" based on a

[6] Akselrud Decl. ¶5, Ex. C (Testimony of Matthew Sanchez, 11/6/17, at 89).

single fiber when it suits his purpose. [Image below][7] When testifying on behalf of another cosmetic talc defendant, Dr. Sanchez conducted a fiber digestion on a plaintiff's lung tissue. There, with a population of one, he labeled a single fiber as "amosite asbestos."[Image below] [8]

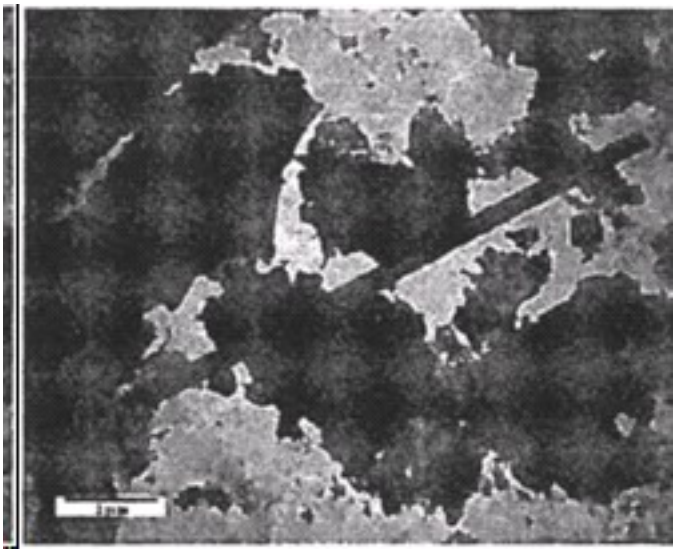

Figure 3. Observed Amosite fiber in Lung 18 grid opening B5. The zone axis diffraction pattern is indexed as the [10-1] zone. Evidence of twinning along (100) is present along be, common in monoclinic amphibole asbestos. This zone axis is definitive for a monoclinic amphibole. Compositionally the fiber is Amosite, also note the presence of manganese (MN) in the spectra, common in Amosite.

What constitutes "asbestos" is clearly a moving target for Dr. Sanchez, and dependent on what he is trying to accomplish for his clients:

> Q: So you identified by TEM one asbestos fiber and no others, no other amosite fibers, right?
>
> A : There's other context here, but yes.
>
> Q: So this is a case where you had a population of one fiber and you concluded it was asbestos, correct?

[7] Akselrud Decl. ¶6, Ex. D (PowerPoint Presentation produced in native format, Bates labeled JNJNL61_000104566).
[8] Akselrud Decl. ¶7, Ex. E (May 5, 2017, Report from RJ Lee and authored by Matthew Sanchez, page 10 of 15).

> A: That's all the data we had, yes.
>
> Q: And you understand that in this case this person had alleged using talc, correct?
>
> A: I don't remember the details, but I believe that talc was involved, yes.
>
> Q: And if you identify amosite, you potentially can point the finger at something else, correct?
>
> A: Amosite would not -this particle would not have come from the talc sample. [9]

In the case discussed above, the finding of amosite allowed Dr. Sanchez's client to point the finger at other asbestos exposures as a possible cause of the plaintiff's mesothelioma, but in order to make the finding, Dr. Sanchez had to set aside his personal requirement that there be a "population." He did just that and concluded that he had found asbestos. Alternating methodology to influence results is not only unscientific, it is fundamentally unethical.[10] Further criticisms can be found in Dr. Longo's expert rebuttal report. Akselrud Decl. ¶4, Ex. B.

Defendants similarly claim that Dr. Downs of the University of Arizona, J&J's expert, has also independently tested talcum powder products from Johnson & Johnson and detected no asbestos in the five bottles he tested. However, before working on this case, Dr. Downs and his laboratory have never conducted testing for asbestos in talcum powder products. As such, Dr. Downs failed to use well established/standardized methodology for the analysis of asbestos samples. Longo

[9] Akselrud Decl. ¶8, Ex. F (Testimony of Matthew Sanchez take 11/7/17, at 3064).

[10] But Imerys, the supplier of talc for Johnson & Johnson cosmetic talcs, was well aware of Dr. Sanchez and his employer's reputation when they retained him. In 2011, Ed McCarthy, who was Market Development Manager for Imerys (Rio Tinto at the time) said as follows to Julie Pier (one of Imerys' corporate representatives in this case): "When the USP asked for input on a rewrite of the talc spec, not a single user of talc put someone up. J&J offered R.J. Lee, an entity closely associated with RT Vanderbilt for the last twenty years of litigation as their 'representative.' **One of the words that are used to describe RJ Lee in respected science circles starts with w...**" He continued, **"We need to make clear to J&J that RJ Lee is not the type of organization we have comfort with on a fundamental ethical basis** and that their association with RT Vanderbilt in the scientific and legal sphere renders them incapable of doing anything but damage to the reputation of talc in the public trust." *See* Akselrud Decl. ¶9, Ex. G (5/13/11 Email from Ed McCarthy to Julie Pier, Bates Labeled IMERYS 095086). At some point, Imerys changed its strategy and brought Dr. Sanchez and the R.J. Lee Group in to support its litigation strategy in mesothelioma cases.

Akselrud Decl. ¶4, Ex. B., at 46. Dr. Downs never attempted to reproduce the methods used by Dr. Longo, including heavy density liquid separation. The major shortfalls of the testing and analysis by Dr. Downs are discussed in detail by Dr. Longo in his rebuttal report. *Id*.

## III. J&J's Case Law Is Inapposite

J&J's authorities fall in stark contrast to this case. In *eDrop-Off Chicago LLC v. Burke*, No. 12-cv-4095-GW, 2012 WL 12896520, *4 (C.D. Ca. June 1, 2012), the court denied the plaintiffs' motion for voluntary dismissal because the defendant would suffer plain legal prejudice because it would sustain a complete loss of protection under an anti-SLAPP law if the defendant were forced to litigate in the other jurisdiction. J&J does not allege any comparable legal prejudice in this case.

In *IP Glob. Inv. Am., Inc. v. Body Glove Ip Holdings, LP*, No. 2:17-cv-06189-ODW, 2019 WL 121191, *4 (C.D. Ca. Jan. 7, 2019), the court permitted voluntary dismissal of one of the defendant's counterclaims after a motion for summary judgment was filed against that claim, but reasoned that the dismissal would be with prejudice, since the defendant moved for voluntary dismissal rather than oppose a motion for summary judgment. Here, Plaintiffs moved for voluntary dismissal as to the entire case, before the filing of any motions for summary judgment. And, in the alternative, Plaintiffs moved for dismissal ***with prejudice***. *See* Motion for Voluntary Dismissal, Doc. # 96, at 8.

In *Hanginout, Inc. v. Google, Inc.*, No. 13cv2811 AJB, 2015 WL 11254788, *2 (S.D. Ca. Apr. 22, 2015), the court denied the plaintiff's motion for voluntary dismissal following its denial of the plaintiff's motion for continuance, before determination of the plaintiff's motion to stay, and after several months of discovery which provided sufficient time during which the plaintiff could have sought dismissal. Here, however, Plaintiffs have not moved to continue or stay proceedings, and they promptly moved for dismissal after receiving information

about other necessary parties to the litigation. *See also White v. Donley*, No. Cv. 05-7728 ABC, 2008 WL 4184651, *3 (C.D. Ca. Sept. 4, 2008) (declining to dismiss an action that had been pending for nearly three years wherein dispositive motions were already filed); *IXIA v. Mitchell*, No. cv 08-07076 RGK, 2009 WL 10674095, *2-3 (C.D. Ca. Jul. 8, 2009) (declining to dismiss an action where allowing a dismissal without prejudice would permit the plaintiff to use Rule 41(a)(2) to revive its untimely jury demand, and where the action was two months from trial, the plaintiff delayed proceedings by failing to appear at a scheduling hearing, the plaintiff failed to engage in discovery, and the plaintiff did not explain why it needed a dismissal without prejudice).

## IV. The Court Should Not Condition Dismissal Upon Plaintiffs' Paying Costs or Attorney's Fees.

Although costs and attorney fees may be imposed upon a plaintiff who is granted a voluntary dismissal under Fed. R. Civ. P. 41(a)(2), "no circuit court has held that payment of the defendant's costs and attorney fees is a prerequisite to an order granting voluntary dismissal." *Stevedoring Servs.*, 889 F.2d at 921. "Moreover, several courts have specifically held that such payment is not required." *Id.* (collecting cases, and holding that the district court did not abuse its discretion by refusing to require the plaintiff to pay the defendant's costs and attorney fees in case involving a contract dispute).

As discussed above, J&J has recycled much of its preparation and work product in this case from personal injury cases against it involving these same products. Plaintiffs have not sought to depose J&J's fact witnesses, expert witnesses have not yet been deposed, J&J has not responded to any written discovery in this case, and J&J retained many of the same experts for this case that it used in other cases involving these same products. Any additional litigation against J&J will not result in excessive or duplicative expenses, as the costs J&J has incurred thus far for the preparation of work product will not be rendered useless.

Of the fees sought by Defendants, some can be eliminated by agreement between the parties. For instance, regarding fees relating to the Notice of Removal (Doc. # 1) and Motion to Remand (Doc. # 27), these Plaintiffs are willing to stipulate that any future case brought by them involving these same claims will be brought in federal court. Other work product required nominal effort, such as J&J's Pro Hac Vice Applications (Doc. ## 6, 7), conferences (Doc. ## 49, 51), and Request to Vacate Motion to Amend Hearing (Doc. # 97).

Further, "a defendant is entitled ***only*** to recover, as a condition of dismissal under Fed. R. Civ. P. 41(a)(2), attorney's fees or costs for work ***which is not useful*** in continuing litigation between the parties." *Koch v. Hankins*, 8 F.3d 650, 652 (9th Cir. 1993) (emphasis added). Because J&J may recycle its Motion to Dismiss (Doc. # 20), Answers (Doc. ## 45-46), and discovery requests in the event of a second lawsuit, it is not entitled to attorney's fees or costs for those items. *See Koch*, 8 F.3d at 652 (finding "[t]he district court abused its discretion in finding the amount of costs without differentiating between work product which was rendered useless and that which might be of use in the [other] litigation."); *Quismundo*, 2018 WL 1963782 at *3 (declining to award fees and costs when dismissing without prejudice of plaintiff's claims for violations of the California Labor Code and California Business & Professions Code where dismissal did not expose defendants to excessive or duplicative expenses because most of the work performed would remain useful in the litigation in state court, and work that would not be of further use was of the defendant's own making); *Santa Rosa Memorial Hospital v. Kent*, 688 Fed. Appx. 492, 494 (9th Cir. 2017) (District court did not abuse its discretion when it declined to award costs and fees and dismissed without prejudice action by hospitals against Department of Health Care Services pertaining to Medicaid reimbursement rates. Although department incurred duplicative expenses and summary judgment motions were before the court, the district court's decision was

justified by its consideration of the legitimate factor of the merit of the Plaintiffs' claims.).

The totality of the factors weigh against imposing costs and attorney's fees on Plaintiffs. Any additional litigation against J&J will not result in excessive or duplicative expenses. Plaintiffs exercised diligence in moving for dismissal upon learning of the need to assert claims against additional defendants, as well as the need for discovery of other potential defendants. The parties have yet to file *Daubert* motions, motions for summary judgment, and pretrial motions. And recent judgments in personal injury cases involving J&J's products and the FDA's warnings about asbestos in cosmetic products demonstrates the merits of Plaintiffs' case.

## CONCLUSION

For the foregoing reasons and the reasons stated in Plaintiffs' Motion for Voluntary Dismissal, Plaintiffs ask the Court to dismiss their claims without imposing costs and attorney's fees on Plaintiffs. In the alternative, Plaintiffs ask the Court to clarify that an award for costs and attorney's fees will ripen only upon Plaintiffs filing a new "action based on or including the same claim against the same defendant" consistent with Rule 41(d).

DATED: July 15, 2019

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