

Firm E-Mail: courtdoes@dickinsonwright.com
David N. Ferrucci (#027423)
dferrucci@dickinsonwright.com
David G. Bray (#014346)
dbray@dickinsonwright.com
Paxton D. Endres (#034796)
pendres@dickinsonwright.com
DICKINSON WRIGHT PLLC
1850 North Central Avenue, Suite 1400
Phoenix, Arizona 85004
Phone: (602) 285-5000
Facsimile: (844) 670-6009
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Renee Ivchenko, et al.,

Plaintiffs

vs.

Kyle David Grant, et al.,

Defendants.

No. CV-20-00674-PHX-MTL

**PLAINTIFFS' MOTION TO DISMISS
WITHOUT PREJUDICE AND STAY
PROCEEDINGS**

(Assigned To Hon. Michael T. Liburdi)

Plaintiffs Renee Ivchenko, et al. ("Plaintiffs"), by and through undersigned counsel, hereby submit this Motion to Dismiss Without Prejudice and Stay Proceedings ("Motion"), and respectfully request that the Court (1) dismiss this case without prejudice and without awarding Defendants' costs and/or attorneys' fees, and (2) stay all proceedings until such time as the Court has ruled on this Motion. Plaintiffs' Motion is based on the attached Memorandum of Points and Authorities, the records and pleadings on file in this action, and such other matters and argument as may be presented prior to or at the hearing of the motion. Proposed orders are submitted herewith.

//

//

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction and Background

On December 17, 2019, Plaintiff Renee Ivchenko filed a complaint (“Original Complaint”) in the Maricopa County Superior Court against Defendants Kyle David Grant, his brother Travis Paul Grant, and Travis Paul Grant’s wife, Mariel Lizette Grant, all d/b/a Rapsheetz.com and Bailbondcity.com (“Defendants”). [See Doc. 1 at Exhibit A]. The Original Complaint asserted causes of action for defamation, false light invasion of privacy, invasion of privacy based on appropriation, intentional infliction of emotional distress, unlawful appropriation/right of publicity, civil conspiracy, punitive damages, injunctive relief, and attorneys’ fees. [*Id.*]

On February 21, 2020, Defendants filed a Motion for Summary Judgment, [See Doc. 1 at Exhibit G] despite being informed in writing by Plaintiffs’ attorney that Plaintiffs planned to file an amended complaint. Shortly thereafter, Plaintiffs Jane Does I–VIII, John Does I–XII, and Renee Ivchenko (“Plaintiffs”) filed an amended complaint (“Amended Complaint”), alleging the following causes of action: violation of the Arizona Mugshot Act (A.R.S. 44-7901/7902) (“Arizona Mugshot Statute”), invasion of privacy based on appropriation, intentional infliction of emotional distress, unlawful appropriation/right of publicity, punitive damages, injunctive relief, and attorneys’ fees. [Doc. 1 at Exhibit H]. These causes of action were generally the same as those in the Original Complaint, with the addition of the claim under the Arizona Mugshot Statute, while defamation and civil conspiracy claims were dropped. [*Id.*]. Defendants answered the Amended Complaint on March 26, 2020. [Doc. 1 at Exhibit N].

On April 1, 2020, Plaintiffs filed their Response to Defendants’ Motion for Summary Judgment. [Doc. 1 at Exhibit P]. Since receiving the Response, Defendants made every effort to avoid a ruling on their Motion for Summary Judgment. Not only

1 did Defendants remove the case to federal court, [see Doc. 1], but they also filed a
 2 Notice of Withdrawal of Pending Motion asking the Court not to decide (or even look
 3 at) their Motion for Summary Judgment. [See Doc 10].

4 On May 1, 2020, Defendants were sued in Maricopa County Superior Court
 5 (Case No. CV2020-093006) by other plaintiffs who alleged the same wrongs and causes
 6 of action as in the instant case, including violations of the Arizona Mugshot Statute (the
 7 “State Court Action”) [See State Court Action Complaint, attached hereto as **Exhibit 1**].
 8 Given the similarities between the State Court Action and the underlying federal action,
 9 many of the Plaintiffs in this case plan to join the State Court Action. In the interest of
 10 judicial economy, and for other reasons detailed below and elsewhere, Plaintiffs file this
 11 Voluntary Motion to Dismiss Without Prejudice and Stay Proceedings, respectfully
 12 requesting that the Court (1) dismiss this case without prejudice and without awarding
 13 Defendants’ costs and/or attorneys’ fees and (2) stay proceedings until such time as the
 14 Court can rule on this Motion.
 15

16 **II. The Court should dismiss this case without prejudice and without awarding**
 17 **Defendants’ costs or attorneys’ fees.**

18 **A. Voluntary dismissal without prejudice is proper because Defendants**
 19 **will not be prejudiced**

20 The Court should grant Plaintiffs’ voluntary motion to dismiss without prejudice
 21 because Defendants will not be prejudiced. “Rule 41(a)(2) permits a plaintiff, with
 22 approval of the court, to dismiss an action without prejudice at any time.” *Stevedoring*
 23 *Servs. of Am. v. Armilla Int’l B.V.*, 889 F.2d 919, 921 (9th Cir. 1989) (“[A]n action may
 24 be dismissed at the plaintiff’s request only by court order, on terms that the court
 25 considers proper”). “A motion for voluntary dismissal under Rule 41(a)(2) is addressed
 26 to the court’s sound discretion and the court’s order will not be disturbed unless the
 27
 28

1 court has abused its discretion.” *Id.* “The purpose of the rule is to permit a plaintiff to
2 dismiss an action without prejudice so long as the defendant will not be prejudiced . . .
3 or unfairly affected by the dismissal.” *Id.* (internal cites omitted).

4 “[W]hen ruling on a motion to dismiss without prejudice, the district court must
5 determine whether the defendant will suffer some plain legal prejudice as a result of the
6 dismissal.” *Zanowick v. Baxter Healthcare Corp.*, 850 F.3d 1090, 1093 (9th Cir. 2017)
7 (citing *Westlands Water Dist. v. United States*, 100 F.3d 94, 96 (9th Cir. 1996); *see also*
8 *Smith v. Lenches*, 263 F.3d 972, 975 (9th Cir. 2001) (“A district court should grant a
9 motion for voluntary dismissal under Rule 41(a)(2) unless a defendant can show that it
10 will suffer some plain legal prejudice as a result”) (internal footnote omitted) (citing
11 *Waller v. Fin. Corp. of Am.*, 828 F.2d 579, 583 (9th Cir.1987); *Jones v. Sec. & Exch.*
12 *Comm’n*, 298 U.S. 1, 19, 56 S. Ct. 654, 659, 80 L. Ed. 1015 (1936) (“The general rule is
13 settled . . . that a plaintiff possesses the unqualified right to dismiss his complaint . . .
14 unless some plain legal prejudice will result to the defendant other than the mere
15 prospect of a second litigation upon the subject matter”). “[L]egal prejudice is just that –
16 prejudice to some legal interest, some legal claim, some legal argument.” *Westlands*,
17 100 F.3d at 96.
18

19 In very rare cases will a defendant suffer plain legal prejudice from voluntary
20 dismissal by a plaintiff. For instance, it is well established that “starting a litigation all
21 over again does not constitute legal prejudice.” *Stevedoring Servs. of Am. v. Armilla Int’l*
22 *B.V.*, 889 F.2d 919, 921 (9th Cir. 1989). “Plain legal prejudice . . . [also] does not result
23 simply when the defendant faces the prospect of a second lawsuit or when plaintiff
24 merely gains some tactical advantage.” *Hamilton v. Firestone Tire & Rubber Co.*, 679
25 F.2d 143, 145 (9th Cir. 1982) (citations omitted); *see also Westlands*, 100 F.3d at 97
26 (“Uncertainty because a dispute remains unresolved is not legal prejudice”). The Ninth
27
28

1 Circuit has also repeatedly held that “the expense incurred in defending against a lawsuit
2 does not amount to legal prejudice.” *Id.*

3 In determining whether a defendant will suffer plain legal prejudice, “cases focus
4 on the rights and defenses available to a defendant in future litigation.” *Westland Water*
5 *Dist.*, 100 F.3d at 97. For instance, courts have examined whether dismissal without
6 prejudice would result in the loss of a jury trial or a statute of limitations defense. *See id.*
7 Notably, even though some courts have examined whether a dismissal would result in
8 the loss of a federal forum, *see id.*, the Ninth Circuit and other Circuit Courts have
9 repeatedly held that plain legal prejudice does not result merely because the defendant
10 will have to defend the case in state court. *See Smith*, 263 F.3d at 976; *Bader v. Elecs.*
11 *for Imaging, Inc.*, 195 F.R.D. 659, 662 (N.D. Cal. 2000) (“Under the Ninth Circuit
12 precedent cited above, while a change from federal to state court might create a tactical
13 disadvantage to defendants, that is not legal prejudice”); *Am. Nat. Bank & Tr. Co. of*
14 *Sapulpa v. Bic Corp.*, 931 F.2d 1411, 1412 (10th Cir. 1991) (“The possibility that
15 plaintiffs may gain a tactical advantage by refile in state court is insufficient to deny a
16 voluntary motion to dismiss without prejudice, especially when state law is involved”);
17 *see e.g. Smith*, 263 F.3d at 976 (holding that a change from federal to state court forum
18 was not legal prejudice); *Am. Nat. Bank & Tr. Co. of Sapulpa*, 931 F.2d at 1412
19 (affirming district court’s order granting Plaintiff’s Rule 41(a)(2) motion to dismiss
20 because “it is not an abuse of discretion for the district court to dismiss an action without
21 prejudice even where the plaintiff’s only motive is to recommence the action in state
22 court”).
23
24

25 In this case, there is absolutely no legitimate argument that voluntary dismissal
26 will cause legal prejudice to Defendants. Dismissal without prejudice will not result in
27 the loss of a jury trial, and it is not apparent that any of the affirmative defenses alleged
28

by Defendants will be time barred. [See Doc. 1 at Exhibit N]. Moreover, as confirmed by dispositive Ninth Circuit law, the fact that Defendants may have to defend the case in state court, without more, is not enough to avoid dismissal without prejudice.

It is also worth noting that this case is still in the very early stages of litigation, discovery has just begun, and neither party has made any effort or spent any sums preparing for trial. *Mittakarin v. InfoTran Sys.*, 279 F.R.D. 38, 40 (D.D.C. 2012) (voluntary dismissal was proper where no discovery had been completed, and the defendants had not likely made any effort or expense in preparing for trial); *Tyco Laboratories, Inc. v. Koppers Co.*, 627 F.2d 54 (7th Cir. 1980) (a defendant was not prejudiced by voluntary dismissal where there has been some, but not extensive discovery). For this reason alone, voluntary dismissal without prejudice is proper.

B. Defendants Should Not be Awarded Any Costs or Attorneys' Fees.

The Court should dismiss this case without awarding Defendants any costs or attorneys' fees. Even though a district court may, after granting a plaintiff's Rule 41(a)(2) motion to dismiss without prejudice, impose costs against the plaintiff, "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. of Am. v. Armilla Int'l B.V.*, 889 F.2d 919, 921 (9th Cir. 1989). In fact, "several courts have specifically held that such payment is not required." *Id.*

"In determining whether to award costs . . . to [a] defendant[] after a voluntary dismissal without prejudice, courts generally consider the following factors: (1) any excessive and duplicative expense of a second litigation; (2) the effort and expense incurred by a defendant in preparing for trial; (3) the extent to which the litigation has progressed; and (4) the plaintiff's diligence in moving to dismiss." *Santa Rosa Mem'l Hosp. v. Kent*, 688 F. App'x 492, 494 (9th Cir. 2017) (citations omitted). "The merits of

1 the plaintiff's claims are also relevant." *Id.*; see e.g. *id.* (holding that "the district court
2 did not abuse its discretion when it declined to award costs and attorneys' fees to
3 [Defendant] . . . [because, even though Defendants] incurred duplicative expenses and
4 summary judgment motions were before the court, . . . [t]he district court's decision
5 [was] justified by its consideration of the legitimate factor of the merit of the Plaintiffs'
6 claims").

7
8 Here, all of the factors weigh against imposing costs and attorneys' fees against
9 Plaintiffs. First, any additional litigation against Defendants will not result in excessive
10 or duplicative expenses because the State Court Action is identical in almost every
11 respect to the underlying case. The Doe plaintiffs in that case, like the Doe Plaintiffs
12 here, alleged the same claims, against the same Defendants, for the same harm, [see
13 **Exhibit 1**], and therefore, all of the work performed by Defendants in this case will be
14 directly relevant and useful in the pending State Court Action. See e.g., *Cortina v. Wal-*
15 *Mart Stores, Inc.*, No. 13-CV-02054-BAS-DHB, 2016 WL 4556455, at *9 (S.D. Cal.
16 Sept. 1, 2016) (declining to award costs and fees under the first factor "because much of
17 the work performed in [the federal] litigation [would] be relevant to the anticipated state-
18 court action").

19
20 The next two factors also weigh strongly against awarding Defendants costs and
21 attorneys' fees because neither party has incurred any expenses preparing for trial, which
22 if there is one, will not take place until well into 2021. Moreover, this case is still in its
23 infancy, and therefore, has progressed very little. Not only have the parties not taken any
24 depositions or responded to any discovery requests propounded by the other party, but
25 not one of the deadlines set forth in the Scheduling Order (Doc. 13) are even remotely
26 close to passing. Moreover, unlike in *Santa Rosa Mem'l Hosp.*, 688 F. App'x at 494,
27 where summary judgment motions were already pending before the court and the district
28

1 court still dismissed the case without granting Defendant's costs or fees, there is no
2 pending motion for summary judgment here. In fact, the only motion pending in this
3 case is Plaintiffs' Motion to Proceed Under Pseudonym. [See Doc. 3].

4 Next, Plaintiffs moved diligently in filing this Motion because, among other
5 things, the pending State Court Action, which many of the Plaintiffs in the underlying
6 case seek to join, was filed not long ago on May 1, 2020. [See **Exhibit 1**]. Thus, the
7 fourth factor also weighs strongly against an award of costs and attorneys' fees.

8 The last factor also weighs against awarding costs and fees because all of
9 Plaintiffs' claims have substantial merit. This is evidenced by, among other things, the
10 simple fact that Defendants, after filing a Motion for Summary Judgment and receiving
11 Plaintiffs' response, took every procedural step possible to avoid a ruling on the motion.
12 Not only did Defendants remove this case to Federal Court shortly after receiving
13 Plaintiffs' response, but, after Plaintiffs filed a Notice of Pending Motion in connection
14 with Defendants' Motion for Summary Judgment, [See Doc. 9], Defendants promptly
15 filed a Notice of Withdrawal of Pending Motion seeking to prevent this Court from ever
16 ruling on their motion. [See Doc. 10]. Clearly, if Plaintiffs' claims lacked merit, then
17 Defendants would not have gone through such great lengths to avoid an adverse ruling
18 on their Motion for Summary Judgment. For this reason, the fifth factor also weighs
19 strongly against an award of costs and fees.
20

21 Simply put, all of the factors set forth in *Santa Rosa* weigh strongly against
22 awarding Defendants any of their costs or attorneys' fees. However, even if the Court
23 were inclined to award costs and fees, Defendants still should not receive anything
24 because the Court can only award "attorneys' fees or costs for work which is not useful
25 in continuing litigation between the parties. *Koch v. Hankins*, 8 F.3d 650, 652 (9th Cir.
26 1993) (holding that the district court "abused its discretion in not differentiating between
27
28

work product that was rendered useless by dismissal of federal action and that which might be of use in state court litigation”). As discussed *supra* at Section II(B), all of the work performed by Defendants in this case will be used by Defendants in the State Court Action because the State Court Action is identical in nearly every respect to the underlying case [See **Exhibit 1**]. Therefore, in the unlikely event that the Court found that the *Santa Rosa* factors weighed in Defendants’ favor, the Court still should not award Defendants any costs or attorneys’ fees.

C. Plaintiffs may refuse voluntary dismissal at any time

In the unlikely event that the Court were inclined to grant this Motion subject to conditions, including, among other things, payment of Defendants’ costs and attorneys’ fees, then the Court must give Plaintiffs “a reasonable period of time within which [either] to refuse the conditional voluntary dismissal by withdrawing [the] motion for dismissal or to accept the dismissal despite the imposition of conditions.” *Beard v. Sheet Metal Workers Union, Local 150*, 908 F.2d 474, 476 (9th Cir. 1990); *Lau v. Glendora Unified Sch. Dist.*, 792 F.2d 929, 930 (9th Cir. 1986) (recognizing that “the plaintiff [has] the option to refuse voluntary dismissal if the conditions imposed are too onerous”); *Bd. of Trustees as Trustees of Nat’l Roofing Indus. Pension Fund v. Von Noorda*, No. 216CV00170JADDJA, 2019 WL 4044009, at *4 (D. Nev. Aug. 27, 2019). For this reason, if the Court were inclined to dismiss this case subject to any conditions, including, but not limited to, payment of Defendants’ costs and attorneys’ fees, then Plaintiffs respectfully request at least **10 days** after receiving such notice from the Court within which to withdraw this Motion or accept the conditional voluntary dismissal.

III. The Court Should Stay Proceedings Until Such Time as It has Ruled on This Motion

1 The Court should stay all proceedings until it has ruled on Plaintiffs' Motion to
2 Dismiss Without Prejudice. "The power to stay proceedings is incidental to the power
3 inherent in every court to control the disposition of the causes on its docket with
4 economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am.*
5 *Co.*, 299 U.S. 248, 254 (1936). See *Clinton v. Jones*, 520 U.S. 681, 706-07 (1997)
6 (setting forth standard of review and explaining that district court "has broad discretion
7 to stay proceedings as an incident to its power to control its own docket"). When
8 deciding a motion to stay, district courts take into account the following factors: "[(1)]
9 the possible damage which may result from granting of a stay, [(2)] the hardship or
10 inequity which a party may suffer in being required to go forward, and [(3)] the orderly
11 course of justice measured in terms of simplifying or complicating of issues, proof, and
12 questions of law which could be expected to result from a stay." *Lockyer v. Mirant*
13 *Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005) (citation omitted).

15 In this case, all three factors weigh strongly in favor of granting a stay. First, there
16 are absolutely no possible damages that may result from a stay of proceedings. If
17 anything, Defendants stand to gain from a stay because, even though all of Defendants'
18 work thus far in this case can be used by Defendants in the pending State Court Action,
19 staying proceedings will ensure that Defendants, going forward, will not expend any
20 time or resources on matters that are not relevant to the State Court Action.

21 The second factor also weighs in favor of staying proceedings because, going
22 forward, Plaintiffs would be required to spend significant time and resources prosecuting
23 this federal litigation even though the outcome of the Motion to Dismiss might dispose
24 of this case.

26 Finally, staying proceedings until the Court rules on the Motion to Dismiss would
27 simplify this entire case because, if the Motion is granted, then there are no longer any
28

1 issues or questions of law for this Court to answer, and therefore, the third factor also
2 weighs strongly in favor of granting a stay.

3 **Conclusion**

4 For the reasons set forth above, based upon the record in the underlying civil
5 action and dispositive Ninth Circuit law, Plaintiffs respectfully request that the Court (1)
6 Dismiss this action without prejudice and without awarding Defendants any attorneys'
7 fees or costs, and (2) stay all proceedings until such time as the Court has ruled on the
8 Motion to Dismiss.
9

10 **DATED** this 19th day of May, 2020.

11 Respectfully submitted,

12 The logo for Dickinson Wright PLLC, featuring the firm name in a serif font with a stylized orange and yellow swoosh graphic.

13 By: /s/ Paxton D. Endres
14 David N. Ferrucci
15 David G. Bray
16 Paxton D. Endres
17 ***Attorneys for Plaintiffs***
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document on May 19, 2020 via the Court's ECF system, thereby causing a true copy of said document to be served electronically upon each other party registered through ECF. In addition, copies of the foregoing were emailed to:

David S. Gingras, #021097
Gingras Law Office, PLLC
4802 E. Ray Road, #23-271
Phoenix, AZ 85044
Attorney for Defendants

/s/ Christine Klepacki
Christin Klepacki

4812-3003-8716 v1 [89794-1]