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9 **UNITED STATES DISTRICT COURT**

10 **DISTRICT OF ARIZONA**

11 Renee Ivchenko, et al.,

12 Plaintiffs

14 vs.

15 Kyle David Grant, et al.,

16 Defendants.

No. CV-20-00674-PHX-MTL

**PLAINTIFFS' REPLY IN SUPPORT OF
PLAINTIFFS' MOTION TO DISMISS
WITHOUT PREJUDICE AND STAY
PROCEEDINGS**

(Assigned To Hon. Michael T. Liburdi)

1 Plaintiffs Renee Ivchenko, *et al*, (“Plaintiffs”) submit this Reply in Support of
2 their Voluntary Motion to Dismiss Without Prejudice and Stay Proceedings (“Motion”).
3 None of the arguments advanced by Defendants Kyle David Grant, *et. al.*,
4 (“Defendants”) in Defendants’ Response to Plaintiffs’ Motion to Dismiss (“Response”)
5 warrant denying the Motion. These reasons, explained more fully below and in the
6 Motion, warrant granting the Motion.

7 **I. Introduction**

8 Defendants do not contest that the Doe Plaintiffs’ claims should be dismissed
9 without prejudice and without awarding Defendants any costs or attorneys’ fees.
10 [Response at 1]. Instead, Defendants continue their strategy of harassment and
11 intimidation directed against Renee Ivchenko, the only named Plaintiff in this case, by
12 requesting that (i) her claims be dismissed with prejudice, and that (ii) she pay
13 Defendants’ “reasonable” attorneys’ fees in the amount of \$21,860. [Response at 1].

14 Under Ninth Circuit precedent, Defendants are entitled to neither. The Court
15 should dismiss Mrs. Ivchenko’s claims without prejudice because Defendants will not
16 suffer any legal prejudice from such dismissal, even after applying the factors for
17 determining legal prejudice articulated in *Loud Records, LLC v. Sanchez*, No. CV-05-
18 695-TUC-DCB, 2008 WL 628913, at *3 (D. Ariz. Mar. 5, 2008). Moreover, even if the
19 Court dismissed Mrs. Ivchenko’s claims with prejudice, Defendants cannot also receive
20 their attorneys’ fees and costs because there are no exceptional circumstances that would
21 justify such an award, and even if there was, Defendants failed to establish that the work
22 used defending against Mrs. Ivchenko’s claims will not be useful in defending against
23 the Doe Plaintiffs. For these and other reasons detailed more fully below, the Court
24 should dismissed Mrs. Ivchenko’s claims without prejudice and without awarding
25 Defendants any costs or attorneys’ fees.
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1 **II. The Court should dismiss Plaintiffs' claims without prejudice and without**
 2 **awarding attorneys' fees**

3 **A. Voluntary Dismissal Without Prejudice is Proper**

4 *i. Doe Plaintiffs*

5 Despite conceding that dismissal of the Doe Plaintiffs' claims without prejudice
 6 and without awarding any costs or fees is proper, Defendants dedicate a significant part
 7 of their brief arguing, apparently without taking any position, that the Court may *sua*
 8 *sponte* deny the Doe Plaintiffs' request for dismissal because, according to Defendants,
 9 the anonymous plaintiffs in the pending State Court Action (Case No. CV2020-093006)
 10 (the "State Court Action") were "fraudulently joined," and therefore, "it is virtually
 11 certain [the State Court Action] will be removed to this Court . . ." [Response at 7]. This
 12 argument completely lacks merit.
 13

14 "To establish that plaintiffs were fraudulently joined, the defendant must
 15 demonstrate by clear and convincing evidence that either (1) there has been outright
 16 fraud in the plaintiffs recitation of jurisdictional facts or (2) there is no possibility that
 17 the plaintiffs would be able to establish a cause of action against the defendant in state
 18 court." *Foslip Pharm., Inc. v. Metabolife Int'l, Inc.*, 92 F. Supp. 2d 891, 903 (N.D. Iowa
 19 2000) (cited by Defendants); *Lerma v. Univision Communications, Inc.*, 52 F.Supp.2d
 20 1011, 1014 (E.D.Wis.1999) ("[J]oinder is fraudulent when there are false allegations of
 21 jurisdictional fact, or more commonly . . . when the claim against the non-diverse
 22 defendant has no possible chance of success in state court").
 23

24 Here, even assuming the Court could provide an advisory opinion regarding
 25 whether parties in a pending state court action were fraudulently joined, Defendants
 26 have not (and cannot) establish either prong of the fraudulent joinder test. In fact,
 27 Defendants outright refuse to analyze (or even mention) either prong, and instead
 28

1 contend that “[a] complete discussion of this point is beyond the scope of the current
2 motion.” [Response at 7]. Thus, contrary to Defendants’ contention, the State Court
3 Action is not “virtually certain” to be removed to federal court, and the Court should not
4 *sua sponte* deny the Doe Plaintiffs’ request for dismissal.

5 ii. *Plaintiff Renee Ivchenko*

6 Practically speaking, even if the Court dismisses Mrs. Ivchenko’s claims without
7 prejudice, Mrs. Ivchenko cannot subsequently refile her claim because they would be
8 time barred. Thus, contrary to Defendants’ contention, [Response at 11], dismissal with
9 prejudice is not necessary to protect Defendants’ interests, and the Court should dismiss
10 Mrs. Ivchenko’s claims without prejudice. *Sherman v. Yahoo! Inc.*, No. 13CV0041-
11 GPC-WVG, 2015 WL 473270, at *5 (S.D. Cal. Feb. 5, 2015) (where dismissal without
12 prejudice did not subject Defendant to the risk of additional litigation, the Court
13 dismissed Plaintiff’s claims without prejudice).

14 Without citing any authority, Defendants contend that Mrs. Ivchenko’s request
15 for dismissal without prejudice under Rule 41(a)(2) should be dismissed with prejudice
16 under Rule 41(a)(1)’s Two Dismissal Rule. However, it is well established that Rule
17 41(a)(1)’s Two Dismissal Rule does not apply to voluntary motions to dismiss under
18 Rule 41(a)(2). *See Sutton Place Dev. Co. v. Abacus Mortg. Inv. Co.*, 826 F.2d 637, 640
19 (7th Cir. 1987) (“By its own clear terms the ‘two dismissal’ rule applies only when the
20 second dismissal is by notice under Rule 41(a)(1)”); *Am. Cyanamid Co. v. McGhee*, 317
21 F.2d 295, 298 (5th Cir. 1963) (“We can read no two dismissal rule into 41(a)(2)”).
22 Therefore, the Two Dismissal Rule does not apply.
23

24 Defendants also argue that legal prejudice is not the only factor courts use to
25 determine whether to dismiss without prejudice, and that the Court should also consider
26 the following additional factors: (i) the defendant’s efforts and expense in preparing for
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1 trial, (ii) any excessive delay or lack of diligence on the part of the plaintiff in
2 prosecuting the action, (iii) insufficiencies in the plaintiff's explanation of the need for a
3 dismissal, and (iv) the fact that a summary judgment motion has been filed by the
4 defendant. [Response at 11].¹

5 However, none of these factors support dismissal with prejudice. For instance,
6 Defendants argue the first factor weighs in favor of dismissal with prejudice because
7 Defendants "incurred more than \$20,000 in attorney's fees and costs defending Mrs.
8 Ivchenko's claims" and these expenses "include[] seeking discovery both from Mrs.
9 Ivchenko and from third party witnesses and otherwise preparing for trial." [Response at
10 12]. However, even if true, the first factor still weighs in favor of dismissal without
11 prejudice because not only is this case nowhere near trial, but, to the extent it can be
12 determined from the Response and Defense Counsel's affidavit or billing invoices, all of
13 Defendants' resources spent in these initial stages of discovery (or preparing for trial),
14 will be useful against the Doe Plaintiffs. [See Dec. of Andrew Ivchenko, attached hereto
15 as **Exhibit A**, at Exhibit 3]. See *e.g.*, *Sherman*, 2015 WL 473270, at *5 (dismissing
16 Plaintiff's claims without prejudice because, *inter alia*, "the case [was] not close to trial .
17 . . and [Defendant's] resources spent on discovery and summary judgment will remain
18 useful in the continuing litigation against Patham").
19

20 Defendants argue the second factor also weighs in favor of dismissal with
21 prejudice because Mrs. Ivchenko refused to dismiss this case from the outset, and as a
22 result, "Defendants were forced to appear in the case, prepare disclosures, serve
23

24 ¹ To be clear, each of these factors are used by Courts to determine whether legal
25 prejudice exists for purposes of determining whether to dismiss with or without
26 prejudice. See *United States v. Berg*, 190 F.R.D. 539, 543 (E.D. Cal. 1999). Thus,
27 Defendants' allegation that Plaintiffs "misstate[d] the law" or that legal prejudice is one
28 of many factors used by courts to determine whether to dismiss with or without
prejudice is simply not true. [Response at 11].

discovery, seek discovery from third parties, and move for summary judgment.” [Response at 13]. According to Defendants, Mrs. Ivchenko had a duty to dismiss her case after Defendants alleged that “her claims were untimely and otherwise groundless.” [Id.]² This argument makes no sense. Taken to its logical conclusion, anytime a defendant asserts a potentially valid defense to a claim, and the plaintiff later voluntarily dismisses the claim, the Court must dismiss the claim with prejudice. This cannot be (and is not) the law.³

Defendants argue the third factor also weighs in favor of dismissal with prejudice because, according to Defendants, “Mrs. Ivchenko offers no explanation whatsoever for her dismissal request.” [Response at 14]. However, Mrs. Ivchenko did not provide an explanation in the Motion because it was so glaringly obvious: Mrs. Ivchenko no longer wants to be harassed by Defendants. Up to this point, Defendants, on multiple occasions, have threatened to sue Mrs. Ivchenko for malicious prosecution in an effort to coerce her into dismissing her valid claims against them and deter others who wish to sue them. [See Exhibit A at ¶¶ 19-22]. Now that Mrs. Ivchenko caved to their demands, Defendants are not finished with her, and instead seek their “pound of flesh” by seeking dismissal with prejudice even though, as detailed *supra* at Section II(A)(ii), Mrs.

² Mrs. Ivchenko’s claims were not groundless or untimely, as was repeatedly explained to Defense Counsel in correspondence between the parties. [See *e.g.* January 31, 2020 and February 3, 2020 Email Correspondence from Plaintiffs’ Counsel to Defense Counsel, attached as Exhibit F to Doc. 15-1]. Defendants’ attempts to mischaracterize those claims and that correspondence should not be permitted.

³ Defendants also argue Mrs. Ivchenko delayed in prosecuting her claims because she dismissed Case 1 then “six months later . . . re-filed exactly the same claims in [this case].” [Response at 13]. Even if the claims alleged in Case 1 and Case 2 were “exactly the same” (they are not), it is unclear how a six-month “delay” between dismissing Case 1 and re-filing Case 2 constitutes a delay sufficient to justify a dismissal with prejudice because Defendants provide no explanation.

1 Ivchenko will no longer be able to assert her claims against them. The Court must put an
2 end to Defendants' relentless harassment and intimidation of Mrs. Ivchenko.

3 Finally, Defendants argue the fourth factor also weighs in favor of dismissal with
4 prejudice because they filed a motion for summary judgment even though they
5 subsequently withdrew this motion after Plaintiffs requested that this Court rule on the
6 motion. [See Doc. 9]. According to Defendants, they withdrew their motion for summary
7 judgment because the motion became substantively moot after Plaintiffs filed the
8 Amended Complaint, and procedurally moot once this case became removable.
9 [Response at 15-16]. This latter point is simply false, as nothing prevented this Court
10 from ruling on Defendants' motion for summary judgment until Defendants filed the
11 Notice of Withdraw of Pending Motion (Doc. 10).
12

13 Defendants' first point also lacks any merit. The Summary Judgment Motion
14 raised issues that were not mooted out by the Amended Complaint, for example whether
15 Defendants are immune from liability under the Communications Decency Act
16 ("CDA"), and Plaintiffs responded to those issues. [See Doc. 1-1 at 208-293].
17 Defendants removed the case and withdrew that motion because the Response
18 demonstrates that Defendants' CDA defense lacks merit. [*Id.* at 215-223; Motion at 8].
19

20 The first point is also specious, as Defendants seek to punish Plaintiffs for
21 Defendants' own vexatious conduct. Defendants were completely aware that Plaintiffs
22 planned to amend their complaint within the 21-day time-period provided by the rules,
23 and that, as part of that amendment, Plaintiffs intended to remove the previously asserted
24 defamation claim. [See Doc. 1-1 at 212]. Nonetheless, Defendants filed their motion for
25 summary judgment on February 21, 2020, and on February 27, 2020, Plaintiffs, as
26 promised, filed the Amended Complaint. [*Id.*]. Despite Defendants' contention that their
27 motion became moot at that point, Defendants never withdrew or otherwise told
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1 Plaintiffs not to respond to the motion. To the contrary, on March 18, 2020, Defendants
2 stipulated to an extension of time for Plaintiffs to respond to the motion. [Doc. 1-1 at
3 152-154]. Clearly, Defendants' either did not believe all the issues raised in the motion
4 were moot, or worse, they simply sought to drive up Plaintiffs' attorneys' fees incurred
5 responding to a motion they planned on withdrawing. Thus, if anything, Plaintiffs, not
6 Defendants, should be awarded their fees incurred in responding to that motion.

7
8 **B. Awarding Attorneys' Fees Would Be Improper**

9 The payment of fees is not, as Defendants suggests, a prerequisite to dismissal
10 under Rule 41(a)(1) or (2). *Stevedoring Servs. of Am. v. Armilla Intern. B.V.*, 889 F.2d
11 919, 921 (9th Cir. 1989) ("no circuit court has held that payment of the defendant's costs
12 and attorney fees is a prerequisite to an order granting voluntary dismissal."). To the
13 contrary, if the Court dismisses a plaintiff's claims with prejudice, then "attorneys' fees
14 may be imposed under Rule 41(a)(2) *only* in 'exceptional circumstances.'" *Steinert v.*
15 *Winn Grp., Inc.*, 440 F.3d 1214, 1222 (10th Cir. 2006) (emphasis added); *Burnette v.*
16 *Godshall*, 828 F. Supp. 1439, 1444 (N.D. Cal. 1993) ("Since the RICO cause of action
17 has been dismissed with prejudice, costs and attorneys' fees cannot be awarded to
18 Defendants because there is no future risk of litigation"); *Gonzalez v. Proctor & Gamble*
19 *Co.*, No. 06CV869 WQH (WMC), 2008 WL 612746, at *3 (S.D. Cal. Mar. 4, 2008) ("A
20 plaintiff faced with the imposition of attorneys' fees and costs as a condition of
21 voluntary dismissal may request that the action be dismissed with prejudice to avoid
22 payment"); *Internmatch, Inc. v. Nxtbigthing, LLC*, No. 14-CV-05438-JST, 2016 WL
23 540812, at *2 (N.D. Cal. Feb. 11, 2016).

24
25 Here, Defendants never even inform the Court of this standard, let alone attempt
26 to establish that exceptional circumstances exist justifying an award of costs and fees.
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1 For this reason alone, and assuming the Court dismisses this case with prejudice (which
2 it should not), the Court should not award costs and fees.

3 Moreover, this is not one of those rare cases where exceptional circumstances
4 exist justifying an award of costs and fees after dismissal with prejudice. “An example
5 of such a circumstance is ‘when a litigant makes a repeated practice of bringing claims
6 and then dismissing them with prejudice after inflicting substantial litigation costs on the
7 opposing party and the judicial system.’” *Steinert*, 440 F.3d at 1222. Here, Mrs. Ivchenko
8 has never voluntarily dismissed a case with prejudice, and even though she requested
9 dismissal of one other action, her request, like her request here, came very early in the
10 litigation (just 22 days after filing her complaint), and immediately after she learned that
11 Defendants had removed her mugshot from their websites. [See **Exhibit A** at ¶¶ 4, 6, 9].
12 Defendants even admit the “first action was quickly dismissed,” [Response at 13], and
13 Defense Counsel further concedes that the “matter was resolved promptly.” [See Dec. of
14 David Gingras at ¶ 11]. Thus, it can hardly be said that Mrs. Ivchenko inflicted
15 substantial litigation costs on the opposing party or the judicial system, and therefore,
16 the Court cannot award costs and fees.

17
18 Moreover, even if the Court dismisses Mrs. Ivchenko’s claims without prejudice
19 (which it should), awarding costs and fees still is not a prerequisite to such dismissal.
20 Though it may be true that “[t]he defendants’ interests can be protected by conditioning
21 the dismissal without prejudice upon payment of appropriate costs and fees,” *Westlands*
22 *Water Dist. v. United States*, 100 F.3d 94, 97 (9th Cir. 1996), [Response at 12], courts, in
23 determining whether the defendants’ interests need to be protected in the first place
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1 (after dismissal without prejudice), apply the factors set forth in *Santa Rosa Mem'l Hosp.*
2 *v. Kent*, 688 F. App'x 492, 494 (9th Cir. 2017).⁴ [See Motion at 6-9].

3 Once again, Defendants never even mention, let alone satisfy, any of the *Santa*
4 *Rosa* factors. To the extent Defendants address factors similar to the *Santa Rosa* factors,
5 albeit in a different context, [Response at 10-16], Defendants' arguments fail. [See
6 Section II(A)(ii), *supra*]. Thus, if the Court grants Mrs. Ivchenko's dismissal without
7 prejudice (which it should), then the Court still cannot award Defendants' costs and fees.

8 Finally, even if the Court could award costs and fees, Defendants still cannot
9 receive anything because, again, the Court can only award "attorneys' fees or costs for
10 work which is not useful in continuing litigation between the parties." *Koch v. Hankins*,
11 8 F.3d 650, 652 (9th Cir. 1993).

12 Here, Defendants allege, in wholly conclusory terms, that they "incurred more
13 than \$20,000 in attorneys' fees and costs defending against Mrs. Ivchenko's claims,"
14

15
16 ⁴ Defendants' reliance on *Davis v. USX Corp.*, 819 F.2d 1270, 1276 (4th Cir. 1987) and
17 *McCants v. Ford Motor Co.*, 781 F.2d 855, 860 (11th Cir. 1986) is also misplaced. In
18 fact, Defendants completely misrepresent the holding in *Davis*. The *Davis* Court never
19 held, as Defendants suggest, that payment of defendant's fees and costs "should be
20 imposed as a matter of course in most cases." [Response at 12]. Rather, the Court simply
21 stated that "taxable costs" should normally be imposed, and that "[t]he requirement that
22 the plaintiff pay a portion of [the defendant's] attorneys' fees is another matter." 819
23 F.2d 1276.

24 Moreover, if anything, *McCants* actually supports Plaintiffs' position that Mrs.
25 Ivchenko's claims should be dismissed without prejudice and without awarding any
26 costs or fees. In that case, the district court granted the plaintiff's motion to dismiss
27 without prejudice and refused to award any costs or fees even though "discovery had
28 proceeded," "interrogatories had been served, objected to, and answered," "[d]epositions
had been taken," and "[Defendant] had obviously incurred considerable litigation
expense." *McCants*, 781 F.2d at 860. Here, in contrast, we are still in the very early
stages of litigation. No interrogatories have been objected to or answered, not one
deposition has been taken, and all of the expenses incurred by Defendants (to the extent
it can be determined) will be useful going forward.

1 and that these expenses include “seeking discovery both from Mrs. Ivchenko and from
2 third party witnesses and otherwise preparing for trial.” [Response at 12]. However,
3 rather than describe the “discovery” they sought or the expenses they incurred
4 “preparing for trial,” and whether or how this work is separate from or cannot be used to
5 defend against the Doe Plaintiffs, Defendants allege conclusively that “virtually all of
6 this time and effort related solely to the claims brought by Mrs. Ivchenko, not the claims
7 of the anonymous Doe Plaintiffs.” [Response at 12]. Defendants utter lack of detail is
8 more than enough to deny their request for costs and fees. *See Internmatch, Inc.*, 2016
9 WL 540812, at *3 (refusing to award costs and fees because party seeking fee award
10 never “described the separate work undertaken in defending against [the opposing
11 party’s] counterclaims that would justify an award of fees and costs”).
12

13 Neither Defense Counsel’s affidavit nor his billing invoices change this
14 conclusion. For instance, in his affidavit, Defense Counsel states conclusively that,
15 except for fees incurred in Case 1 and responding to the Doe Plaintiffs’ Motion to
16 Proceeding Under Pseudonym, “all other time and costs incurred in this matter [(totaling
17 \$21,860)] relates directly to the defense of the claims pursued by Renee and Andrew
18 Ivchenko in Case #2.” [Gingras Dec. at ¶ 15]⁵ Not only does Defense Counsel, once
19 again, never explain why this other work cannot be used to defend against the Doe
20 Plaintiffs, but he completely misstates the standard for awarding costs and fees. The
21 question is not whether the work relates to the claims pursued by Mrs. Ivchenko, rather
22 Defendants must establish the work will not be useful going forward. Defendants have
23 not made this showing, and thus, cannot receive any costs or fees. At any rate, it is more
24

25 ⁵ Even if this were the correct standard for awarding fees and costs (it is not),
26 Defendants request thousands of dollars in fees for work that does not relate to Mrs.
27 Ivchenko. For instance, Defendants request \$2,500 for fees incurred drafting a Motion to
28 Dismiss the State Court Action. [Gingras Dec. at ¶ 16].

1 than apparent that all of the work relating to Mrs. Ivchenko's claims will be useful
2 against the Doe Plaintiffs. [See **Exhibit A** at Exhibit 3].

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 requests that the Court
6 (1) Dismiss this action without prejudice and without awarding Defendants any
7 attorneys' fees or costs, and (2) stay all proceedings until such time as the Court has
8 ruled on the Motion to Dismiss.
9

10
11 **DATED** this 5th day of June, 2020.

12 Respectfully submitted,

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

14
15 By: s/ David N. Ferrucci

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document on June 5, 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:

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4839-5289-3887 v1 [89794-1]