

- In this action, Plaintiffs first moved for a dismissal without prejudice on November 30, 2012. (Dkt. No. 14.) Defendant filed an opposition. (Dkt. No. 16.) On January 17, 2013, Plaintiffs withdrew their November 30, 2012 motion without explanation. (Dkt. No. 24.) On May 2, 2013, Plaintiffs refilled substantively the same motion for dismissal without prejudice (Dkt. No. 65) that is now before the Court.
- Also pending before this Court is the *qui tam* action styled *Joshua Harman, on behalf of the United States of America v. Trinity Industries, Inc.*, Cause No. 2:12-cv-89, filed on March 6, 2012.

II. Applicable Legal Standard

Voluntary dismissal under Rule 41(a)(2) is a matter within the discretion of the district court. *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 604 (5th Cir. 1976). “The primary purpose of Rule 41(a)(2) is to prevent voluntary dismissals which unfairly affect the other side, and to permit the imposition of curative conditions.” *Elbaor v. Tripath Imaging, Inc.*, 279 F.3d 314, 317 (5th Cir. 2002) (quotations and citations omitted). In this Circuit, “motions for voluntary dismissal should be freely granted unless the non-moving party will suffer some plain legal prejudice other than the mere prospect of a second lawsuit.” *Id.* (citations omitted). If the district court concludes that granting the motion unconditionally will cause plain legal prejudice, it can deny the motion or craft conditions that will cure the prejudice. *Id.* In addition, the Fifth Circuit has held that Rule 41(a)(2) permits the district court the discretion to “convert” a motion for Rule 41(a)(2) dismissal without prejudice and grant the dismissal on the condition that it be with prejudice. *Id.* at 320.

III. Analysis

The Court first considers whether Defendant will suffer plain legal prejudice if dismissal without prejudice is granted.

The stage at which the motion to dismiss is made is important in assessing prejudice. *Hartford Acc. & Indem. Co. v. Costa Lines Cargo Servs., Inc.*, 903 F.2d 352, 360 (5th Cir. 1990). “Where the plaintiff does not seek dismissal until a late stage and the defendants have exerted

significant time and effort, the district court may, in its discretion, refuse to grant a voluntary dismissal.” *Id.* (citations omitted.) This case has been pending for almost a year and a half since the complaint was filed on January 30, 2012. The parties have engaged in various motion practice, are in the midst of the discovery process, and jury selection is scheduled for September 3, 2013. Although Plaintiffs contend that there has been no extensive discovery or depositions, the Court finds that this case is at a sufficiently late stage that Defendant is likely to suffer some cognizable prejudice that could have been prevented if this Motion was before the Court earlier in time.¹

Plaintiffs also contend that plain legal prejudice must be something more than the “mere prospect of a second lawsuit.” *Elbaor*, 279 F.3d at 320. However, the litigation history recounted above reveals Plaintiffs have undertaken a pattern of seeking dismissals on an *ad hoc*, if not a rolling, basis. First, Plaintiffs filed a defamation action in the Northern District of Georgia and dismissed it two months later. Then, Plaintiffs filed a Rule 41 motion to dismiss in this case which was then ten months into litigation. Defendant opposed, and Plaintiffs withdrew that motion with no explanation after briefing was already complete. Plaintiffs amended their complaint on April 24, 2013. Now, Plaintiffs seek to dismiss without prejudice a third time on the same cause of action. Defendant has already had to defend against a Rule 41(a)(2) motion once in this case. Consequently, the Court finds that Defendant will suffer plain legal prejudice if Plaintiffs’ motion is granted.

Having established that plain legal prejudice will be suffered by Defendant to some degree, the Court considers what constitutes a fair and appropriate remedy. Defendant has asked for dismissal with prejudice, its attorney’s fees and an award of costs associated with defense of this

¹ Plaintiffs moved to dismiss this action without prejudice on November 30, 2012. Defendant opposed and Plaintiffs subsequently withdrew their motion without explanation on January 17, 2013. Plaintiffs then refilled this motion on May 2, 2013.

case, as well as the preservation of certain discovery for use in the *qui tam* action. The Court has considered each of Defendant's requests and finds that while the Defendant has suffered some degree of prejudice, it does not rise to the level that would require a dismissal with prejudice. The prejudicial effect here is the risk that the same suit will be refilled and will impose duplicative expenses upon the Defendant.

Accordingly, the Court finds that to cure such prejudicial effect the Plaintiffs should reimburse Defendant the litigation costs and reasonable attorney's fees incurred in defending this suit. The Court does not find Defendant's request to preserve discovery (from this action and the Eastern District of Virginia litigation) to be an appropriate remedy here or necessary to address the prejudice described above.

Defendant also asks the Court to vacate its order sealing the Presentation. (Dkt. Nos. 11 and 42.) The Presentation is designated "Confidential – Attorneys Eyes Only" pursuant to the Protective Order entered by this Court. The Court finds that the provisions regarding termination of this litigation in the Protective Order shall control, unless otherwise agreed to by the parties. Such other agreement being absent, the Court orders that the provisions of the present Protective Order (Dkt. No. 21) shall control as to the Presentation and its confidential status.

IV. Conclusion

Based on the foregoing, the Court hereby **GRANTS** Plaintiffs' Motion for Voluntary Dismissal Without Prejudice (Dkt. No. 65). However, as a part thereof, the Court also **ORDERS** Plaintiffs to reimburse Defendant for his litigation costs and reasonable attorney's fees incurred in defending this suit. Defendant is **ORDERED** to provide Plaintiffs with a sworn and itemized record of such costs and fees within fourteen (14) days and Plaintiffs shall reimburse such sums to

Defendant within fourteen (14) days of having received such record. All other relief is **DENIED**.

So ORDERED and SIGNED this 11th day of June, 2013.



RODNEY GILSTRAP
UNITED STATES DISTRICT JUDGE