

1 **WO**

NOT FOR PUBLICATION

2  
3  
4  
5  
6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
89 Frank A. Perrino, *et al.*,

10 Plaintiffs,

11 v.

12 Atrium Medical Corporation,

13 Defendant.  
14

No. CV-16-00512-PHX-JJT

**ORDER**

15 At issue is Defendant Atrium Medical Corporation's Motion to Dismiss (Doc. 6),  
16 to which Plaintiffs Frank A. and Yeseria Perrino filed a Response (Doc. 9) and Defendant  
17 filed a Reply (Doc. 16). Defendant asks the Court to dismiss this action because, in a  
18 prior action in this District, Case No. CV-15-00520-PHX-SPL, U.S. District Judge Logan  
19 dismissed Plaintiffs' claims with prejudice and, in any event, Plaintiffs' claims are time  
20 barred. (Doc. 6.)

21 In the prior action, Plaintiffs and Defendant jointly filed a Certificate of Conferral  
22 stating that Defendant agreed not to file a Motion to Dismiss and Plaintiffs agreed to file  
23 an Amended Complaint to address the agreed-upon defects in their Complaint by a date  
24 to be set forth by the Court. (Case No. CV-15-00520-PHX-SPL, Doc. 18.) Judge Logan  
25 ordered Plaintiffs to file the Amended Complaint by August 4, 2015, or "show cause in  
26 writing why this action should not be dismissed for failure to prosecute within such  
27 time." (Case No. CV-15-00520-PHX-SPL, Doc. 19.) When Plaintiffs filed nothing by the  
28 deadline, Judge Logan found they failed to demonstrate why the case should not be

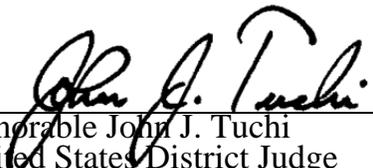
1 dismissed for failure to prosecute and ordered “that this action is dismissed.” (Case No.  
2 CV-15-00520-PHX-SPL, Doc. 23.)

3 By the plain language of the filings in the prior action, Judge Logan’s dismissal  
4 was not based on a voluntary dismissal of the action by Plaintiffs under Federal Rule of  
5 Civil Procedure 41(a), as they now urge. Instead, Plaintiffs were under an Order of the  
6 Court to either file an Amended Complaint, as they had agreed, or show cause by a  
7 specific date why the action should not be dismissed for failure to prosecute. Judge  
8 Logan’s ultimate dismissal—entered six months before Plaintiffs brought the present  
9 action—was under Federal Rule of Civil Procedure 41(b), which contemplates instances  
10 when a plaintiff “fails to prosecute or to comply with these rules or a court order.” The  
11 Rule continues, “[u]nless the dismissal order states otherwise, a dismissal under this  
12 subdivision (b) and any dismissal not under this rule . . . operates as an adjudication on  
13 the merits.” Fed. R. Civ. P. 41(b). Because Judge Logan’s dismissal Order did not state  
14 that the dismissal was without prejudice, it was an adjudication on the merits, and  
15 Plaintiffs may not now bring the same action again.

16 IT IS THEREFORE ORDERED granting Defendant Atrium Medical  
17 Corporation’s Motion to Dismiss (Doc. 6).

18 IT IS FURTHER ORDERED directing the Clerk of Court to terminate this action.

19 Dated this 7<sup>th</sup> day of June, 2016.

20  
21   
22 \_\_\_\_\_  
23 Honorable John J. Tuchi  
24 United States District Judge  
25  
26  
27  
28