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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
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11 CERTIFIED NUTRACEUTICALS,  
12 INC. a California corporation,  
13 Plaintiff,

14 v.

15 THE CLOROX COMPANY, a  
16 Delaware Corporation; NEOCELL  
17 CORPORATION, a California  
18 Corporation; NEOCELL HOLDING  
19 COMPANY, a Delaware Limited  
20 Liability Company; NUTRANEXT, a  
21 Delaware Corporation; AVICENNA  
22 NUTRACEUTICAL,  
23 LLC, a Georgia Limited Liability  
24 Company; and DOES 1 through 10,  
25 inclusive,

26 Defendants.

Case No.: 18-cv-00744 W (KSC)

**ORDER:**

**DENYING DEFENDANT SARAH  
QUADRI AND FATMA  
BOUKHARI'S MOTION FOR  
ATTORNEY'S FEES [DOC. 56]**

24 Pending before the Court is Defendant Sarah Quadri and Fatma Boukarhi's  
25 (collectively, "Individual Defendants") motion for attorney's fees. [Doc. 56.] The Court  
26 decides the matter without oral argument pursuant to Civil Local Rule 7.1(d)(1). For the  
27 reasons that follow, the Court **DENIES** Defendants' motion for attorney's fees.

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1 **I. BACKGROUND**

2 This case was initially filed by the Plaintiff, Certified Nutraceuticals, against  
3 Defendants, The Clorox Company, Neocell Corporation, Neocell Holding Company,  
4 Nutranext, Sarah Quadri, Fatma Boukhari, Avicenna Nutraceutical LLC, and Does 1  
5 through 10. The original complaint alleged false advertising in violation of the Lanham  
6 Act, false designation of origin in violation of the Lanham Act, unfair competition, and  
7 false advertising.

8 The Plaintiff filed a Second Amended Complaint (“SAC”) which alleged that  
9 Defendants, The Clorox Company, Neocell Holding Company, and Nutranext, are  
10 retailers that sell dietary supplements using raw materials provided by the Plaintiff’s  
11 competitor, Defendant Avicenna Nutraceutical, LLC (“Avicenna”). The SAC alleged  
12 that Defendants “have been falsely passing off inferior products as Chicken Sternum  
13 Collagen Type II[,]” which is contained in the Plaintiff’s product. (SAC [Doc 21] ¶¶ 16,  
14 20, 23.) Additionally, the SAC alleged Avicenna sold its raw materials at a lower market  
15 rate giving them an unfair competitive advantage and that Avicenna knew or should have  
16 known their practices were deceptive. (SAC ¶ 23.) The SAC alleged the Individual  
17 Defendants are the principals of Defendants Neocell Holding Company, Nutranext, and  
18 The Clorox Company. (SAC ¶¶ 20, 21.)

19 On May 6, 2019, the Individual Defendants filed a motion to dismiss for failure to  
20 state a claim. [Doc. 42.] The Court found that the SAC did not claim misrepresentation  
21 by the Individual Defendants; nor did the SAC allege with particularity any facts that  
22 could give rise to individual liability on behalf of the Individual Defendants. (*Order*  
23 *Granting Defs.’ Mot. Dismiss* [Doc. 49] 5:2-4.) The Plaintiff was warned of these  
24 deficiencies when the Individual Defendants served the Plaintiff with a draft Rule 11  
25 motion that demanded dismissal from the case. (*Defs.’ Mot. Attorney Fees* [Doc. 56]  
26 6:22-26.) The Plaintiff nevertheless continued with its claims, filing an opposition to the  
27 motion to dismiss. (*Id.* at 7:1.) The Court granted the Individual Defendants’ motion to  
28 dismiss with leave to amend on June 10, 2019. (*Order Granting Defs.’ Mot. Dismiss.*)

1 The Plaintiff filed a Third Amended Complaint in compliance with the June 10, 2019  
2 order and did not name the Individual Defendants. (*TAC* [Doc 50].) Approximately  
3 three months later, the Individual Defendants filed this motion for attorney’s fees in the  
4 amount of \$73,805.20 pursuant to the Lanham Act (15 U.S.C. § 117(a)).  
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## 6 **II. LEGAL STANDARD**

7 Section 35(a) of the Lanham Act provides that “[t]he court in exceptional cases  
8 may award reasonable attorney fees to the prevailing party.” 15 U.S.C. § 1117(a). “A  
9 ‘prevailing party’ is one who has been awarded some relief by the court.” Buckhannon  
10 Bd. & Care Home, Inc. v. W. Va. Dept. of Health & Human Res., 532 U.S. 598, 603  
11 (2001). Prevailing party status rests on a judicial sanction that materially alters the  
12 parties’ legal relationship. Klamath Siskiyou Wildlands Ctr v. U.S. Bureau of Land  
13 Mgmt., 589 F.3d 1027, 1031 (9th Cir. 2009). Judgments on the merits and court-ordered  
14 decrees create a material alteration of the parties legal relationship and permit an award.  
15 Buckhannon, 532 U.S. at 598. Yet, a defendant’s voluntary change in conduct, although  
16 accomplishing what the plaintiff sought to achieve, “lacks the necessary judicial  
17 *imprimatur* on the change.” Id. at 598–98.

18 Not only does the party requesting fees need to be the prevailing party, but the  
19 court must also determine the case is an exceptional one to grant the award. See §  
20 1117(a). To determine if a case is exceptional, the Supreme Court has held that a district  
21 court should look to the totality of the circumstances to determine if the infringement was  
22 exceptional. Octane Fitness, LLC v. ICON Health & Fitness, Inc., 572 U.S. 545, 554  
23 (2014). “[A]n ‘exceptional’ case stands out from others with respect to the substantive  
24 strength of a party’s litigating position . . . or the unreasonable way in which the case was  
25 litigated.” Id. Specifically, the court looks to a “‘nonexclusive’ list of ‘factors’ including  
26 ‘frivolousness, motivation, objective unreasonableness (both in the factual and legal  
27 components of the case) and the need in particular circumstances to advance  
28 considerations of compensation and deterrence.’” SunEarth, Inc. v. Sun Earth Solar

1 Power Co., 839 F.3d 1179, 1181 (9th Cir. 2016) (citing Octane Fitness, 572 U.S. at 558  
2 n.6).

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4 **III. DISCUSSION**

5 The issue here is whether the Individual Defendants are the prevailing party as a  
6 result of the order granting the motion to dismiss. The Plaintiff argues the Individual  
7 Defendants are not the prevailing party because the order granted the dismissal with leave  
8 to amend. (See *Pl.s' Opp'n* [Doc. 58].) The Individual Defendants counter, arguing they  
9 are the prevailing party because the Plaintiff is precluded from refileing its claim against  
10 them. (See *Defs.' Reply* [Doc. 60] 4:1-2.)

11 A dismissal without prejudice does not materially alter the legal relationship of the  
12 parties. U.S. v. Milner, 583 F.3d 1174, 1196–97 (9th Cir. 2009). This is because the  
13 defendant remains subject to the risk of refileing. Id. However, a defendant is the  
14 prevailing party if the plaintiff is precluded from refileing the claim against the defendant.  
15 Cadkin v. Loose, 569 F.3d 1142, 1149 (9th Cir. 2009).

16 Here, the Court granted the Individual Defendants' motion to dismiss with leave to  
17 amend. This gave the Plaintiff the opportunity to refile its claim against the Individual  
18 Defendants. Even though the Plaintiff did not include the Individual Defendants in its  
19 Third Amended Complaint, the fact that the Plaintiff chose not to does not mean they  
20 cannot add the Individual Defendants at a later date. See Buckhannon, 532 U.S. at 605  
21 (explaining voluntary conduct lacks judicial *imprimatur* and does not constitute a judicial  
22 sanction.) Although the order granting the motion to dismiss conditioned the amended  
23 pleading to be filed on or before June 24, 2019, the Plaintiff still has an opportunity to  
24 ask the Court's permission to refile against the Individual Defendants in a Fourth  
25 Amended Complaint. Because the Plaintiff can ask the Court's permission to file a  
26 Fourth Amended Complaint, the Plaintiff is not yet precluded from refileing the claim  
27 against the Individual Defendants. Thus, the Individual Defendants are not the prevailing  
28 party.

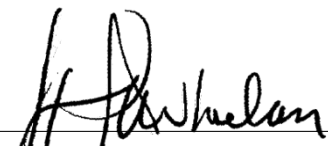
1           Because we have concluded the Individual Defendants are not the prevailing party,  
2 we need not discuss whether this case is an exceptional one pursuant to the Lanham Act.

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4 **IV. CONCLUSION & ORDER**

5           For the foregoing reasons, the Court **DENIES** the Individual Defendants' motion  
6 for attorney's fees [Doc. 56].

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8           **IT IS SO ORDERED.**

9 Dated: February 19, 2020

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12 Hon. Thomas J. Whelan  
United States District Judge