UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

STOP RECKLESS ECONOMIC INSTABILITY CAUSED BY DEMOCRATS, *et al.*,	)	
Plaintiffs,	)	Civ. No. 1:14-397 (AJT-IDD)
v.	)	RESPONSE IN PARTIAL OPPOSITION TO VOLUNTARY DISMISSAL AND TO AMENDING THE COMPLAINT
FEDERAL ELECTION COMMISSION,	)	
Defendant.	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S COMBINED RESPONSE IN PARTIAL OPPOSITION TO PLAINTIFFS' MOTION FOR VOLUNTARY DISMISSAL AND MOTION TO AMEND OR SUPPLEMENT THE COMPLAINT

Lisa J. Stevenson*
Deputy General Counsel – Law

Kevin Deeley*
Acting Associate General Counsel

Harry J. Summers*
Assistant General Counsel

Holly J. Baker*
Esther D. Gyory (VA Bar # 76826)
Kevin P. Hancock*
Attorneys

COUNSEL FOR DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street NW
Washington, DC 20463
(202) 694-1650

July 17, 2014

* *Admitted Pro Hac Vice*

TABLE OF CONTENTS

I. BACKGROUND 2

A. The Parties and Claims 2

B. Procedural History 4

II. THE INNIS PLAINTIFFFS SHOULD NOT BE VOLUNTARILY DISMISSED UNDER RULE 41(a)(2) UNTIL THEY HAVE RESPONDED TO FEC DISCOVERY REQUESTS 5

A. Rule 41(a)(2) Cannot Be Used to Evade an Adverse Discovery Ruling 5

B. The Circumstances of Plaintiffs' Rule 41(a)(2) Motion Indicate That They Seek to Evade This Court's Ruling Allowing the FEC to Take Discovery 6

1. Before the June 18 Discovery Ruling, the Innis Plaintiffs Stated That They Would Remain Parties to the Case Even if Innis Lost the June 10 Primary 7

2. The Innis Plaintiffs Could Have Noticed Their Own Dismissal for Six Days After the June 10 Election and Yet Did Not Move for Dismissal Until After the June 18 Adverse Discovery Ruling 7

3. In the Related *Tea Party Fund I* Litigation, the Tea Party Fund and Its Candidate Coplaintiffs Similarly Sought Dismissal After Suffering an Adverse Discovery Ruling, and This Pattern Justifies a Dismissal With Prejudice 9

C. The FEC Would Be Unfairly Prejudiced if the Innis Plaintiffs Were Unconditionally Dismissed at This Time Because They Likely Possess Unique Facts Important to the FEC's Continuing Defense of This Case 10

III. PLAINTIFFS' RULE 15 MOTION TO AMEND THE COMPLAINT SHOULD BE DENIED TO THE EXTENT IT SEEKS TO REMOVE THE INNIS PLAINTIFFS AS PARTIES PRIOR TO THE CLOSE OF DISCOVERY 15

A. Plaintiffs Cannot Circumvent Rule 41(a)(2)'s Requirement for a Court Order for Voluntary Dismissal by Amending the Complaint Under Rule 15(a)(1)(B) 15

B. The Commission Does Not Otherwise Oppose Plaintiffs' Proposed Amendments 17

IV. CONCLUSION 18

Defendant Federal Election Commission ("FEC" or "Commission") requests that the voluntary dismissal two plaintiffs seek under Federal Rule of Civil Procedure 41(a)(2) not take effect until those plaintiffs comply with their discovery obligations in this case. Niger Innis and Niger Innis for Congress ("Innis plaintiffs") claim that they request dismissal because Innis lost the June 10 congressional primary election. But the timing and circumstances surrounding their motion suggest that those plaintiffs seek dismissal for the improper purpose of evading this Court's June 18 ruling requiring them to provide discovery. The Innis plaintiffs claimed before the primary that they would stay in the case if Innis lost. And after the election, the Innis plaintiffs did nothing during the six days they could have dismissed as of right under Rule 41(a)(1)(A)(i). Yet they sought dismissal soon after the adverse June 18 discovery ruling.

If the Innis plaintiffs were unconditionally dismissed from this case at this time it would prejudice the FEC. The Innis plaintiffs likely have unique information that will remain important to the FEC's ongoing defense of the merits of this case even if they are dismissed. This Court granted the FEC's Rule 56(d) motion in part so it could seek this evidence. The FEC has served discovery requests on the Innis plaintiffs and intends to depose them. Dismissal of the Innis plaintiffs therefore should not take effect until those plaintiffs respond fully to pending discovery requests and have their depositions taken, and the special protections for nonparties should be deemed inapplicable to them for any future Rule 45 requests. In addition, dismissal should be with prejudice so as to prevent the Innis plaintiffs from re-filing their claims elsewhere in hopes of obtaining a more favorable discovery ruling, given the apparent pattern of some involved in plaintiffs' lawsuit of seeking dismissal to evade discovery.

Plaintiffs have also filed a motion under Rule 15(a) to amend their complaint. This Court should deny that motion to the extent plaintiffs are attempting to circumvent the Court's power

under Rule 41(a)(2) to set conditions for the Innis plaintiffs' dismissal by simply removing the Innis plaintiffs' claims from the complaint under Rule 15(a)(1)(B).

I. BACKGROUND

A. The Parties and Claims

The FEC is the independent agency of the United States government with statutory authority over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act ("FECA"), 2 U.S.C. §§ 431-57. *See* 2 U.S.C. §§ 437c(b)(1), 437d(a)(7)-(8), 437g, 438(a)(8). Congress enacted FECA primarily "to limit the actuality and appearance of corruption resulting from large individual financial contributions." *Buckley v. Valeo*, 424 U.S. 1, 26 (1976) (*per curiam*). To that end, FECA, *inter alia*, places dollar limitations on contributions to candidates for federal office and to political committees. *See* 2 U.S.C. § 441a(a).

Plaintiffs are four political committees and Niger Innis, a former candidate for federal office. Their complaint's three claims challenge the constitutionality of parts of FECA. (Compl. ¶¶ 39-59 (Docket No. 1).)

In support of Claims 1 and 2, plaintiff Stop Reckless Economic Instability caused by Democrats PAC ("Stop PAC") alleges that it contributed $2,600 to Innis for the June 10, 2014 primary for the Republican nomination for Congress from Nevada's fourth congressional district. (Compl. ¶¶ 22-23 (Docket No. 1).) Stop PAC wished to contribute an additional $2,400 (for a total of $5,000) to Innis for that election. (*Id.* ¶¶ 23-24.) FECA, however, limits contributions from political committees like Stop PAC to federal candidates to $2,600 per election. 2 U.S.C. § 441a(a)(1)(A). Stop PAC will be able to contribute $5,000 per election to any federal candidate when it becomes a "multicandidate" political committee (commonly known as a "PAC") under FECA in less than two months, on September 11, 2014. *See id.* § 441a(a)(2)(A). On that date,

Stop PAC will have met all three of FECA's requirements for a PAC to become a multicandidate PAC: a PAC must (1) receive contributions from more than 50 persons; (2) contribute to at least five federal candidates; and (3) have been registered with the FEC for at least six months. 2 U.S.C. § 441a(a)(4).

The Supreme Court has upheld the constitutionality of these requirements, explaining that they "serve the permissible purpose of preventing individuals from evading the applicable contribution limitations by labeling themselves committees," while "enhance[ing] the opportunity of bona fide groups to participate in the election process." *Buckley*, 424 U.S. at 35-36. But in Claims 1 and 2 of the complaint, Stop PAC and the Innis plaintiffs assert that the six-month registration period of section 441a(a)(4) violates the First Amendment (Compl. ¶¶ 47-51) and that the lower $2,600 contribution limit of section 441a(a)(1)(A) violates the equal protection guarantee of the Fifth Amendment (Compl. ¶¶ 39-46).

In support of Claim 3, plaintiff Tea Party Leadership Fund ("Tea Party Fund"), a multicandidate PAC, alleges that it has contributed $5,000 to plaintiff Alexandria Republican City Committee ("Alexandria Committee"), a local political party committee. (Compl. ¶ 34.) The Tea Party Fund wishes to contribute an additional $5,000 (for a total of $10,000) to the Alexandria Committee in 2014. (*Id.* ¶ 35.) FECA, however, limits contributions from multicandidate PACs like the Tea Party Fund to state and local political party committees to $5,000 per calendar year. 2 U.S.C. § 441a(a)(2)(C). The Tea Party Fund also alleges that it wishes to contribute a total of $32,400 in 2014 to the National Republican Senatorial Committee ("NRSC"), a national political party committee. (Compl. ¶ 35.) But FECA limits such contributions to $15,000 per calendar year. 2 U.S.C. § 441a(a)(2)(B). Claim 3 asserts that these contribution limits, *id.* § 441a(a)(2)(B)-(C), violate the Fifth Amendment because individuals

and PACs that have yet to achieve multicandidate PAC status may give the increased amounts that the Tea Party Fund wishes to contribute. (Compl. ¶¶ 52-59.)

B. Procedural History

Twenty-two days after filing their complaint, plaintiffs moved for summary judgment. (Docket No. 6.) On May 23, 2014, the FEC opposed that motion by seeking time to take discovery under Rule 56(d). (Docket No. 27.) On June 16, the FEC answered the complaint. (Docket No. 31.) Two days later, on June 18, this Court agreed with the FEC that plaintiffs' motion was "premature," and thus granted the FEC's Rule 56(d) motion while denying plaintiffs' motion for summary judgment without prejudice. (Docket No. 33.) The Court explained that "an adequate factual record is necessary for proper consideration of plaintiff's constitutional claims" and that the FEC "is entitled to a reasonable opportunity to obtain discovery for that purpose." (*Id.*) The Court also issued a separate order scheduling pre-trial conferences and stating that discovery must be complete by September 12, 2014. (Docket No. 32.)

On June 27, the parties held a Rule 26(f) conference, and on July 2, they filed a joint proposed discovery plan. (Docket No. 34.) A day later, on July 3, plaintiffs moved to voluntarily dismiss the Innis plaintiffs under Rule 41(a)(2). (Docket No. 35.) Then on July 7, plaintiffs moved to amend and supplement the complaint under Rule 15. (Docket No. 36.) The parties appeared for an initial pretrial conference on July 9 and filed an amended joint discovery plan on July 11. (Docket Nos. 38-39.) On July 16, the Court issued a Rule 16(b) Scheduling Order. (Docket No. 40.) On that same day, the FEC served its first round of written discovery requests upon plaintiffs. Any objections by plaintiffs to those requests are due within 15 days of service, and plaintiffs' responses to those requests are due within 30 days of service. (*See* First

Sets of Discovery Requests to Plaintiffs Niger Innis and Niger Innis for Congress, dated July 16, 2014, FEC Exh. 1.)

II. THE INNIS PLAINTIFFS SHOULD NOT BE VOLUNTARILY DISMISSED UNDER RULE 41(a)(2) UNTIL THEY HAVE RESPONDED TO FEC DISCOVERY REQUESTS

A. Rule 41(a)(2) Cannot Be Used to Evade an Adverse Discovery Ruling

A plaintiff may unilaterally notice his or her dismissal from a lawsuit "before the opposing party serves either an answer or a motion for summary judgment." Fed. R. Civ. P. 41(a)(1)(i). After that point, however, a court must order a dismissal under Rule 41(a)(2) "on terms that the court considers proper." When considering whether to deny or impose conditions on dismissal, a court "must focus primarily on protecting the interests of the defendant" and whether the defendant "will be unfairly prejudiced." *Davis v. USX Corp.*, 819 F.2d 1270, 1273 (4th Cir. 1987).[1]

A plaintiff may not use voluntary dismissal to evade the effect of an adverse court ruling. *See Francis v. Ingles*, 1 Fed. App'x. 152, 154 (4th Cir. 2001) (*per curiam*) (affirming denial of Rule 41(a)(2) motion where plaintiff's "motivation for the motion appeared to be to circumvent the court's [evidentiary] decision"); *Skinner v. First Am. Bank of Va.*, 64 F.3d 659, No. 93-2493, 1995 WL 507264, at *2-3 (4th Cir. 1995) (*per curiam*) (holding that voluntary dismissal and complaint amendment are not required where it would "permit [plaintiffs] to dismiss their federal claim and thereby avoid an adverse ruling in federal court"); *RMD Concessions, LLC v. Westfield Corp., Inc.*, 194 F.R.D. 241, 243 (E.D. Va. 2000) ("[P]laintiffs may not use Rule

---

[1] Factors that are relevant to this analysis include: "the opposing party's effort and expense in preparing for trial, excessive delay and lack of diligence on the part of the movant, and insufficient explanation of the need for a voluntary dismissal, as well as the present stage of litigation." *Howard v. Inova Health Care Servs.*, 302 F. App'x 166, 178-79 (4th Cir. 2008) (internal quotation marks omitted).

41(a)(2) to avoid or undo the effect of an unfavorable order or ruling."); *Teck Gen. P'ship v. Crown Cent. Petroleum Corp.*, 28 F. Supp. 2d 989, 992 (E.D. Va. 1998) ("[I]t is settled that a plaintiff may not obtain a non-prejudicial voluntary dismissal simply to circumvent adverse rulings.").

As a result, courts have imposed conditions on voluntary dismissal to prevent evasion of adverse discovery rulings, particularly where the plaintiff's continued compliance with its discovery obligations was important to the defendant's continued defense of the action. *See, e.g.*, *Alliance For Global Justice v. D.C.*, Civ. No. 01-0811, 2005 WL 469593, at *3 (D.D.C. Feb. 7, 2005) (recommending dismissal upon condition that plaintiffs respond to discovery; stating that "[i]t is simply unfair to allow plaintiffs to walk away from these [discovery] obligations when it appears that they have information pertinent to the case that they initiated and that defendants must continue to defend," particularly where "plaintiffs admittedly sought voluntary dismissal to avoid complying with discovery"); *see also In re Wellbutrin XL*, 268 F.R.D. 539, 544 (E.D. Pa. 2010) ("The Court considers it proper to condition RDC's voluntary dismissal upon its production of the Court-ordered discovery described in the March 11 Order," which "go[es] to the heart of the defendants' anticipated defense"); *In re Vitamins Antitrust Litig.*, 198 F.R.D. 296, 304 (D.D.C. 2000) (conditioning dismissal on plaintiffs responding to discovery where "it seems fairly obvious that these plaintiffs wish to dismiss their actions merely to avoid having to give defendants the discovery authorized by the Special Master's Report").

B. The Circumstances of Plaintiffs' Rule 41(a)(2) Motion Indicate That They Seek to Evade This Court's Ruling Allowing the FEC to Take Discovery

The Innis plaintiffs claim that they seek dismissal because Niger Innis is no longer a federal candidate after losing the June 10, 2014 primary election. (Mem. in Supp. of Pls.' Mot. to Dismiss Pls. Niger Innis and Niger Innis for Congress Pursuant to Rule 41(a)(2) ("Pls.' Rule

41 Br.") at 1, 7 (Docket No. 35-1).) But, for three reasons, the circumstances surrounding their motion indicate that they seek to evade this Court's June 18 ruling allowing the FEC to take merits discovery from them.

1. Before the June 18 Discovery Ruling, the Innis Plaintiffs Stated That They Would Remain Parties to the Case Even if Innis Lost the June 10 Primary

In support of its Rule 56(d) motion to allow discovery, the FEC pointed out that the Innis plaintiffs' claims might become moot if Innis lost the June 10 primary and had no intention to run for office again. (Decl. of Counsel in Supp. of FEC's Mot. to Allow Time for Disc. Under Rule 56(d) ("Hancock Decl.") ¶ 8(b) (Docket No. 27-2).) Plaintiffs responded on May 27 that "discovery into Innis' future electoral plans [would be] unnecessary," because if he lost the June 10 primary, "Plaintiffs intend to argue that" the Innis plaintiffs' claims are capable of repetition yet evading review as a matter of law regardless of Innis's future intentions. (Pls.' Rebuttal Br. in Supp. of Mot. for Summ. J. and Against Def.'s Rule 56(d) Mot. at 12-13 n.12 (Doc. No. 29).)

But now, after becoming subject to discovery under the Court's June 18 ruling, the Innis plaintiffs seek dismissal in part based on an asserted new-found belief that Innis's June 10 primary loss "potentially undermin[es] their standing." (Pls.' Rule 41 Br. at 1, 8 (Docket No. 35-1).) While plaintiffs are entitled to alter their litigation strategy, the fact that this change of heart has occurred only after this Court's adverse discovery ruling suggests that their motivation for dismissal is to avoid complying with that ruling.

2. The Innis Plaintiffs Could Have Noticed Their Own Dismissal for Six Days After the June 10 Election and Yet Did Not Move for Dismissal Until After the June 18 Adverse Discovery Ruling

After Innis lost the June 10 primary, the Innis plaintiffs had a six-day window during which they could have noticed their voluntary dismissal from this case as of right under Rule

41(a)(1)(A)(i). The Commission did not answer the Complaint until June 16 and it has not moved for summary judgment. But on June 18, this Court held that plaintiffs must answer discovery. (Docket No. 33.) Only then did the Innis plaintiffs seek voluntary dismissal, purportedly because Innis lost the June 10 election. Their failure to unilaterally dismiss their claims after Innis lost the election but before they were subject to discovery further undermines their asserted justification. *See Teck Gen. P'ship*, 28 F. Supp. 2d at 992-93 (denying dismissal where plaintiff failed to "promptly move[] for a non-prejudicial dismissal soon after" he first could have and only waited until after an adverse discovery ruling); *In re Vitamins Antitrust Litig.*, 198 F.R.D. at 304 (conditioning dismissal where "the timing of plaintiffs' Motion does appear suspect" since they waited until "after the Special Master had already ruled against them" on a discovery issue).

The Innis plaintiffs claim that they did not unduly delay seeking dismissal after the June 10 primary because "a portion of [Innis's] time since was spent investigating legal options for contesting the results" (Pls. Rule 41 Br. at 6-7 (Docket No. 35-1)), but available information suggests otherwise. The Innis campaign's own June 12 press release makes clear that Innis had *conceded the election* despite his call for an "audit" of the results, which he and his campaign manager admitted would not change the outcome. *See* Thomas Mitchell, *Candidate Innis calls on secretary of state to investigate unusual results in CD4 race*, 4TH ST8 (June 12, 2014) (quoting Innis press release: "'At this point in time, Crescent Hardy has won the Republican nomination to face [the Democratic opponent] in the November General Election, and we need to move forward.'")[2]; *see also Innis Wants Audit of Election Results*, CBS Las Vegas (June 13,

---

[2] *See* http://4thst8.wordpress.com/2014/06/12/candidate-innis-calls-on-secretary-of-state-to-investigate-unusual-results-in-cd4-race/. The Innis campaign posted this article quoting its

2014) ("[Innis] acknowledged that Hardy won the nomination and 'we need to move forward.'").[3] Indeed, Innis only questioned the vote tally of an opponent who also *lost* the election, not the election's winner, *id.*, whom Innis trailed by "about 10 percentage points," Laura Myers, *Hardy nabs win in 4th Congressional District's GOP primary*, Las Vegas Review-Journal (June 10, 2014).[4] Thus, there was ample time after Innis conceded the election for voluntary dismissal as of right, but he did not choose to seek such dismissal until after the Court's Rule 56(d) ruling.

3. In the Related *Tea Party Fund I* Litigation, the Tea Party Fund and Its Candidate Coplaintiffs Similarly Sought Dismissal After Suffering an Adverse Discovery Ruling, and This Pattern Justifies a Dismissal With Prejudice

Finally, this is not the first time plaintiff Tea Party Fund and its candidate coplaintiffs have sought a dismissal apparently to avoid an adverse discovery ruling. In 2012, the Tea Party Fund and two then-federal candidates, Sean Bielat and John Raese, asserted essentially the same claims that Stop PAC and the Innis plaintiffs do here against the FEC. *See Tea Party Leadership Fund, et al. v. FEC*, Civ. No. 12-1707 (D.D.C.) ("*Tea Party Fund I*"). In the prior case, the plaintiffs moved for summary judgment soon after the start of discovery and the FEC responded with a Rule 56(d) motion. *See Tea Party Fund I* (Docket No. 20). A magistrate judge subsequently ordered the plaintiffs, including Bielat and Raese, to respond to FEC discovery requests. *See* Mem. Order at 12, *Tea Party Fund I* (Docket No. 35). On the day the discovery

---

press release on its Facebook page on June 12. *See* https://www.facebook.com/pages/Niger-Innis/165079270285540 (last viewed July 16, 2014).

[3] *See* http://lasvegas.cbslocal.com/2014/06/13/innis-wants-audit-of-election-results/. Innis abandoned his audit effort on June 23. *See Innis Abandons Bid for Recount*, CBS Las Vegas (June 24, 2014), http://lasvegas.cbslocal.com/2014/06/24/innis-abandons-bid-for-recount/.

[4] *See* http://www.reviewjournal.com/politics/elections/hardy-nabs-win-4th-congressional-district-s-gop-primary.

was due, instead of responding, the plaintiffs moved to "withdraw" Bielat and Raese; Bielat sought dismissal explicitly because he thought the FEC's discovery requests were "burdensome" and "irrelevant," while Raese cited his desire to avoid "imposition on his time and resources." *See* Motions to Withdraw Sean Bielat and John Raese, *Tea Party Fund I* (Docket Nos. 39-40).[5] A little over a month later, all plaintiffs including the Tea Party Fund voluntarily dismissed their lawsuit with prejudice under Rule 41(a)(1)(A)(ii). (*Tea Party Fund I* (Docket No. 50).) Now, nearly the same sequence of events has occurred again in this forum. This pattern further suggests that the Innis plaintiffs' motivation for dismissal is to evade this Court's discovery ruling.

In addition, such an illegitimate motivation is a "decisive factor weighing against non-prejudicial dismissal." *Teck Gen. P'ship*, 28 F. Supp. 2d at 992. Thus, if this Court grants the Innis plaintiffs' Rule 41(a)(2) motion it should do so with prejudice to prevent the Innis plaintiffs from re-filing in hopes of obtaining a more favorable discovery ruling elsewhere.

C. The FEC Would Be Unfairly Prejudiced if the Innis Plaintiffs Were Unconditionally Dismissed at This Time Because They Likely Possess Unique Facts Important to the FEC's Continuing Defense of This Case

The FEC would be unfairly prejudiced if the Innis plaintiffs were unconditionally dismissed because they have information that will be important to the FEC's continuing defense against Stop PAC's claims. *See Alliance For Global Justice*, 2005 WL 469593, at *3 ("It is simply unfair to allow plaintiffs to walk away from these [discovery] obligations when it appears

---

[5] The Commission chose not to oppose Raese and Bielat's dismissal from the *Tea Party Fund I* case. (*See* Docket Nos. 48-49.) Their absence did not threaten to prejudice the Commission's ability to take merits discovery that was essential to its defense of that lawsuit, and the Commission had not yet been faced with a pattern of withdrawn claims following adverse discovery rulings. The same is not true in this case for the Innis plaintiffs' proposed dismissal. *See infra* Part II.C.

that they have information pertinent to the case that they initiated and that defendants must continue to defend.").

Plaintiffs allege that the FECA provisions they challenge are unconstitutional because they are "not closely tailored to furthering an important government interest." (Compl. ¶¶ 45, 58 (Docket No. 1).) The FEC will demonstrate, however, that the statutes at issue further the important government interests of lessening the threats of (1) actual corruption; (2) the appearance of corruption; and (3) circumvention of FECA's contribution limits.[6] (*See* Def. FEC's Mem. in Supp. of Mot. to Allow Time for Disc. Under Rule 56(d) and in Opp'n to Pls.' Mot. for Summ. J. ("FEC Rule 56(d) Br.") at 12 (Docket No. 27-1).) To that end, one important area of discovery involves the circumstances of Stop PAC's creation, operation, and relationship with the Innis campaign. As the FEC discussed in its Rule 56(d) brief and declaration, public information indicates that Stop PAC's chairman appears to be a contributor and political consultant to the Innis campaign, as well as a former colleague of Innis's. (FEC Rule 56(d) Br. at 12-13 (Docket No. 27-1); Hancock Decl ¶ 7(e) (Docket No. 27-2).) Further, Stop PAC's litigation counsel, treasurer, and custodian of records is also a consultant to, and the treasurer and custodian of records for, Niger Innis for Congress. (Hancock Decl. ¶ 7(e) & n.2 (Docket No. 27-2).) So discovery is needed to determine the extent to which Innis and his campaign are responsible for the formation and operation of Stop PAC and the extent to which Stop PAC may have been created to enable circumvention of the limits on contributions to Innis. (*Id.*) The close relationship between Stop PAC and the Innis plaintiffs appears to be particularly indicative

---

[6] While the statutes plaintiffs' challenge are constitutional because they can satisfy this level of scrutiny — often called "closely drawn" or "intermediate" scrutiny — the Commission will also argue that a lower level of scrutiny applies to plaintiffs' equal protection claims. (*See* FEC Rebuttal Mem. in Supp. of Mot. to Allow Time for Disc. Under Rule 56(d) at 4-5 n.3 (Docket No. 30).)

of the danger new political committees pose of circumvention of the limit on contributions to candidate committees. Many of the FEC's pending discovery requests to the Innis plaintiffs explore these matters, and the FEC's Rule 56(d) motion, which the Court granted, was based in part on that key avenue of discovery. (Docket No. 33.)

Such evidence from the Innis plaintiffs will remain important to the FEC's defense even if they are dismissed because Stop PAC and its claims, which are identical to the Innis plaintiffs' claims, will remain in the case. Thus, Stop PAC and Innis's assertion of the same claims weighs *against* plaintiffs' motion, not in favor of it, as they argue. (Pls.' Rule 41 Br. at 2, 6 (Docket No. 35-1).) While Stop PAC may provide the FEC with information regarding its relationship with Innis in discovery, such information would not take the place of evidence or unique facts potentially held by the Innis plaintiffs. The Innis plaintiffs' documents and recollection of events may significantly differ from or add to information that Stop PAC provides. *Cf. In re Wellbutrin XL*, 268 F.R.D. at 544 (conditioning dismissal upon answering discovery where the discovery at issue "go[es] to the heart of the defendant's anticipated defense" and "defendants cannot obtain equivalent discovery" elsewhere).

Plaintiffs previously asserted that the Innis plaintiffs' claims would not be moot regardless of Innis's electoral plans, but now claim that possible jurisdictional problems (either due to mootness or under 2 U.S.C. § 437h) mean they should be unconditionally dismissed. (Pls.' Rule 41 Br. at 1, 7-8 (Docket No. 35-1).) Plaintiffs ignore, however, that the *merits* discovery the Innis plaintiffs are attempting to avoid providing now will likely be important to the FEC's defense against Stop PAC's identical claims. The FEC will have to defend against

Claims 1 and 2 on the merits, and the FEC 's defense on the merits requires discovery from the Innis plaintiffs.[7]

If the Innis plaintiffs are unconditionally dismissed from this action, the FEC would not receive responses to its pending written discovery requests to those plaintiffs. The Innis plaintiffs would also likely resist nonparty deposition subpoenas given their apparent desire to evade the Court's June 18 discovery order. Requiring the Commission to issue Rule 45 subpoenas to obtain documents and testimony from the Innis plaintiffs is not warranted in this case, in which the parties have just litigated the propriety of the discovery sought and only a short amount of time for discovery remains. *Cf. Alliance for Global Justice*, 2005 WL 469593, at *2 (recommending conditioned dismissal where "the prejudice to defendants is not purely financial; it is the loss of relevant information and the burden of seeking the information they already demanded via other means, such as Rule 45 subpoenas.").

Plaintiffs characterize this prejudice as "mere inconvenience or tactical disadvantage" (Pls.' Rule 41 Br. at 5 (Docket No. 35-1) (internal quotation marks and emphasis omitted)), but the very cases they cite for that proposition show otherwise. The court in *RMD Concessions*

---

[7] Plaintiffs also overstate the extent to which the Commission questioned whether the Court has jurisdiction over the Innis plaintiffs. The Commission has not "challenged this Court's jurisdiction over Innis's claims under 2 U.S.C § 437h." (Pls.' Rule 41 Br. at 7 (Docket No. 35-1).) Given the Court's obligation to examine its own jurisdiction *sua sponte*, the FEC brought to the Court's attention non-binding authority suggesting that it may lack jurisdiction to make a decision on the merits of Innis's claims under section 437h. (*See* Hancock Decl. ¶ 8(a) (citing *Wagner v. FEC*, 717 F.3d 1007, 1010-17 (D.C. Cir. 2013) (*per curiam*) (Docket No. 27-2).) But the FEC has not asked this Court to follow *Wagner*, explicitly stated that it "may decide not to challenge the asserted jurisdiction for Innis's claims" on section 437h grounds, (*id.*), and declined to file a motion to dismiss on that ground.

Regarding mootness, the Commission has not yet received Innis's discovery responses and does not know whether he plans to run for office again. Had the Innis plaintiffs continued with their pre-Rule 56(d) ruling plan to remain in this case after a loss by Innis in the primary election, the record in this Court would not yet be complete regarding whether their claims present a live controversy.

held that a "defendant suffers legal prejudice . . . where a voluntary dismissal potentially unravels the effect of an earlier legal ruling." 194 F.R.D. at 243. Similarly, in *Teck General Partnership*, the court denied a Rule 41(a)(2) motion where the plaintiff had brought it "to avoid [an] adverse discovery ruling," concluding that the defendant there suffered prejudice, not mere tactical disadvantage, as a result. 28 F. Supp. 2d at 992.[8]

Finally, the FEC has expended significant effort to attempt to obtain discovery from the Innis plaintiffs thus far in this case. After being served with plaintiffs' premature summary judgment motion on May 6, the FEC moved under Rule 56(d) to preserve its right to take discovery from the Innis plaintiffs and other plaintiffs. (Docket No. 27.) In a brief and declaration of counsel in support of that motion, the Commission explained why those facts from the Innis plaintiffs would likely be relevant to the merits of this case. (Docket Nos. 27-1, 27-2.) After the Court granted the FEC's Rule 56(d) motion on June 18 (Docket No. 33), the FEC started to prepare its discovery strategy and requests. The parties held a Rule 26(f) conference to discuss discovery on June 27, and filed a joint proposed discovery plan on July 2. On July 9, the parties attended an initial pre-trial conference before Magistrate Judge Davis, on July 11 they filed an amended discovery plan, and on July 16 the Court issued its Rule 16(b) Scheduling Order. On that same day, the FEC served discovery requests on the Innis plaintiffs, with any objections due within 15 days of service, and responses due within 30 days of service, in addition to the Innis plaintiffs' initial disclosures, which are due tomorrow. Later in the discovery period, the FEC may serve deposition notices, depending in part on the answers received to the

---

[8] Plaintiffs also cite *Blanzy v. Griffin Pipe Prods. Co., Inc.*, Civ. No. 6:11-0050, 2012 WL 1038808, at *2-3 & n.1 (W.D. Va. Mar. 28, 2012), an inapposite case where, unlike here, the plaintiff had "a legitimate explanation for the need to dismiss" and had moved for dismissal with "sufficient promptness," and the plaintiff had already answered discovery requests that the defendant had served.

Commission's now pending requests. Plaintiffs' contention that this constitutes "[r]elatively little" activity (Pls. Br. at 4 (Docket No. 35-1)) is therefore inaccurate, and indeed, a court in this district has held that a comparable level of activity supported a denial of Rule 41(a)(2) relief when taken together with a plaintiff's lack of diligence and desire to avoid an adverse discovery ruling. *See Teck Gen. P'ship*, 28 F. Supp. 2d at 991-93. The same factors weighing against unconditional voluntary dismissal are present here.

III. PLAINTIFFS' RULE 15 MOTION TO AMEND THE COMPLAINT SHOULD BE DENIED TO THE EXTENT IT SEEKS TO REMOVE THE INNIS PLAINTIFFS AS PARTIES PRIOR TO THE CLOSE OF DISCOVERY

A. Plaintiffs Cannot Circumvent Rule 41(a)(2)'s Requirement for a Court Order for Voluntary Dismissal by Amending the Complaint Under Rule 15(a)(1)(B)

Just four days after requesting a court order dismissing the Innis plaintiffs under Rule 41(a)(2), plaintiffs filed an amendment to their complaint under Rule 15(a)(1)(B) purporting to drop the Innis plaintiffs from the case without leave of court. (*See* Docket Nos. 36, 36-1, 36-2, 36-3, 37.)[9] The Court should reject this attempt to circumvent its power under Rule 41(a)(2) to condition dismissal where, as here, it would cause prejudice to the defendant.

In a similar context, the Fourth Circuit has held that a plaintiff may not bypass a district court's power to deny the joinder of a nondiverse party under 28 U.S.C. § 1447(e) by adding that party in a Rule 15(a)(1)(B) amendment without leave of court. *Mayes v. Rapoport*, 198 F.3d 457, 462 n.11 (4th Cir. 1999). Although a plaintiff's ability to amend the complaint under Rule 15(a)(1)(B) has been described as "absolute," *Galustian v. Peter*, 591 F.3d 724, 730 (4th Cir.

[9] Plaintiffs filed a redlined version of the complaint highlighting their proposed amendments. (*See* Docket No. 36-2.) The edits purporting to immediately remove the Innis plaintiffs, to which the Commission objects, can be found in the caption and the original complaint paragraphs 4, 5, 20, 22, 38, and 46. (*Id.*)

2010), Rule 15(a) must still be read "in connection" with the district court's powers under other applicable Federal Rules of Civil Procedure and statutes, *see Mayes*, 198 F.3d at 462 n.11 ("Reading Rule 15(a) in connection with [Rules] 19 and 21, and 28 U.S.C. § 1447(e), resolves any doubts over whether the district court has authority to pass upon any attempts — even those for which the plaintiff needs no leave of court — to join a nondiverse defendant."); *see also Galustian*, 591 F.3d at 730 (citing *Mayes* with approval); *Breighner v. Neugebauer*, Civ. No. 11-0163, 2011 WL 1230828 (D. Md. Mar. 30, 2011) (following *Mayes*, and denying joinder via a Rule 15(a)(1)(B) amendment). In fact, since *Galustian*, the Fourth Circuit has affirmed a district court's denial of a Rule 15(a)(1)(B) amendment using the district court's power under 28 U.S.C. § 1915 to control proceedings in *forma pauperis* — despite the district court's recognition that "the Fourth Circuit very recently held that a plaintiff's []right to amend his complaint once under [Rule] 15(a) is absolute." *Rutledge v. Town of Chatham*, Civ. No. 4:10-0035, 2010 WL 4791840, at *6 (W.D. Va. Nov. 18, 2010), *aff'd sub nom. Rutledge v. Roach*, 414 F. App'x 568 (4th Cir. 2011) (affirming denial of plaintiff's "motion to amend his complaint" for "the reasons stated by the district court").

Similarly, the district court's power to deny or impose reasonable limits on a voluntary dismissal under Rule 41(a)(2) is not abrogated by Rule 15(a)(1)(B). Plaintiffs had the chance to notice the dismissal of the Innis plaintiffs as of right under Rule 41(a)(1) before the Commission filed its answer on June 16. They failed to do so and as a result have sought a Court order under Rule 41(a)(2). This Court should not permit them to use Rule 15(a)(1)(B) as a back-up plan to achieve unconditional voluntary dismissal despite the prejudice that would cause to the FEC.[10]

---

[10] At a minimum, the Innis plaintiffs should be ordered to comply with the Commission's pending Requests for Production, rather than being permitted to delay discovery by requiring the

Indeed, Magistrate Judge Davis has already rejected the Innis plaintiffs' attempt to use Rule 15 in this way in connection with the parties' Joint Proposed Discovery Plan. Plaintiffs requested that the Innis plaintiffs presumptively be relieved from making initial disclosures. (Joint Proposed Disc. Plan at 2-3, 7 (Docket No. 34).) But the Magistrate Judge stated at the initial pretrial conference that Rule 15 is read in conjunction with Rule 41, and he declined to find that the omission of the Innis plaintiffs from the proposed amended complaint relieved those plaintiffs of their initial disclosure obligations. (*See* Am. Joint Disc. Plan at 1 (Docket No. 39).)[11]

B. The Commission Does Not Otherwise Oppose Plaintiffs' Proposed Amendments

Plaintiffs also ask this Court to approve amendments to the complaint (1) making "technical changes" and (2) adding allegations regarding contributions that Stop PAC claims to have made since the date of the original complaint. (Pls.' Rule 15(a) Br. at 2, 5-6 (Docket No. 36-3).) The Commission does not oppose these amendments, regardless of whether the Court considers them under Rule 15(a)(1)(B) or Rule 15(d).

---

issuance of a Rule 45 subpoena for the same materials, and the special protections in Rule 45 for nonparties should be deemed inapplicable.

[11] Plaintiffs argue that if the Court does not allow them to voluntarily dismiss the Innis plaintiffs using Rule 15(a)(1)(B), it should consider their request under Rule 15(a)(2), which requires "the court's leave." (Mot. of Pls. to Amend and Supplement Compl. Pursuant to Rule 15(a), (d) ("Pls.' Rule 15(a) Br.") at 3 (Docket No. 36-3).) As plaintiffs recognize, though, the standard for evaluating a Rule 15(a) motion is "effectively the same" as that for plaintiffs' Rule 41(a)(2) motion. Pls.' Rule 15(a) Br. at 4 (citing *Miller v. Terramite Corp.*, 114 Fed. App'x 536, 539 (4th Cir. 2004)); *see also Equal Rights Ctr. v. Niles Bolton Assocs.*, 602 F.3d 597, 603 (4th Cir. 2010) (stating that a Rule 15(a)(2) motion may be denied "when the amendment would be prejudicial to the opposing party"); *Skinner*, 64 F.3d 659, 1995 WL 507264, at *2-3 (denying Rule 15(a) *and* 41(a)(2) motions where both would "permit [plaintiffs] to dismiss their federal claim and thereby avoid an adverse ruling in federal court"). Rule 41(a)(2) and its case law should therefore govern plaintiffs' request to dismiss the Innis plaintiffs.

IV. CONCLUSION

For the foregoing reasons, plaintiffs' motion for voluntary dismissal under Rule 41(a)(2) should not be granted unless the Innis plaintiffs are dismissed with prejudice, the dismissal does not take effect until those plaintiffs respond to the FEC's pending discovery requests and the Commission has the opportunity to take party depositions of the Innis plaintiffs. Plaintiffs' motion to amend the complaint under Rule 15(a) should be denied to the extent it seeks to voluntarily dismiss the Innis plaintiffs without the reasonable conditions the Commission requests.

Respectfully submitted,

Lisa J. Stevenson*
Deputy General Counsel – Law

Kevin Deeley*
Acting Associate General Counsel

Harry J. Summers*
Assistant General Counsel

Holly J. Baker*
Kevin P. Hancock*
Attorneys

/s/
Esther D. Gyory (VA Bar #76826)
EGyory@fec.gov
Attorney

COUNSEL FOR DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street NW
Washington, DC 20463
(202) 694-1650

July 17, 2014

* *Admitted pro hac vice*

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

STOP RECKLESS ECONOMIC INSTABILITY CAUSED BY DEMOCRATS, *et al.*,	)
Plaintiffs,	) Civ. No. 1:14-397 (AJT-IDD)
v.	)
FEDERAL ELECTION COMMISSION,	)
Defendant.	)

CERTIFICATE OF SERVICE

I hereby certify that on July 17, 2014, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing to the following counsel for plaintiff:

Dan Backer, Esq.
DB Capitol Strategies PLLC
717 King Street, Suite 300
Alexandria, VA 22314
DBacker@DBCapitolStrategies.com

Michael Thomas Morley, Esq.
Coolidge-Reagan Foundation
1629 K Street
Suite 300
Washington, DC 20006

/s/

Esther D. Gyory (VA Bar # 76826)
COUNSEL FOR DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street NW
Washington, DC 20463
Telephone: (202) 694-1650
Fax: (202) 219-0260
EGyory@fec.gov