UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

STOP RECKLESS ECONOMIC INSTABILITY CAUSED BY DEMOCRATS, NIGER INNIS, NIGER INNIS FOR CONGRESS, TEA PARTY LEADERSHIP FUND, and ALEXANDRIA REPUBLICAN CITY COMMITTEE, *Plaintiffs*, v. FEDERAL ELECTION COMMISSION, *Defendant*.	)	Civ. No. 1:14-397 (AJT-IDD)

PLAINTIFFS' MOTION PURSUANT TO FED. R. CIV. P. 41(a)(2) TO VOLUNARILY DISMISS PLAINTIFFS NIGER INNIS AND NIGER INNIS FOR CONGRESS

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Plaintiffs respectfully move this Court to dismiss Plaintiffs Niger Innis and Niger Innis for Congress without prejudice pursuant to Fed. R. Civ. P. 41(a)(2). A Memorandum in Support of Plaintiffs' Motion, Proposed Order, and Notice of Hearing are attached.

Plaintiffs met and conferred by telephone on July 3, 2014. Defendant Federal Election Commission has refused to consent to this motion, unless Niger Innis and Niger Innis for Congress agree to continue to be treated as plaintiffs for discovery purposes throughout this litigation, and that the dismissal of their claims be with prejudice. Plaintiffs do not agree to such conditions.

The parties agree that no hearing or oral argument is required on this motion.

Dated this 3rd day of July 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Dan Backer, hereby certify that on this 3rd day of July 2014, I did cause a true and complete copy of the foregoing Plaintiffs' Motion Pursuant to Fed. R. Civ. P. 41(a)(2) to Voluntarily Dismiss Plaintiffs Niger Innis and Niger Innis for Congress, supporting memorandum, and proposed order to be electronically filed with the Clerk of Court using the CM/ECF system, which will effect service on the following counsel for the plaintiff:

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STOP RECKLESS ECONOMIC INSTABILITY CAUSED BY DEMOCRATS, NIGER INNIS, NIGER INNIS FOR CONGRESS, TEA PARTY LEADERSHIP FUND, and ALEXANDRIA REPUBLICAN CITY COMMITTEE,	)	Civil Action No. 1:14-397 (AJT-IDD)
Plaintiffs,	)	NO HEARING REQUESTED
v.	)	
FEDERAL ELECTION COMMISSION,	)	
Defendant.	)	

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO DISMISS PLAINTIFFS NIGER INNIS AND NIGER INNIS FOR CONGRESS PURSUANT TO FED. R. CIV. P. 41(a)(2)

Plaintiffs respectfully move pursuant to Fed. R. Civ. P. 41(a)(2) to voluntarily dismiss the claims of Niger Innis ("Innis") and Niger Innis for Congress ("NIFC") (collectively, "the Innis Plaintiffs") without prejudice, and to dismiss the Innis Plaintiffs from this case without further conditions. The FEC has refused to consent to this motion, unless: (i) Innis and NIFC agree to continue to be treated as plaintiffs for discovery purposes throughout the course of this litigation, and (ii) this Court dismisses their claims with prejudice.

Plaintiffs do not believe such conditions are proper, especially given:

(i) the FEC's contention in prior briefing that this Court may lack subject-matter jurisdiction over Innis' claim;

(ii) that Innis lost the intervening primary election, eliminating the Innis Plaintiffs' reason for participating in this case and potentially undermining their standing;

(iii) the early stage of the case (neither side has yet propounded any discovery requests or made initial disclosures, and the discovery conference is scheduled for July 9, 2014); and

(iv) the Innis Plaintiffs' lack of any independent activity in this case, and consequent lack of prejudice to the FEC from having had Innis and NIFC listed as plaintiffs on previous filings.

"At bottom, [the FEC's] opposition to [this] motion is nothing more than an effort to preserve a perceived tactical advantage, and that is an insufficient justification" for refusing to allow the Innis Plaintiffs to be dismissed without prejudice and without further precondition. *Blanzy v. Griffin Pipe Prods. Co.*, No. 6:11-CV-00050, 2012 U.S. Dist. LEXIS 42293, at *14 (W.D. Va. Mar, 28, 2012). Thus, this Court should dismiss the Innis Plaintiffs' claims without imposing further conditions.

Concomitantly with this motion, Plaintiffs Stop Reckless Economic Insanity Caused by Democrats ("Stop PAC"), Tea Party Leadership Fund ("the Fund"), and Arlington Republican City Committee ("ARCC") are separately moving to file an Amended Complaint. The proposed Amended Complaint omits Innis and NIFC as plaintiffs, and does not seek to add any new candidates or candidate committee plaintiffs. It discusses the candidate contribution(s) Stop PAC made to candidates other than Innis after the original Complaint was filed, as well as additional contribution(s) Stop PAC wishes to make to such candidates that are prohibited by federal law.

Background

This case presents an as-applied constitutional challenge to provisions in federal campaign finance law that impose differing contribution limits on materially indistinguishable political committees that have received more than 50 contributions, and have contributed to five

or more federal candidates, based solely on whether the committee has been registered with the FEC for more than six months. *See* 2 U.S.C. § 441a(a)(4). Such committees that have been registered for less than six months are treated as "persons," and may contribute $2,600 per election to a federal candidate, $10,000 annually to a state political party committee and its local affiliates, and $32,400 annually to a national political party committee. 2 U.S.C. § 441a(a)(1); *see also* 79 Fed. Reg. 7,190, 7,192 (Feb. 6, 2014) (adjusting for inflation limits on contributions to local, state, and national political party committees).

Once a political committee that has received 50 contributions and contributed to five or more candidates has been registered for more than six months, it qualifies as a multicandidate political committee ("MPC"), and the amount it may contribute to each candidate per election ***increases*** to $5,000, *see* 2 U.S.C. § 441a(a)(2)(A). In contrast, the amount it may contribute to local and state political party committees ***decreases*** to $5,000 annually, *id*. § 441a(a)(2)(C), and the amount it may contribute to a national political party committee ***decreases*** to $15,000 annually, *id*. § 441a(a)(2)(B).

Plaintiff Stop PAC has received more than 50 contributions (over 1400 contributions to date), and contributed to five or more federal candidates, but has been registered with the FEC for less than six months. *See* Complaint, Doc. #1, ¶¶ 20-21 (Apr. 14, 2014). It therefore may contribute no more than $2,600 per election to each candidate. Plaintiff Innis was a candidate for the Republican nomination for Congress from Nevada's fourth congressional district in the June 2014 primary election; Plaintiff NIFC is his candidate committee. *Id*. ¶¶ 4-5.

Stop PAC contributed the maximum statutorily permitted amount of $2,600 to Innis in connection with the June 2014 primary, and wished to contribute an additional $2,400 in connection with that race (which it presently has in its account), for a total of $5,000. *Id*. ¶¶ 22-

26. Innis wished to accept those additional funds as a way of associating with Stop PAC. *Id*. ¶ 27. These Plaintiffs challenged the constitutionality of 2 U.S.C. § 441a(a)(1)(A) and (a)(2)(A)'s discriminatory limits on contributions to candidates, as applied to political committees with more than 50 contributors that have contributed to five or more candidates. *Id*. ¶¶ 39-51 (Counts I-II).[1]

Relatively little has occurred in this case since the Complaint was filed. In early May, Plaintiffs moved for summary judgment, asking this Court to adjudicate their claims as a matter of law. *See* Motion for Summary Judgment, Doc. #6 (May 6, 2014). Rather than responding on the merits, the FEC filed a motion under Rule 56(d), asking this Court to deny the motion and proceed to discovery. *See* FEC's Motion to Allow Time for Discovery Under Rule 56(d), Doc. #27 (May 23, 2014). This Court granted the FEC motion without oral argument. *See* Order, Doc. #33 (June 18, 2014). The FEC filed its Answer on June 16, 2014, *see* Answer, Doc. #31 (June 16, 2014), and the parties filed a joint discovery plan yesterday, on July 2, 2014, *see* Report of Rule 26(f) Planning Meeting (July 2, 2014). No discovery has yet been propounded by either side, no other substantive motions have been filed, and no hearings have been held.

This Court may take judicial notice of the fact that Innis lost the June 2014 primary. *See* Nev. Sec'y of State Ross Miller, *Silver State Election Night Results 2014*, *available at* http://www.silverstateelection.com/USCongress/#race1945. As Innis is no longer a candidate for

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[1] Plaintiff Stop PAC argues that the Government does not have a constitutionally sufficient basis for requiring political committees that have received more than 50 contributions, and contributed to five or more candidates, to wait six months before being able to contribute the maximum statutorily authorized amount of $5,000 to a federal candidate. *See* Complaint, Doc. #1, ¶¶ 43-45. Such a waiting period especially cannot be reconciled with the fact that, once such a committee has been registered for more than six months, the amounts it may contribute to local, state, and national political party committees are dramatically ***reduced***. *Id*. ¶¶ 18-19.

Plaintiffs ARCC and the Fund are challenging the discriminatory reductions in the amounts that political committees that have received more than 50 contributions and contributed to five or more candidates may contribute to local, state, and national political party committees, that occur once those political committees have been registered for six months. *See* 2 U.S.C. § 441a(a)(1)(B), (D), 441a(a)(2)(B)-(C).

federal office, Innis and NIFC seek to be dismissed from this case. The FEC has refused to consent to their dismissal, unless this Court: (i) orders that Innis and NIFC be treated as plaintiffs for discovery purposes throughout the course of this litigation, and (ii) dismisses the claims of Innis and NIFC with prejudice. Plaintiffs ask that this Court dismiss Innis and NIFC without prejudice, and treat them as ordinary third parties for discovery purposes.

Innis and NIFC Should Be Dismissed and
Treated as Third Parties for Discovery Purposes

Plaintiffs respectfully request that this Court grant their motion, dismiss Innis and NIFC and their claims from this case, and treat Innis and NIFC as third parties for discovery purposes, rather than continuing to subject them to the discovery burdens of party litigants. Rule 41(a)(2) provides that, once an answer has been filed, "an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. . . . Unless the order states otherwise, a dismissal . . . is without prejudice." Fed. R. Civ. P. 41(a)(2).

The purpose of Rule 41(a)(2) is to "***freely*** allow voluntary dismissals unless the parties will be unfairly prejudiced." *Davis v. USX Corp.*, 819 F.2d 1270, 1273 (4th Cir. 1987) (emphasis added). "A plaintiff's motion under Rule 41(a)(2) for dismissal without prejudice should not be denied absent ***substantial*** prejudice to the defendant." *Andes v. Versant Corp.*, 788 F.2d 1033, 1036 (4th Cir. 1986) (emphasis added). Although the court may impose conditions on the dismissal to protect a defendant from prejudice, "defendants are entitled to protection [only] from legal prejudice, ***and not from mere inconvenience or tactical disadvantage***." *RMD Concessions, L.L.C. v. Westfield Corp.*, 194 F.R.D. 241, 243 (E.D. Va. 2000) (emphasis added); *see also Teck Gen. Pshp. v. Crown Cent. Petroleum Corp.*, 28 F. Supp. 2d 989, 991 (E.D. Va. 1998) (noting that a defendant may not prevent dismissal on the grounds that "plaintiff will gain a tactical advantage").

In determining whether dismissal will prejudice a defendant, the Fourth Circuit requires district courts to consider factors such as: "'[1] the opposing party's effort and expense in preparing for trial, [2] excessive delay and lack of diligence on the part of the movant, and [3] insufficient explanation of the need for a voluntary dismissal, as well as [4] the present stage of litigation.'" *Howard v. Inova Health Care Servs.*, 302 F. App'x 166, 179 (4th Cir. 2008) (quoting *Miller v. Terramite* Corp., 114 F. App'x 536, 540 (4th Cir. 2004)); *accord Teck Gen. Pshp.*, 28 F. Supp. at 991 (citing *Gross v. Spies*, 133 F.3d 914 (4th Cir. 1998)). All of these factors favor dismissing Innis' and NIFC's claims in this case, without prejudice and without further precondition (such as the FEC's demand they be treated as party litigants).

First, the FEC has not been required to expend substantial additional effort as a result of the Innis Plaintiffs' inclusion as plaintiffs in this case. The Fourth Circuit held a defendant is not prejudiced by dismissal of a plaintiff where the defendant faced "similar claims by another party" in the suit, and would have filed substantially the same papers, even had that plaintiff not participated in the first place. *Bridge Oil*, 321 F. App'x 244, 245 (4th Cir. 2008) (per curiam). As discussed earlier, the Innis Plaintiffs pursued the same constitutional challenge as Plaintiff Stop PAC. Thus, virtually all the FEC's efforts to date in this case would have been necessary in response to Stop PAC's claims, even if the Innis Plaintiffs had never been included as party litigants. Their dismissal cannot be deemed prejudicial. *See also* In re *Columbia Leasing, L.L.C. v. Mullen*, No. 2:12-CV-678, 2014 U.S. Dist. LEXIS 22083, at *11 (E.D. Va. Feb. 20, 2014) (holding a plaintiff's Rule 41(a)(2) motion not prejudicial where defendant can "easily carr[y] over" to other litigation "the work and resources [it] expended" against that plaintiff).

Second, Plaintiffs have not unduly delayed in bringing this motion. Innis' primary occurred less than four weeks ago, on June 10, and a portion of his time since was spent

investigating legal options for contesting the results. Plaintiffs filed this motion shortly after he decided to withdraw from the race and cease being a candidate. The Innis Plaintiffs have not unreasonably delayed in filing this motion.

Third, there are numerous legitimate reasons for dismissing Innis and NIFC from the case, some of which render the FEC's conditions not only inappropriate as a discretionary matter, but arguably improper as a matter of law:

- Most basically, Innis lost the June primary. As Innis is no longer a candidate for federal office, the Innis Plaintiffs no longer wish to pursue this litigation, which concerns the constitutionality of federal campaign finance laws. Innis' loss in the intervening primary constitutes "a legitimate explanation for the need to dismiss," *Blanzy*, 2012 U.S. Dist. LEXIS 42293, at *7, and does not warrant the imposition of additional preconditions (such as the FEC's demand that the Innis Plaintiffs continue to be treated as party litigants for discovery purposes).

- The FEC challenged this Court's jurisdiction over Innis' claims under 2 U.S.C. § 437h. *See* FEC's Memo. in Support of Motion to Allow Time for Discovery Under Rule 56(d), Doc. #27-1, at 7 n.9, (May 23, 2013) (hereafter, "FEC Rule 56(d) Brief"); *see also* Declaration of Kevin P. Hancock, Doc. #27-2, ¶ 8(a), at 8-9 (May 23, 2013) (hereafter, "Hancock Decl."). Section 437h provides "any individual eligible to vote in any election for the office of President may institute such actions in the appropriate district court of the United States . . . as may be appropriate to construe the constitutionality of any provision" of the Federal Election Campaign Act ("FECA") of 1971, Pub. L. No. 92-225, 86 Stat. 3 (Feb. 7, 1972). 2 U.S.C. § 437h. Pursuant to the provision, a district court lacks jurisdiction to itself adjudicate challenges to FECA, but instead must "certify all questions of [FECA's] constitutionality . . . to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc." *Id*.

The D.C. Circuit, in *Wagner v. FEC*, 717 F.3d 1007, 1011, 1016 (D.C. Cir. 2013), held that "the plain text of section 437h grants exclusive merits jurisdiction" over constitutional challenges to FECA "to the en banc court of appeals," and the parties listed in § 437h "may bring actions challenging FECA's constitutionality only under that section." In this case, the FEC has questioned whether, under *Wagner*'s construction of § 437h, this Court has jurisdiction over Innis' claims. FEC Rule 56(d) Brief, Doc. #27-1, at 7 n.9; Hancock Decl., Doc. #27-2, ¶ 8(a), at 8-9.[2] The Fourth Circuit has yet to rule on whether individuals challenging FECA provisions are required to proceed under § 437h, which would require the *en banc* court of appeals to determine their constitutionality. And the parties have not briefed as to whether this challenge should be viewed as an attack on FECA, which would be subject to § 437h, or instead is partially or wholly a challenge to subsequent amendments made in the Bipartisan Campaign Reform Act ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81 (Mar. 27, 2002), which contains a different judicial review provision, *see* BCRA, § 403, 116 Stat. at 113, *codified at* 2 U.S.C. § 437h note. Voluntary dismissal without precondition is appropriate given the open questions concerning this Court's possible lack of subject-matter jurisdiction over Plaintiff Innis' claims.

- As mentioned above, Innis lost the June primary. He therefore is no longer a candidate for federal office; the Innis Plaintiffs' standing to pursue these claims therefore may be undermined. *Cf. Maupin v. Yamamoto*, No. 3:97-CV-00038, 2000 U.S. Dist. LEXIS 18598, at *5-6 (W.D. Va. Dec. 19, 2000) (holding that courts lack discretion to deny Rule 41(a)(2) motions where the plaintiff lacks standing).

Fourth, this case remains in an early stage. The FEC has filed an Answer, prevailed on its Rule 56(d) motion and, along with Plaintiffs, filed a joint discovery plan. *Cf. Jones v. Hill*,

[2] Because 2 U.S.C. § 437h does not provide special procedures for constitutional challenges brought by political committees or political party committees, any jurisdictional uncertainty does not extend to the other Plaintiffs' claims.

No. 95-6356, 1995 U.S. App. LEXIS 34422, at *4 (4th Cir. Dec. 7, 1995) ("The mere filing of an answer or motion for summary judgment, without more, cannot be the basis for refusing to dismiss without prejudice."). That is all. "[N]o discovery whatsoever ha[s] been undertaken." *Fidelity Bank PLC v. Northern Fox Shipping N.V.*, 242 F. App'x 84 (4th Cir. 2007) (affirming district court's conclusion that Rule 41(a)(2) dismissal was appropriate because the case was "at an early stage") (quotation marks omitted); *see also McCoy v. Delhaize Am., Inc.*, No. 2:12-CV-415, 2012 U.S. Dist. LEXIS 146806, at *6 (E.D. Va. Oct. 11, 2012) (granting Rule 41(a)(2) motion where "[t]his case is at the very earliest stages of litigation—little or no discovery has taken place, and there are no motions for summary judgment pending").

A motion for dismissal has been held prejudicially untimely, in contrast, when it was filed "after the close of discovery, after defendants had already filed their motion for summary judgment, and within three weeks of the scheduled trial date." *Seligman v. Tenzer*, 173 F. App'x 280, 283 (4th Cir. 2006); *see also Nesari v. Taylor*, 806 F. Supp. 2d 848, 861 (E.D. Va. 2011) (quotation marks omitted) (holding that voluntary dismissal was inappropriate "where discovery has closed and defendants have filed a compelling motion for summary judgment that is ripe for adjudication"). The timing of this motion strongly favors dismissing the Innis Plaintiffs without prejudice or precondition.

In short, dismissing the Innis Plaintiffs will not cause any legally cognizable prejudice to the FEC The simple fact that the FEC might be able to obtain broader discovery from the Innis Plaintiffs if they remain, or are treated as, party litigants does not make their dismissal prejudicial to the FEC. *See also McCoy*, 2012 U.S. Dist. LEXIS 146806, at *6 (E.D. Va.) ("[T]he possibility that the plaintiff might gain a tactical advantage over the defendant in future litigation likewise is not sufficient basis for denying a motion for voluntary dismissal."). The

gravamen of the FEC's complaint is that it may suffer "tactical disadvantage" in discovery from the Innis Plaintiffs' dismissal, which is not a basis for opposing, or attempting to impose conditions on, a Rule 41(a)(2) motion. *Id*.; *RMD Concessions*, 194 F.R.D. at 243 (E.D. Va.); *Teck Gen Pshp.*, 28 F. Supp. 2d at 991 (E.D. Va.). Thus, this Court should dismiss the Innis Plaintiffs' claims, and dismiss Innis and NIFC as Plaintiffs from this case, without imposing additional conditions on those dismissals.[3]

Innis' and NIFC's Claims Should Be Dismissed Without Prejudice

There is no basis for the FEC's request that Innis' and NIFC's claims be dismissed with prejudice. Dismissals under Rule 41(a)(2) are presumptively without prejudice unless the court expressly orders otherwise and "supplie[s] [a] rationale for its decision." *Andes*, 788 F.2d at 1037. A dismissal should be "without prejudice" unless the defendant can establish "substantial prejudice" from that presumptive remedy. *Id*. There is nothing unusual about the Innis Plaintiffs' claims that require departure from the default rule of dismissal without prejudice.

Dismissing the Innis Plaintiffs' claims with prejudice would bar them from challenging these constitutional provisions in the future (in the event that Innis chooses to become a candidate in a future federal election, finds his fundraising hampered by the challenged provisions, and decides to subject himself to the burdens and rigors of litigation). Courts have uniformly held, however, that a defendant may not insist that a Rule 41(a)(2) dismissal be with

[3] In *Choice Hotels Int'l*, 11 F.3d at 471, the Fourth Circuit held that Rule 41(a)(2) allows a district court to dismiss a plaintiffs' claims either with or without prejudice. The Rule "also allows the district court to dismiss the plaintiff's action without prejudice but with conditions that the plaintiff must satisfy, and to specify that the dismissal will become prejudicial if the plaintiff fails to satisfy the condition." *Id*. Were this Court inclined to agree with the FEC's request that the Innis Plaintiffs continue to be treated as party litigants for discovery purposes following their dismissal, the Innis Plaintiffs would respectfully object to such condition. Under *Choice Hotels Int'l*, it appears the most appropriate would be ordering their dismissal with prejudice, rather than continuing to enforce the FEC's requested condition. Thus, ***at most***, this Court should dismiss the Innis Plaintiffs with prejudice, without imposing additional preconditions concerning discovery.

prejudice to foreclose the possibility of future litigation. *Stout v. Lightburn*, No. 1:04-CV-00087, 2005 U.S. Dist. LEXIS 10729, at *2-3 (W.D. Va. June 3, 2005) ("The threat of future litigation does not constitute prejudice or hardship sufficient to justify refusing a plaintiff's request for voluntary dismissal without prejudice."). Thus, while the Innis Plaintiffs have no plans to file a renewed lawsuit, any dismissal should be without prejudice.

CONCLUSION

For these reasons, this Court should GRANT Plaintiffs' Motion to Voluntarily Dismiss Plaintiffs Niger Innis and Niger Innis for Congress pursuant to Fed. R. Civ. P. 41(a)(2).

Dated July 3, 2014

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